No. _____

IN THE

Supreme Court of the United States

VICTOR D. VICKERS, JR., *Petitioner,*

v.

STATE OF MISSOURI, *Respondent.*

On Petition for a Writ of Certiorari
to the Missouri Court of Appeals,
Western District

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Missouri Court of Appeals, Western District.

STATE of Missouri, Respondent,
v.
Victor D. VICKERS, Jr., Appellant.

WD 80148
|
OPINION FILED: July 31, 2018
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Synopsis

Background: Defendant was convicted in the Circuit Court, Jackson County, John M. Torrence, J., of first-degree murder, first-degree assault, and two counts of armed criminal action, and sentenced as a prior offender to concurrent terms of life without parole and three terms of 30 years in prison. Defendant appealed.

Holdings: The Court of Appeals, Karen King Mitchell, Chief Judge, held that:

[1] defendant's constitutional right to a speedy trial was not violated;

[2] trial court properly excluded alibi witness;

[3] there was sufficient evidence that defendant deliberated upon victim's death to support conviction for first-degree murder as an accomplice;

[4] allegedly undisclosed impeachment evidence did not meet *Brady* materiality standard; and

[5] trial court properly denied defendant's motion for mistrial.

Affirmed.

West Headnotes (66)

[1] **Criminal Law**
⇐ In general;complaint, warrant, and preliminary examination

Court of Appeals is entitled to presume that omitted portions of the record are unfavorable to the appellant and favorable to the trial court's decision.

Cases that cite this headnote

[2] **Criminal Law**
⇐ Constitutional guarantees;speedy trial in general

The right to a speedy trial is guaranteed by both the Sixth Amendment to the United States Constitution and the Missouri Constitution. U.S. Const. Amend. 6; Mo. Const. art. 1, § 18(a).

Cases that cite this headnote

[3] **Criminal Law**
⇐ Accrual of right to time restraints

The speedy trial protections of the Sixth Amendment attach when there is a formal indictment or information or when actual restraints are imposed by arrest and holding to answer a criminal charge. U.S. Const. Amend. 6.

Cases that cite this headnote

[4] **Criminal Law**
⇐ Review De Novo

The issue of whether the defendant's Sixth Amendment rights have been violated is a question of law, and therefore, appellate courts review de novo. U.S. Const. Amend. 6.

Cases that cite this headnote

[5] **Criminal Law**
⇐ Review De Novo

Criminal Law
⇦ Speedy trial

While Court of Appeals reviews de novo whether the defendant's Sixth Amendment right was violated, it defers to the trial court's findings of fact. U.S. Const. Amend. 6.

Cases that cite this headnote

[6] **Criminal Law**
⇦ In general;balancing test

The determination of whether there has been a violation of speedy trial rights involves a balancing process. U.S. Const. Amend. 6.

Cases that cite this headnote

[7] **Criminal Law**
⇦ In general;balancing test

In determining whether the right to speedy trial has been violated, the Court of Appeals is to consider and balance all of the circumstances and to weigh four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. U.S. Const. Amend. 6.

Cases that cite this headnote

[8] **Criminal Law**
⇦ Length of Delay

The length of the delay is a triggering mechanism because until there is a delay that is presumptively prejudicial, there is no need to discuss the other factors that are part of the speedy trial balancing process. U.S. Const. Amend. 6.

Cases that cite this headnote

[9] **Criminal Law**
⇦ Accrual of right to time restraints

The delay in bringing a defendant to trial is measured for speedy trial purposes from the time of a formal indictment or information or when actual restraints are imposed by an arrest. U.S. Const. Amend. 6.

Cases that cite this headnote

[10] **Criminal Law**
⇦ In general;balancing test

Different weights are assigned to different reasons for a delay, for purpose of speedy trial analysis. U.S. Const. Amend. 6.

Cases that cite this headnote

[11] **Criminal Law**
⇦ Deliberate governmental conduct

A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government, for purpose of speedy trial analysis. U.S. Const. Amend. 6.

Cases that cite this headnote

[12] **Criminal Law**
⇦ Duty of prosecution to proceed to trial

Criminal Law
⇦ Necessities of trial procedure;docket congestion

Criminal Law
⇦ Delay Attributable to Prosecution

A more neutral reason for delay such as negligence or overcrowded courts should be weighted less heavily than deliberate governmental conduct, but nevertheless should be considered in speedy trial analysis since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. U.S. Const. Amend. 6.

Cases that cite this headnote

[13] **Criminal Law**
⇦ Cause for delay, "good cause", and excuse or justification in general

Criminal Law
⇦ Absence of witness

A valid reason, such as a missing witness, should serve to justify appropriate delay for purpose of speedy trial analysis. U.S. Const. Amend. 6.

Cases that cite this headnote

[14] **Criminal Law**
⇐ Delay caused by accused

Delays attributable to the defendant weigh heavily against the defendant, for purpose of speedy trial analysis. U.S. Const. Amend. 6.

Cases that cite this headnote

[15] **Criminal Law**
⇐ Speedy trial

A court reviewing a speedy trial decision is to give considerable deference to any trial court findings regarding either negligence or bad faith on the part of the State. U.S. Const. Amend. 6.

Cases that cite this headnote

[16] **Criminal Law**
⇐ Consent to or waiver of delay

Defendant invited and acquiesced in delay of approximately 21 months resulting from dismissal and refiling of state charges to allow defendant to resolve a separate federal case first, and thus delay could not be counted against State for purpose establishing a violation of defendant's constitutional right to a speedy trial. U.S. Const. Amend. 6.

Cases that cite this headnote

[17] **Criminal Law**
⇐ Cause for delay, "good cause", and excuse or justification in general

Delay resulting from the state's performance of DNA analysis is weighed against the state for purpose of speedy trial analysis, but not heavily. U.S. Const. Amend. 6.

Cases that cite this headnote

[18] **Criminal Law**
⇐ Cause for delay, "good cause", and excuse or justification in general

Delay of approximately four months due to continuance requested by both parties for DNA analysis was neutral factor in analysis of whether defendant's constitutional right to a speedy trial was violated. U.S. Const. Amend. 6.

Cases that cite this headnote

[19] **Criminal Law**
⇐ Consent to or waiver of delay

Delay of approximately ten months due to continuance requested by both parties based on parties' desire to discern consequences of defendant's pending federal drug case was neutral factor in analysis of whether defendant's constitutional right to a speedy trial was violated. U.S. Const. Amend. 6.

Cases that cite this headnote

[20] **Criminal Law**
⇐ Particular or conjunctive circumstances, fulfillment or denial of right

"Reason for delay" factor weighed slightly in defendant's favor in analysis of whether defendant's constitutional right to a speedy trial had been violated; of 56 months between defendant's initial arrest and his trial, 35 months were neutral to the analysis because they involved delay that defendant joined State in seeking, but any remaining delays were due to either the court's docket or the State's effort to obtain DNA evidence, all of which weighed slightly against State. U.S. Const. Amend. 6.

Cases that cite this headnote

[21] **Criminal Law**
⇐ Demand for trial

There is no rigid requirement regarding when a defendant must assert his right to a speedy trial. U.S. Const. Amend. 6.

Cases that cite this headnote

[22] **Criminal Law**
⇦ Demand for trial

As part of speedy trial analysis, courts will weigh the timeliness of the assertion of the right and the frequency and force of a defendant's objections. U.S. Const. Amend. 6.

Cases that cite this headnote

[23] **Criminal Law**
⇦ Demand for trial

Although a defendant has no duty to bring himself to trial, failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. U.S. Const. Amend. 6.

Cases that cite this headnote

[24] **Criminal Law**
⇦ Demand for trial

Criminal Law
⇦ Relief;Dismissal or Discharge

A defendant seeking to dismiss the charges when he first asserts the right to a speedy trial strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried. U.S. Const. Amend. 6.

Cases that cite this headnote

[25] **Criminal Law**
⇦ Demand for trial

"Assertion of right" factor weighed against defendant in analysis of whether his constitutional right to a speedy trial had been violated; defendant did not object to any continuances and did not assert his right until one week before trial, approximately 12 months after second indictment and 56 months after original indictment against him, and defendant sought to dismiss charges when he first asserted his right, which suggested that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain dismissal of the charges, he did not want to be tried. U.S. Const. Amend. 6.

Cases that cite this headnote

[26] **Criminal Law**
⇦ Prejudice or absence of prejudice

Generally, prejudice due to the violation of a defendant's constitutional right to a speedy trial must be actual prejudice apparent on the record or by reasonable inference, not speculative or possible prejudice. U.S. Const. Amend. 6.

Cases that cite this headnote

[27] **Criminal Law**
⇦ Prejudice or absence of prejudice

There are three considerations in determining whether a delay has prejudiced the defendant, for purpose of speedy trial analysis: (1) prevention of oppressive pretrial incarceration, (2) minimization of anxiety and concern of the accused, and (3) limitation of the possibility that the defense will be impaired. U.S. Const. Amend. 6.

Cases that cite this headnote

[28] **Criminal Law**
⇦ Prejudice or absence of prejudice

For purpose of speedy trial analysis, the inability of a defendant adequately to prepare his case due to delay skews the fairness of the entire system. U.S. Const. Amend. 6.

Cases that cite this headnote

[29] **Criminal Law**
⇦ Prejudice or absence of prejudice

For purpose of speedy trial analysis, if witnesses die or disappear during a delay, the prejudice is obvious, but there is also prejudice if defense witnesses are unable to recall accurately events of the distant past; loss

of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. U.S. Const. Amend. 6.

Cases that cite this headnote

[30] **Criminal Law**
⇐ Prejudice or absence of prejudice

"Prejudice" factor weighed against defendant in analysis of whether his constitutional right to a speedy trial had been violated; pretrial incarceration was not oppressive, given that much of defendant's time in custody was due to either a parole violation on an unrelated case or his federal charge and conviction, and defendant's claim that he was prejudiced because the delay afforded State the opportunity to track down an additional witness was undermined by fact that majority of witness's testimony was cumulative of other evidence presented. U.S. Const. Amend. 6.

Cases that cite this headnote

[31] **Criminal Law**
⇐ Delay caused by accused

Criminal Law
⇐ Demand for trial

Criminal Law
⇐ Subsequent to accusation

Criminal Law
⇐ Prejudice or absence of prejudice

Defendant's constitutional right to a speedy trial was not violated by delay of approximately 56 months between original indictment and trial; much of delay was attributable to joint efforts by State and defendant to both investigate the matter and to resolve defendant's pending federal case, defendant did not assert his right until one week before trial was scheduled, and defendant failed to demonstrate prejudice resulting from the numerous delays in which he acquiesced. U.S. Const. Amend. 6.

Cases that cite this headnote

[32] **Criminal Law**
⇐ In general;examination of victim or witness

Discovery rules help eliminate surprise and allow both sides to become aware of trial witnesses and evidence.

1 Cases that cite this headnote

[33] **Criminal Law**
⇐ Discretion in ordering disclosure

The decision to exclude a witness under the governing discovery rule is within the discretion of the circuit court.

Cases that cite this headnote

[34] **Criminal Law**
⇐ Preliminary proceedings

In determining whether the trial court abused its discretion in excluding a witness, an appellate court must first consider what prejudice the State would have suffered as a result of the discovery violation and second, whether the remedy resulted in fundamental unfairness to the defendant.

Cases that cite this headnote

[35] **Criminal Law**
⇐ Exclusion of evidence or witnesses

Exclusion may be proper when there is no reasonable justification for failure to disclose the witness.

Cases that cite this headnote

[36] **Criminal Law**
⇐ Alibi

The remedy of disallowing an alibi witness to the defendant is almost as drastic, if not as drastic, as declaring a mistrial.

1 Cases that cite this headnote

[37] **Criminal Law**
⇐ Exclusion of evidence or witnesses

The remedy of disallowing the relevant and material testimony of a defense witness essentially deprives the defendant of his right to call witnesses in his defense; this is not to say it should never be done, but it is certainly a drastic remedy that should be used with the utmost of caution.

1 Cases that cite this headnote

[38] **Criminal Law**
⇐ Time for making indorsements

As a matter of law, no abuse of discretion exists when the court refuses to allow the late endorsement of a defense witness whose testimony would have been cumulative or collateral, or if the late endorsement would have unfairly surprised the State.

1 Cases that cite this headnote

[39] **Criminal Law**
⇐ Discovery and disclosure

The review of the propriety of the trial court's action of refusing to allow the late endorsement of an alibi witness includes consideration of whether the State was unfairly surprised by the alibi witness's testimony and the harm, if any, it would have suffered by virtue of that surprise.

Cases that cite this headnote

[40] **Criminal Law**
⇐ Alibi

Trial court properly excluded alibi witness at trial for first-degree murder, first-degree assault, and armed criminal action; defendant responded in the negative one week before trial to State's discovery request regarding whether he intended to rely on an alibi defense, defendant did not give any indication of a possible alibi defense until first day of trial, despite the fact that he had been aware of and actively investigating potential alibi witness for at least two weeks, defendant's case had been pending for approximately 56 months when he first revealed alibi witness to State, and defendant provided no reasonable justification for the late endorsement.

Cases that cite this headnote

[41] **Homicide**
⇐ Parties to Offense

To convict a defendant of first-degree murder on a theory of accomplice liability, the State must prove that the accomplice deliberated upon the murder; the element of deliberation cannot be imputed. V.A.M.S. § 565.020, subd. 1.

Cases that cite this headnote

[42] **Homicide**
⇐ Deliberation and premeditation

"Deliberation," for purpose of first-degree murder, means cool reflection upon the victim's death for some amount of time, no matter how short. V.A.M.S. § 565.020, subd. 1.

Cases that cite this headnote

[43] **Homicide**
⇐ Parties to offenses

A submissible case of accomplice liability for first-degree murder exists where there is some evidence that the accomplice made a decision to kill the victim prior to the murder from which the jury could infer that the accomplice coolly deliberated on the victim's death. V.A.M.S. § 565.020, subd. 1.

Cases that cite this headnote

[44] **Homicide**
⇐ Deliberation and premeditation

For accomplice liability, circumstances that can support an inference of deliberation, as element of first-degree murder, must be those properly attributable to the accomplice. V.A.M.S. § 565.020, subd. 1.

Cases that cite this headnote

[45] **Criminal Law**
⇐ Particular facts

A reasonable inference can be drawn that by bringing a deadly weapon to commit the crime planned, the defendant reasonably anticipated use of the weapon.

Cases that cite this headnote

[46] **Homicide**
⇐ Deliberation and premeditation

Deliberation, as element of first-degree murder, may be inferred from multiple wounds, especially when there is a break between injury-causing incidents. V.A.M.S. § 565.020, subd. 1.

Cases that cite this headnote

[47] **Homicide**
⇐ Deliberation and premeditation

The inference of deliberation, as element of first-degree murder, is strengthened by the fact that the defendant left the crime scene without procuring aid for the victim, despite knowing the victim had been seriously injured. V.A.M.S. § 565.020, subd. 1.

Cases that cite this headnote

[48] **Homicide**
⇐ Parties to offense

There was sufficient evidence that defendant deliberated upon victim's death to support conviction for first-degree murder as an accomplice; defendant brought a firearm to victim's home, suggesting that he reasonably anticipated using it, neither defendant nor his confederates attempted to hide their identity from the victims, who knew defendant and at least one of his confederates, suggesting defendant and his confederates did not intend for the victims to survive, victim was shot seven times, and defendant and his confederates fled the scene without procuring any aid for either of the victims, both of whom had suffered serious gunshot wounds. V.A.M.S. § 565.020, subd. 1.

Cases that cite this headnote

[49] **Criminal Law**
⇐ Time for Making

The rule providing time limitations for filing motions for new trial in criminal cases does not make an exception extending the time to file a motion, even where newly discovered evidence on which the motion for a new trial is predicated is not discovered until after the filing deadline has passed; because no exception is provided, a request to add a ground to the motion for new trial is a nullity when it is made after the extension period has expired. Mo. Sup. Ct. R. 29.11(b).

Cases that cite this headnote

[50] **Criminal Law**
⇐ Time for Making

Under rule providing time limitations for filing motions for new trial in criminal cases, a motion for new trial may not be filed or amended to allege, as a basis for a new trial, the existence of newly discovered evidence which was not discoverable until after the filing deadline had passed; accordingly, an untimely motion for new trial is not an appropriate means to introduce new evidence, preserves nothing for appeal, and is a procedural nullity. Mo. Sup. Ct. R. 29.11(b).

Cases that cite this headnote

[51] **Criminal Law**
⇐ Sufficiency and Scope of Motion

An appellate court may review an untimely motion for new trial based on newly discovered evidence to determine whether extraordinary circumstances exist that justify remand and establish that manifest injustice or miscarriage of justice occurred. Mo. Sup. Ct. R. 29.11(b).

Cases that cite this headnote

[52] **Habeas Corpus**

⇐ Trial

Generally, alleged *Brady* violations arising after the time in which a motion for new trial must be filed are most appropriately addressed in the context of a habeas corpus motion in which the prosecution's serious alleged violation of *Brady* can be explored.

Cases that cite this headnote

[53] **Constitutional Law**

⇐ Evidence

Favorable evidence is material, and constitutional error results from its suppression by the government in violation of due process, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. U.S. Const. Amend. 14.

Cases that cite this headnote

[54] **Criminal Law**

⇐ Materiality and probable effect of information in general

In determining whether evidence that government failed to disclose to defendant satisfied "materiality" test of *Brady*, question is not whether defendant would more likely than not have received different verdict with evidence, but whether in its absence he received "fair trial," understood as a trial resulting in verdict worthy of confidence; "reasonable probability" of different result is accordingly shown when government's evidentiary suppression undermines confidence in outcome of trial. U.S. Const. Amend. 14.

Cases that cite this headnote

[55] **Constitutional Law**

⇐ Evidence

It is not a due process violation every time government fails or chooses not to disclose evidence that might prove helpful to defense. U.S. Const. Amend. 14.

Cases that cite this headnote

[56] **Criminal Law**

⇐ Materiality and probable effect of information in general

Simply showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more; the undisclosed evidence must be material to the case before any relief is warranted. U.S. Const. Amend. 14.

Cases that cite this headnote

[57] **Criminal Law**

⇐ Newly Discovered Evidence

To succeed on a claim of newly discovered evidence, as basis for new trial, a defendant typically has to show: (1) the evidence has come to the knowledge of the defendant since the trial, (2) failure to discover the evidence sooner was not the result of a lack of due diligence, (3) the evidence is so material that a new trial would produce a different outcome, and (4) it is not cumulative only or merely impeaching the credibility of a witness.

Cases that cite this headnote

[58] **Criminal Law**

⇐ Materiality

The fact that newly discovered evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial; for that reason the defendant seeking a new trial should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal, and accordingly, the *Brady* "reasonable probability" standard of materiality is the applicable standard, rather than the outcome-determinative standard

applied to typical claims of newly discovered evidence.

Cases that cite this headnote

[59] **Constitutional Law**
⇐ Witnesses
Criminal Law
⇐ Impeaching evidence

Allegedly undisclosed impeachment evidence that police detective who took statement from witness was involved in an altercation, unrelated to defendant's case, that resulted in an official criminal investigation and an internal police department inquiry, did not meet *Brady* materiality standard, and thus defendant's due process rights were not violated by State's failure to disclose; victim knew defendant and his confederates from attending same high school, detective's testimony that victim's identification never wavered was merely cumulative of other evidence demonstrating her consistent identification of her assailants, and detective was not the officer who showed victim any photographic lineups from which she identified defendant. U.S. Const. Amend. 14.

Cases that cite this headnote

[60] **Criminal Law**
⇐ Issues related to jury trial

Court of Appeals reviews the trial court's denial of a motion for mistrial for abuse of discretion.

Cases that cite this headnote

[61] **Criminal Law**
⇐ Issues related to jury trial

Judicial discretion is deemed abused by the denial of a motion for mistrial only when a trial court's ruling is clearly against the logic of the circumstances then before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.

Cases that cite this headnote

[62] **Criminal Law**
⇐ Showing bad character or criminal propensity in general

As a general rule, evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes.

Cases that cite this headnote

[63] **Criminal Law**
⇐ Other Misconduct as Evidence of Offense Charged in General

When not properly related and logically relevant to the crime at issue, the introduction of other crimes evidence violates the defendant's right to be tried only for the offense for which he is charged.

Cases that cite this headnote

[64] **Criminal Law**
⇐ Discharge of Jury Without Verdict; Mistrial

A mistrial is a drastic remedy that should be granted in only extraordinary circumstances.

1 Cases that cite this headnote

[65] **Criminal Law**
⇐ Discharge of Jury Without Verdict; Mistrial

The fact that a defendant limits his request for relief to that of a mistrial rather than making a request for a less drastic corrective action cannot aid him.

Cases that cite this headnote

[66] **Criminal Law**
⇐ Other Misconduct;Character of Accused

Trial court properly denied defendant's motion for mistrial after police sergeant testified that victim told him, when asked

how she knew defendant, that she knew him "as a wanna-be rapper that was into drugs"; prosecutor's question asking police sergeant how victim knew defendant was not designed to elicit any information about defendant being involved in drugs, the remark itself was somewhat vague, and there was no reason to believe that the single, isolated reference, which amounted to nothing more than victim's reported impression of defendant, played a decisive role in jury's verdict.

Cases that cite this headnote

***10 Appeal from the Circuit Court of Jackson County, Missouri, The Honorable John M. Torrence, Judge**

Attorneys and Law Firms

Joshua D. Hawley, Attorney General, and Richard A. Starnes, Assistant Attorney General, Jefferson City, MO, Attorneys for Respondent.

Amy M. Bartholow, Assistant Public Defender, Columbia, MO, Attorney for Appellant.

Before Division Two: Karen King Mitchell, Chief Judge, and Alok Ahuja and Edward R. Ardini, Jr., Judges

Opinion

Karen King Mitchell, Chief Judge

***11** Victor Vickers appeals, following a jury trial, his convictions of first-degree murder (§ 565.020),[1] first-degree assault (§ 565.050), and two counts of armed criminal action (§ 571.015), for which he was sentenced, as a prior offender, to concurrent terms of life without parole and three terms of thirty years' imprisonment. Vickers raises five claims on appeal. He argues that (1) he was denied his right to a speedy trial; (2) the court erred in excluding his proposed alibi witness; (3) the evidence was insufficient to support a finding of deliberation; (4) he was entitled to a new trial based upon newly discovered evidence; and (5) he was entitled to a mistrial when a State's witness volunteered information associating Vickers with an unrelated drug offense. Finding no reversible error, we affirm.

Background[2]

In August of 2011, Kristen Forbush lived on 85th Terrace in Jackson County with her fiancé, Edward Ewing, III, and her two young children. On August 15, 2011, Forbush worked from 6:00 p.m. to midnight; neither of her children were home that night. While she was at work, Forbush received a call from a high-school friend, Kyeisa Ransom, asking Forbush why she had not attended a party the weekend before that was hosted by Vickers. Ewing had attended the party and took Forbush's camcorder with him. During Forbush's conversation with Ransom, Forbush indicated that she got off work at midnight.

After Forbush got off work, she stopped for groceries before heading home. Around 1:00 a.m., as she was coming up the street toward her house, Forbush noticed a car parked down the street with its parking lights on, which she thought was unusual. Forbush parked in her driveway and began to unload her grocery bags when she noticed that the car she had seen with its parking lights on was now sitting at the edge of her driveway.[3] Three men wearing hoodies got out of the car and approached Forbush. She immediately recognized Vickers as one of the men and Garron Briggs (Ransom's boyfriend and Vickers's cousin) as another; she did not know the third man.[4] Forbush saw that Vickers was carrying a gun.

As the men approached, they directed Forbush to open the door to the house. She responded by saying, "Please take whatever you want. You can have whatever you want." But the men continued to instruct her to open the door. As Forbush put the key in the door, Briggs grabbed her while Vickers and the third man went inside. Briggs led Forbush into the house and directed her to lie on the floor in the living room, where he then stood over her with a gun pointed at her, while Vickers and the other man went to the back bedroom where Ewing had been sleeping. Forbush heard Vickers and the other man repeatedly demand, "Where's it at? Where's it at?" Ewing kept asking, "Where is what at? What are you all looking ***12** for?" Briggs asked Forbush where the camcorder was, and Forbush responded, "What camcorder?" Meanwhile, she could hear people going through closets and drawers while Vickers and the other man continued to demand, "Where is it at?" Ewing kept asking, "What are you all looking for? I don't sell drugs. What are you all looking for?" Ewing,

Vickers, and the third man approached the living room, with Ewing stopping along the way to open a coat closet and let the men search. When Ewing saw Forbush on the floor, he said, "You all got me messed up. What are you all doing? What are you all looking for?" Forbush told Ewing to "chill," and then Ewing, Vickers, and the third man headed back toward the bedroom. The third man briefly returned to the living room and told Briggs, "They don't have shit. Now what?" Briggs responded, "Just do it." Briggs then shot Forbush in the neck and ran out the front door.

Forbush heard approximately six shots from the back bedroom. She heard four shots, a pause, and then two more, after which Vickers and the third man ran out the front door. Either Vickers or the third man tripped over Forbush's leg on the way out, but she could not tell which one it was.

After the men left, Forbush called 911 and went to check on Ewing, who was unresponsive. When officers arrived, they asked Forbush if she knew who had attacked her, and she told them it was Briggs, Vickers, and a third man she did not know. She further advised that the men had been in Ransom's car. At the hospital, Forbush viewed several photographic lineups presented by officers, and she identified Vickers, Briggs, and Ransom.

Ewing died as a result of his injuries. A subsequent examination of his body revealed that he had been shot in both the head and chest seven times, six of which would have been fatal in isolation. Forensic analysis of the bullets, bullet fragments, and shell casings found at the scene suggested that there were at least two different guns and that all of the rounds fired at Ewing were from the same gun.

The State filed a complaint against Vickers on August 19, 2011, charging him with first-degree murder, first-degree assault, and two counts of armed criminal action. After Vickers was arrested, he contacted Keith Jones, seeking money to post bond. Jones provided the money and discussed the case with Vickers. Vickers told Jones that he "drove the car." Vickers also told Jones that he, Briggs, and another man went over to Ewing's house for the purpose of retrieving a moneybag belonging to Briggs. Vickers was tried on May 16, 2016, after which the jury found him guilty as charged. The court sentenced Vickers, as a prior offender, to concurrent terms of life without parole, and three terms of thirty years' imprisonment. Vickers appeals. [5]

Analysis

Vickers raises five points on appeal. In his first point, he argues that his right to a speedy trial was violated in light of the fact that nearly five years elapsed between the date of the State's initial complaint and the date of his trial. In his second point, he claims that he was denied his right to present a defense when the trial court precluded him from presenting testimony from a proposed alibi witness as a discovery sanction. Vickers's third point alleges that the evidence was insufficient to support a finding that he deliberated—a necessary element for first-degree murder. His fourth point claims that he was entitled to a new trial on the basis of newly ***13** discovered evidence pertaining to the credibility of one of the State's witnesses. And his final point argues that he was entitled to a mistrial when a State's witness volunteered during the trial that Vickers was known as a "wanna-be rapper who was into drugs." Finding no reversible error, we affirm.

Speedy Trial

A. Background Facts

The State filed the initial complaint against Vickers on August 19, 2011, and Vickers was arrested on the associated warrant on August 22, 2011. On September 2, 2011, Vickers was indicted by a grand jury. The trial was originally set for March 12, 2012. On January 24, 2012, the State requested a continuance in order to obtain DNA evidence from Vickers, and Vickers did not oppose the continuance. Trial was rescheduled for July 9, 2012. On June 26, 2012, Vickers and the State filed a joint application for a continuance because the DNA analysis had not yet been completed. The trial was then rescheduled for November 26, 2012. On October 15, 2012, Vickers and the State filed another joint motion for continuance on the ground that

> Defendant was named in a multi-defendant federal drug indictment, 4:12cr-00283-BCW, dated September 26, 2012, and

> the parties request an opportunity to investigate the potential consequences of said federal case before expending substantial judicial resources on the instant case.

Vickers was transferred into federal custody pursuant to the federal charges on October 19, 2012. At a scheduled pretrial conference on November 1, 2012, the court set a new pretrial conference for May 2, 2013, which was subsequently rescheduled to May 9, 2013. At the May 9, 2013 conference, the court set trial for September 23, 2013, at 9:30 a.m. and noted that no further continuances would be granted. On August 9, 2013, however, Vickers requested another continuance, unopposed by the State, due to the hospitalization of a member of defense counsel's family. On August 15, 2013, the court held a pretrial conference of which no record was apparently made. [6]

[1] On September 10, 2013, the State voluntarily dismissed Vickers's case and then refiled a complaint alleging the same charges thirteen days later. After the complaint was refiled, nothing happened in the State murder case until after Vickers was sentenced in federal court on May 28, 2015, upon conviction of a drug offense. On June 12, 2015, Vickers was again indicted on the State charges. On September 11, 2015, without objection, the court set a trial date for May 16, 2016. On May 9, 2016—seven days before trial—Vickers filed a motion to dismiss, asserting for the first time a violation of his right to a speedy trial. The State filed a response to Vickers's motion, arguing that Vickers either acquiesced or actively contributed to most of the delay; specifically, the State argued that Vickers either joined in all of the pretrial continuance requests or requested them on his own and that Vickers supported the State's decision to dismiss and refile the charges so as to allow Vickers's federal case to conclude before proceeding with the State charges.

Before trial, the court held a hearing on Vickers's motion to dismiss, wherein the ***14** State reiterated that the decision to dismiss and refile was based, in large part, on Vickers's desire to resolve his federal case first:

> I think [defense counsel] made the decision that it was a good idea because of the consecutive time issue when the Court was not going to grant his continuance back in September of 2013. I believe he filed his in August. It wasn't brought up until a pretrial sometime two weeks before the actual trial date in September, 2013. At that time the State dismissed it.
>
> And it is my understanding the State dismissed it so he would face the charges in federal court with the understanding that then it would be more likely they can run concurrent times under the two cases. And I know there were negotiations going on between the parties at all times.

Vickers did not refute the State's assertion. And, upon hearing the State's assertion and reviewing the sparse record before it, the trial court accepted the State's explanation:

> I think the best information I can infer from what's been alleged in the motion and response and what I have heard the two of you talk about here this morning is that after the federal indictment was handed up, there was some recognition joined by both lawyers for both parties which concluded that the defendant would like to get the federal case resolved before the State case was resolved. That's kind of what the procedural history of this case looks like to me. That's common practice. It is typical for people to try to arrange things and go that way. Because the case wasn't continued by Judge Midkiff in Division one, it was dismissed and refiled. There is nothing here that leads me to believe that I should grant the motion to dismiss. So I will overrule the Motion to Dismiss based on the speedy trial argument.

B. Standard of Review

[2] **[3]** **[4]** **[5]** "The right to a speedy trial is guaranteed by both the Sixth Amendment to the United States Constitution and Article I of the Missouri Constitution."

State v. Fisher, 509 S.W.3d 747, 751 (Mo. App. W.D. 2016). "The protections of the Sixth Amendment attach when there is a formal indictment or information or when actual restraints are imposed by arrest and holding to answer a criminal charge." *Id.* "The issue of whether the [d]efendant's Sixth Amendment rights have been violated is a question of law, and therefore, appellate courts review de novo." *Id.* "While we review de novo whether the defendant's Sixth Amendment right was violated, we defer to the trial court's findings of fact." *Id.*

C. The trial court did not err in denying Vickers's motion to dismiss.

[6] **[7]** "The determination of whether there has been a violation of speedy trial rights involves a balancing process." *State ex rel. Garcia v. Goldman*, 316 S.W.3d 907, 911 (Mo. banc 2010). "In determining whether [the] right to speedy trial has been violated, the Court is to consider and balance all of the circumstances and to weigh four factors: 'Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.' " *Id.* (quoting *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)).

[8] "The length of the delay is a 'triggering mechanism' because until there is a 'delay [that] is presumptively prejudicial,' there is no need to discuss the other factors that are part of the balancing process." *Id.* (quoting *Barker*, 407 U.S. at 530, 92 S.Ct. 2182). "Missouri courts have found ***15** that a delay of greater than eight months is presumptively prejudicial." *Id.* (internal quotations omitted).

1. Length of Delay

[9] "The delay in bringing a defendant to trial is measured from the time of a formal indictment or information or when actual restraints are imposed by an arrest." *State v. Sisco*, 458 S.W.3d 304, 313 (Mo. banc 2015). Here, Vickers was arrested on the State's initial complaint on August 22, 2011, and indicted on September 2, 2011.[7] The State dismissed the charges on September 10, 2013, and then refiled a complaint, alleging the same charges, on September 23, 2013. The time from Vickers's first arrest until dismissal was approximately twenty-four months, and the time between dismissal and refiling was thirteen days. After refiling the complaint, the State took no action on Vickers's case until June 12, 2015, when Vickers was formally indicted on the refiled charges. This delay consisted of approximately twenty-one months. From the second indictment to the trial on May 16, 2016, there was a delay of approximately eleven months. Thus, approximately fifty-six months passed from Vickers's initial arrest until his trial.

Though the parties disagree as to how much of the time during the various delays should be counted for purposes of discerning the total length of delay, they agree that it surpasses the eight-month benchmark for presumptive prejudice; accordingly, we must examine the remaining *Barker* factors.[8]

2. Reason for Delay

[10] **[11]** **[12]** **[13]** **[14]** **[15]** "Different weights are assigned to different reasons for a delay." *Garcia*, 316 S.W.3d at 911. "A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." *Sisco*, 458 S.W.3d at 314 (quoting *Barker*, 407 U.S. at 531, 92 S.Ct. 2182). "A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* (quoting *Barker*, 407 U.S. at 531, 92 S.Ct. 2182). "Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay." *Id.* (quoting *Barker*, 407 U.S. at 531, 92 S.Ct. 2182). "On the other hand, '[d]elays attributable to the defendant weigh heavily against the defendant.' " *Id.* (quoting *State v. Greenlee*, 327 S.W.3d 602, 612 (Mo. App. E.D. 2010)). A reviewing court is to give "considerable deference" to any trial court findings regarding either negligence or bad faith on the part of the State. *Id.* at 315.

Of the fifty-six-month delay, approximately twenty-one months lapsed between dismissal of the original charges and indictment on the refiled charges. The parties disagree as to whether this time should be counted against the State, or even counted at all. The State argues that, ***16** because the time does not commence until a formal indictment or information is filed, the time between the September 2013 dismissal and the second indictment in June 2015 should not be considered. Vickers argues that the time begins when actual restraints are imposed by an arrest and, because he was in custody throughout the duration, all of the time should be counted. Vickers further argues that, even if the State's argument is correct, the time

should nevertheless be counted against the State because the State's dismissal in September 2013 was a calculated strategy, done in bad faith, intended to gain an advantage over Vickers.

[16] The trial court found that the choice to dismiss was the result of "some recognition joined by both lawyers for both parties which concluded that the defendant would like to get the federal case resolved before the State case was resolved." And, because the trial court indicated that no further continuances would be granted, the only way to resolve the federal case first was for the State to dismiss the state charges and then pursue them at the conclusion of Vickers's federal case. Thus, the trial court determined that, rather than a deliberate delay to hamper the defense, the intentional delay here was done to help Vickers resolve his federal case first. This is a finding to which we grant "considerable deference." *Sisco*, 458 S.W.3d at 315. Accordingly, we need not decide whether the period between the State's dismissal of charges in September 2013 and its reindictment of Vickers in June 2015 should be excluded from the analysis in the circumstances of this case. Instead, it is sufficient to observe that the trial court found that Vickers invited and acquiesced in the delay resulting from the dismissal and refiling, in furtherance of his desire to have his pending federal charges resolved before his State charges. Because of Vickers's complicity in the twenty-one-month delay between September 2013 and June 2015, that delay cannot establish a speedy-trial violation.[9]

[17] **[18]** **[19]** In addition to the dismissal and refiling, there were a number of continuances in the case made pursuant to either a joint request from both parties or solely to Vickers's request. The first continuance request was made on January 24, 2012, by the State for purposes of conducting DNA analysis. Vickers did not object to this continuance, and it resulted in a delay of trial from March 12, 2012, to July 9, 2012, or approximately four months. "Delay resulting from the state's performance of DNA analysis is weighed against the state but not heavily." *Sisco*, 458 S.W.3d at 314.[10] On June 26, 2012, the parties filed a joint application for continuance, again based on DNA analysis. This continuance delayed the trial for another four months until November 26, 2012. Because it was requested by both parties, it is a neutral factor in the analysis. A second ***17** joint application for a continuance was filed on October 15, 2012, resulting in an approximately ten-month delay of the trial to September 23, 2013. This joint application was based on the parties' desire to discern the consequences of Vickers's pending federal drug case. Again, its effect is neutral to the analysis. A final request for continuance was made solely by Vickers on August 9, 2013, due to a health issue with a family member of Vickers's counsel. This request was not ruled on because the State subsequently dismissed the charges on September 10, 2013; thus, it is impossible to discern what effect this request had on the delay.

[20] Accordingly, of the fifty-six months between Vickers's initial arrest and his trial, thirty-five months are neutral to the analysis because they involved delay that Vickers joined the State in seeking (fourteen months for joint applications for continuances and twenty-one months for dismissal and reindictment to resolve federal charges). Any remaining delays were due to either the court's docket or the State's effort to obtain DNA evidence, all of which weigh only slightly against the State. Accordingly, this factor weighs in favor of Vickers, but only slightly.

3. Assertion of Right

[21] **[22]** "The third factor to be considered is whether and how the defendant asserted his right to a speedy trial." *Sisco*, 458 S.W.3d at 316. "There is no rigid requirement regarding when a defendant must assert his right to a speedy trial." *Id.* "Instead, courts will weigh the timeliness of the assertion and the frequency and force of a defendant's objections." *Id.*

[23] **[24]** **[25]** Here, Vickers did not object to any continuances and did not assert his right until one week before trial, approximately twelve months after the second indictment and fifty-six months after the original indictment. "Waiting several months to assert the right to a speedy trial has been found to weigh against a defendant." *State v. Newman*, 256 S.W.3d 210, 216 (Mo. App. W.D. 2008). "Although [a] defendant has no duty to bring himself to trial, ... failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* (quoting *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 729 (Mo. banc 2007)). Additionally, when Vickers first asserted the right, he sought to dismiss the charges. This "strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried." *Barker*, 407 U.S. at 535, 92 S.Ct. 2182. Furthermore, Vickers actually sought an

additional continuance on the first day of trial for the purpose of alleviating the burden he placed on the State in conjunction with his untimely notice of the potential alibi witness that is the subject of his second point on appeal. Accordingly, this factor weighs against Vickers.

4. Prejudice

[26] "Generally, prejudice must be 'actual prejudice apparent on the record or by reasonable inference—not speculative or possible prejudice.' " *Garcia*, 316 S.W.3d at 912 (quoting *State v. Edwards*, 750 S.W.2d 438, 442 (Mo. banc 1988)). "More recently, however, the United States Supreme Court allowed a speedy trial claim to stand absent particularized prejudice." *Id.* (citing *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)). "Negligence, the Supreme Court said, is not 'automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him.' " *Id.* (quoting *Doggett*, 505 U.S. at 657, 112 S.Ct. 2686).

***18** **[27]** **[28]** **[29]** "There are three considerations in determining whether a delay has prejudiced the defendant: (1) prevention of oppressive pretrial incarceration; (2) minimization of anxiety and concern of the accused; and (3) limitation of the possibility that the defense will be impaired." *Garcia*, 316 S.W.3d at 912. "Courts regard the third consideration as the most serious." *Id.*

> "[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."

Id. (quoting *Barker*, 407 U.S. at 532, 92 S.Ct. 2182).

[30] Here, neither of the first two concerns are present, as much of Vickers's time in custody was due to either a parole violation on an unrelated case or his federal charge and conviction. *State v. Williams*, 120 S.W.3d 294, 300 (Mo. App. W.D. 2003) ("Williams was already incarcerated on an unrelated incident at the time of the possession charge, so oppressiveness of pretrial incarceration is not an issue."); *United States v. MacDonald*, 456 U.S. 1, 9, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982) ("Certainly the knowledge of an ongoing criminal investigation will cause stress, discomfort, and perhaps a certain disruption in normal life[, but t]his is true whether or not charges have been filed...."). As for the third concern, Vickers has not identified any real prejudice from the delay. There is certainly no negligence on the part of the State to bring him to trial, as was present in *Doggett*. [11]

At best, he argues that the State would not have found Keith Jones but for the delay. But he does not identify any witnesses experiencing memory issues, nor any evidence lost as a result of the delay. And most of Jones's testimony was cumulative of other evidence presented. Jones testified that he knew Vickers, Briggs, Ransom, Forbush, and Ewing. Jones testified that he gave money to Vickers to bond him out of jail and that they discussed Ewing's murder. According to Jones, Vickers said he drove the car and "[e]verybody knew why" they went to Ewing's house that night—it was "[t]o see if the money [belonging to Briggs] was there," and, in the course of doing so, "[a] man got killed." The only information Jones's testimony added to the evidence already presented by Forbush was that Jones bonded Vickers out of jail and that the assailants had apparently been looking for money. Everything else was cumulative to Forbush's testimony that Vickers and Briggs (both of whom she knew) and a third man arrived at her house, held her at gunpoint while searching for something, and one of them shot and killed Ewing. Accordingly, this factor weighs against Vickers.

[31] After examining the four *Barker* factors, it is apparent that, although there was an extended delay, much of it was attributable to joint efforts by the State and Vickers to both investigate this matter and resolve his federal case. Vickers did not assert his right to a speedy trial ***19** until one week before the trial was scheduled, and, at that time, he sought only dismissal of the charges and continued to seek additional delay. Finally, he has failed to demonstrate prejudice resulting from the numerous delays in which he acquiesced. Accordingly, he has failed to prove a violation of his right to speedy trial.

Point I is denied.

Exclusion of Alibi Witness

A. Background Facts

On the first day of trial, in the midst of *voir dire* examinations, Vickers advised the court that he wished to endorse a new witness and rely on an alibi defense:

> We are requesting at this time to be permitted to endorse Emily DeMarea and announce that we have an alibi defense in this case. We would be able to proceed with her today if the State would like to talk with her. In the alternative, we would not object to a continuance for the State to investigate this alibi.

According to Vickers's counsel, DeMarea came to her attention approximately two weeks earlier, DeMarea was interviewed at that time, and DeMarea indicated that she remembered that she was with Vickers around the time of the charged crimes, but she was unsure of the exact dates. DeMarea then spoke with an investigator for the Public Defender's Office the morning of the first day of trial, "with regard to her memory of the events and believe[d] that she was with Mr. Vickers on the evening of this incident, which is August 15, leading into the morning of August 16, 2011." The State objected, noting that, at no point during the five years leading up to trial, had Vickers ever given any indication of an alibi defense. In fact, Vickers's counsel acknowledged that, one week earlier, in response to a discovery request from the State, Vickers had expressly denied any intent to rely on an alibi defense, despite his awareness of DeMarea as a potential alibi witness at that time. The court denied Vickers's request for late endorsement and assertion of an alibi defense:

> I'm going to deny the motion. I just think there is nothing that I have heard that indicates any basis for the Court to allow this to come out when this is something that was apparently developing, at least a couple of weeks ago in some form it was developed. To not get notice of the alibi or give notice of the alibi until or really the afternoon of the first day of trial, I think is just fundamentally unfair to the State.

The court further noted,

> It is incomprehensible to me how it can get to this point and the history of this case and be talking about an alibi witness being disclosed on the first day of trial, almost five years after this case was filed. I think it just crosses the line into just not justifying the late endorsement.

B. Standard of Review

[32] [33] [34] [35] "Discovery rules help eliminate surprise and allow both sides to become aware of trial witnesses and evidence." *State v. Anderson*, 348 S.W.3d 840, 846 (Mo. App. W.D. 2011). "Rule 25.05(A)(2) requires a defendant in discovery to disclose any witnesses he intends to call to testify." *Id.* "Rule [25.18] offers sanctions for failure to comply with discovery rules, and exclusion of a witness is one such sanction." *Id.* at 847. "The decision to exclude a witness under the rule is within the discretion of the circuit court." *Id.* "In determining whether the trial court abused its discretion, an appellate court must first consider what prejudice the State would have suffered as a result of the discovery violation and second, whether the remedy ***20** resulted in fundamental unfairness to the defendant." *Id.* (quoting *State v. Martin*, 103 S.W.3d 255, 260 (Mo. App. W.D. 2003)). "Exclusion may be proper when there is no reasonable justification for failure to disclose the witness." *Id.*

C. The court did not err in excluding Vickers's alibi witness.

[36] [37] [38] [39] "The remedy of disallowing an alibi witness to the defendant is almost as drastic, if not as drastic, as declaring a mistrial." *State v. Mansfield*, 637 S.W.2d 699, 703 (Mo. banc 1982). "The remedy of disallowing the relevant and material testimony of a defense witness essentially deprives the defendant of his right to call witnesses in his defense." *Id.* "This is not to say it should never be done, but it is certainly a drastic remedy that should be used with the utmost of caution." *Id.* "As a matter of law, no abuse of discretion exists when the court refuses to allow the late endorsement of a defense witness whose testimony would have been cumulative [or] collateral, or if the late endorsement would have unfairly

surprised the State." *State v. Hopper*, 315 S.W.3d 361, 367 (Mo. App. S.D. 2010) (quoting *State v. Destefano*, 211 S.W.3d 173, 181 (Mo. App. S.D. 2007)). "Therefore, the review of the propriety of the trial court's action includes consideration of whether the State was unfairly surprised by [the alibi witness's] testimony and the harm, if any, it would have suffered by virtue of that surprise." *Id.* at 368 (quoting *State v. Simonton*, 49 S.W.3d 766, 781 (Mo. App. W.D. 2001)).

[40] Here, the State sought, in a discovery request dated September 9, 2011, information as to whether Vickers intended to rely on an alibi defense. On May 9, 2016, one week before trial, Vickers responded to the discovery request by stating, "The defendant does not intend to rely on the defense of alibi at this time. Should this change, a supplemental response to discovery will be filed." It was not until the first day of trial, in the midst of *voir dire*, that Vickers first gave any indication of a possible alibi defense, despite the fact that he had been aware of and actively investigating DeMarea for at least two weeks. Additionally, DeMarea's potential alibi evidence would have been known to Vickers, as she claimed to be with him the night of the charged crimes. But, when Vickers first revealed DeMarea's presence to the State, his case had been pending for approximately fifty-six months, and he had raised a claimed violation of his right to a speedy trial. And, even if the court had agreed to grant a continuance, there is no way of knowing how long it would have taken the State to investigate DeMarea's testimony and, thus, how much further delay would have been caused by permitting the late endorsement. Accordingly, his offer of a continuance to allow the State to investigate DeMarea put the State in the awkward position of either proceeding in the face of an uninvestigated defense or further delaying Vickers's trial and thereby supporting his claimed speedy-trial violation. In short, Vickers's request to endorse DeMarea clearly took the State by surprise and would have resulted in fundamental unfairness to the State. Exclusion of proposed alibi witnesses is proper where "[n]o reasonable justification [i]s given for late endorsement." *State v. Harris*, 664 S.W.2d 677, 680 (Mo. App. E.D. 1984). Here, Vickers provided no reasonable justification for the late endorsement, and, as in *Harris*, "It is inconceivable that [the] alibi witness[ ] w[as] undiscovered the [nearly five] years prior to the [first] day of the trial." *Id.* at 680-81.

Point II is denied.

Sufficiency of the Evidence

In his third point on appeal, Vickers argues that the evidence was insufficient *21 to support the jury's determination that he deliberated upon Ewing's death, as was required to support his conviction for first-degree murder. We disagree.

A. Standard of Review

"To determine whether the evidence presented was sufficient to support a conviction and to withstand a motion for judgment of acquittal, [a reviewing c]ourt does not weigh the evidence but, rather, 'accept[s] as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict, and ignore[s] all contrary evidence and inferences.' " *State v. Zetina-Torres*, 482 S.W.3d 801, 806 (Mo. banc 2016) (quoting *State v. Holmes*, 399 S.W.3d 809, 812 (Mo. banc 2013)). Our "review is limited to determining whether there was sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt." *Id.* (quoting *State v. Letica*, 356 S.W.3d 157, 166 (Mo. banc 2011)). "This is not an assessment of whether [we] believe[ ] that the evidence at trial established guilt beyond a reasonable doubt but rather a question of whether, in light of the evidence most favorable to the State, any rational fact-finder could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (quoting *State v. Nash*, 339 S.W.3d 500, 509 (Mo. banc 2011) (internal quotations omitted)).

B. The evidence was sufficient to establish that Vickers deliberated on Ewing's death.

[41] **[42]** **[43]** In this case, Vickers was charged as an accomplice to first-degree murder for Ewing's death. "To convict a defendant of first[-]degree murder on a theory of accomplice liability, the state must prove that the accomplice deliberated upon the murder; the element of deliberation cannot be imputed." *State v. Rousan*, 961 S.W.2d 831, 841 (Mo. banc 1998). "Deliberation means cool reflection upon the victim's death for some amount of time, no matter how short." *Id.* "A submissible case of accomplice liability for first[-]degree murder exists where there is some evidence that the accomplice made a decision to kill the victim prior to the murder from which the jury

could infer that the accomplice coolly deliberated on the victim's death." *Id.*

[44] "For accomplice liability, circumstances that can support an inference of deliberation must be those properly attributable to the accomplice." *Id.* The Missouri Supreme Court

> has outlined three circumstances highly relevant to determining whether accomplice liability may be inferred for first[-]degree murder: first, the defendant or a co-defendant in the defendant's presence made a statement or exhibited conduct indicating an intent to kill prior to the murder; second, the defendant knew that a deadly weapon was to be used in the commission of a crime and that weapon was later used to kill the victim; and third, the defendant participated in the killing or continued with a criminal enterprise after it was apparent that a victim was to be killed.

Id.

[45] **[46]** **[47]** **[48]** Here, the evidence supported a determination that Vickers deliberated on Ewing's death in multiple ways. First, Vickers brought a gun with him to Ewing's home. "A reasonable inference can be drawn that by bringing a deadly weapon to commit the crime ... planned, [the defendant] reasonably anticipated use of the weapon." *State v. Stacy*, 913 S.W.2d 384, 387 (Mo. App. W.D. 1996). Second, when Vickers and the third individual were unable to find whatever they were seeking, Briggs said, "Just do it," after which both Forbush and Ewing were shot, suggesting that the plan had been to kill any witnesses ***22** upon completion of the search. This inference is further supported by the fact that none of the men made any effort to hide their identity from the victims who both knew at least two of the men (including Vickers), suggesting that the men did not intend for the victims to survive, so there was no risk of being identified. This kind of planning supports a finding of deliberation. *State v. Collings*, 450 S.W.3d 741, 760 (Mo. banc 2014) (evidence demonstrating "planning on Collings'[s] part to facilitate the crime [was] evidence of deliberation"). Third, Ewing was shot seven times, and there was apparently a brief pause in the middle of those shots. "Deliberation may be inferred from multiple wounds," especially when there is a break between injury-causing incidents. *Stacy*, 913 S.W.2d at 386. Finally, Briggs, Vickers, and the third man all fled the scene without procuring any aid for either Forbush or Ewing, both of whom had suffered serious gunshot wounds. The "inference of deliberation is strengthened by the fact that [the defendant] left the crime scene without procuring aid for the victim," despite knowing the victim had been seriously injured. *Id.* at 387. Accordingly, there was sufficient evidence from which the jury could determine that Vickers deliberated upon Ewing's death.

Point III is denied.

Newly Discovered Evidence

A. Background Facts

On May 2, 2016, a detective who served as a State's witness at Vickers's trial ("Detective") was involved in an altercation, unrelated to Vickers's case, that resulted in an official criminal investigation and an internal police department inquiry. Detective was identified as the victim of an assault by a man who believed Detective was having an affair with the man's wife. Detective initially denied the man's accusations, but the following day, he admitted to his superiors that he had, in fact, been having an affair with the woman. That same day, the prosecutor's office declined to file charges against Detective's assailant.

From May 2, 2016, through July 18, 2016, Detective's superiors conducted an internal investigation into Detective's conduct surrounding the assault. Vickers's trial began on May 16, 2016, and Detective testified on May 17, 2016. The following day, May 18, 2016, Detective was first notified by his superiors of the internal investigation in a formal disciplinary report, wherein it was alleged that Detective violated Personnel Policy 201-8 Code of Ethics and Rules of Conduct, Section IV-Rules of Conduct, Subsection B, Line 8, which provided that "Members will not ... [e]ngage in or attempt to engage in, or knowingly consent to any form of dishonesty, including deviations from the truth, whether on or off duty."

Vickers's trial concluded on May 20, 2016, and he was given twenty-five days in which to file a motion for new trial. Vickers filed a motion for new trial twenty-one days later, on June 10, 2016. On July 15, 2016, Vickers's counsel sought a continuance of the originally scheduled sentencing hearing, based upon "a letter received by the PD's office on another case in regard to Detective ..., with regard to that he is pending investigation with regard to his truthfulness." Despite its determination that any further motions for new trial would be untimely, the trial court, in an abundance of caution, granted Vickers a continuance to further investigate the information.

The existence of the investigation into Detective was formally disclosed to Vickers on August 10, 2016. Vickers then filed a second motion for new trial on August 23, 2016, alleging that the investigation *23 into Detective's conduct constituted newly discovered *Brady*[12] evidence warranting a new trial. As of August 24, 2016, Detective had not been subjected to any disciplinary action, and the internal inquiry was still pending review and final determination.

At the hearing on Vickers's second motion for new trial, the trial court expressed its concern "as to whether a witness, a police officer or otherwise, who has been determined to have been dishonest in some other matter can be impeached by bringing up an unrelated matter where there was some specific instance of dishonesty." Thereafter, the court denied Vickers's motion, finding that Detective's testimony was neither adverse to Vickers nor his theory or defense and, therefore, the newly discovered evidence was not material. The court stated its belief that

> the strength of the State's case herein would always rise or fall exclusively on whether the jury was convinced beyond a reasonable doubt of the credibility of the eyewitness identification of Defendant by the surviving victim, Krist[e]n Forbush. The testimony of Detective ... had no material impact on the identification issue.

The court further determined that "extrinsic evidence concerning the unresolved disciplinary proceeding against Detective would not be properly admissible as impeachment evidence under *Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. banc 2010)." The court finally concluded that, "even if the newly discovered evidence regarding the pending disciplinary proceedings against Detective ... at the KCPD at issue were deemed proper impeachment evidence, there is no reasonable probability that the result of the trial would have been any different."

B. Standard of Review

"Rule 29.11(b) provides that, in a criminal case, a motion for new trial must be filed not later than fifteen days after the verdict is returned, and for good cause shown, the court may extend the time for filing by one additional period not to exceed ten days." *State v. Shelton*, 529 S.W.3d 853, 866 (Mo. App. E.D. 2017). "Rule 29.11(b) applies to requests for new trials based upon newly discovered evidence." *Id.* "The time limitations in Rule 29.11(b) for filing a motion for new trial in criminal cases are mandatory." *Id.*

[49] [50] [51] "Rule 29.11(b) 'does not make an exception extending the time to file a motion, even where the newly discovered evidence on which the motion for a new trial is predicated is not discovered until after the filing deadline has passed.' " *Id.* (quoting *State v. Stephens*, 88 S.W.3d 876, 880 (Mo. App. W.D. 2002)). "Because no exception is provided, a request to add a ground to the motion for new trial is a nullity when it is made after the extension period has expired." *Id.* (internal quotations omitted). "In other words, a motion for new trial may not be filed or amended to allege, 'as a basis for a new trial, the existence of newly discovered evidence which was not discoverable until after the filing deadline had passed.' " *Id.* (quoting *Stephens*, 88 S.W.3d at 880). "Accordingly, an untimely motion for new trial is not an appropriate means to introduce new evidence, preserves nothing for appeal, and is a procedural nullity." *Id.* at 866-67. "Nevertheless, an appellate court may review the untimely claim to determine whether 'extraordinary circumstances' exist that *24 justify remand and establish that manifest injustice or miscarriage of justice occurred." *Id.* at 867.

[52] Generally, alleged *Brady* violations arising after the time in which a motion for new trial must be filed are "more appropriately addressed in the context of a habeas

corpus motion in which the prosecution's serious alleged violation of *Brady* ... can be explored." *Weeks v. State*, 140 S.W.3d 39, 42 n.2 (Mo. banc 2004). Nevertheless, "Missouri's appellate courts have considered *Brady* claims raised [through other avenues] but only when the appellate court had a proper record to consider or where the facts were uncontroverted." *State v. Parker*, 198 S.W.3d 178, 181 (Mo. App. W.D. 2006). Here, the trial court held a hearing on the untimely motion for new trial. Thus, regardless of the propriety of its choice to do so, the fact that it did means that we have a sufficient record before us to review Vickers's claim.

C. The newly discovered evidence did not warrant a new trial.

[53] [54] Vickers argues that evidence pertaining to the internal inquiry of Detective constituted *Brady* evidence that the State had an independent duty to disclose insofar as he could have used it to challenge Detective's credibility as a witness. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." In *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the Court clarified that "[i]mpeachment evidence, ... as well as exculpatory evidence, falls within the *Brady* rule." "[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *Bagley*, 473 U.S. at 682, 105 S.Ct. 3375). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434, 115 S.Ct. 1555. "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " *Id.* (quoting *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375).

[55] [56] [57] [58] "[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Id.* at 436-37, 115 S.Ct. 1555. Simply "showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more." *Id.* at 437, 115 S.Ct. 1555. The undisclosed evidence must be material to the case before any relief is warranted. Materiality is a question of "whether we can be confident that the jury's verdict would have been the same," had the State disclosed the favorable evidence. [13] *Id.* at 453, 115 S.Ct. 1555.

***25 [59]** Both parties agree that the evidence at issue here is, at best, impeachment evidence. [14] In other words, "[t]he constitutional error, if any, in this case was the Government's failure to assist the defense by disclosing information that might have been helpful in conducting the cross-examination." *Bagley*, 473 U.S. at 678, 105 S.Ct. 3375. But "such suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial." *Id.* In other words, "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Id.*

Vickers argues that "there was no forensic or other physical evidence of any kind linking him to the shootings[;] ... the State's case against Mr. Vickers was based solely on eyewitness identification testimony of Kristen Forbush." This is what the trial court found as well, when it noted that "the strength of the State's case herein would always rise or fall exclusively on whether the jury was convinced beyond a reasonable doubt of the credibility of the eyewitness identification of Defendant by the surviving victim, Krist[e]n Forbush." But where Vickers and the trial court disagree is what effect, if any, Detective's testimony had on Forbush's credibility. Vickers argues that "Det[ective's] ... testimony was presented to bolster the credibility of Kristen Forbush's identification." Whereas the trial court determined that "[t]he testimony of Detective had no material impact on the identification issue." We agree with the trial court.

Detective testified that his involvement with Forbush was limited to taking her statement:

> Q. Did you also then take a statement from Kristen Forbush?
>
> A. I did.
>
> Q. What day was it that you took that statement?

A. I believe it was the 18th, two days later.

Q. Okay. Two days later?

A. Yes.

Q. Was it a videotaped statement?

*26 A. Yes.

Q. Was it taken at the police station?

A. Yes.

Q. And it actually was transcribed as well. Meaning that there was a transcription of that videotaped statement?

A. Yes.

Q. And in that statement did she identify two individuals that were involved in the homicide, in the shooting of Edward Ewing, and the shooting of herself?

A. She did.

Q. And you went over the details of that statement with her?

A. Yes, I did.

Q. And in full?

A. In full.

Q. Okay. And did she waiver [sic] on who was involved in this case?

A. Not in the least.

Q. Who did she say was involved in that shooting?

A. Garron Briggs and Victor Vickers.

Vickers suggests that, because "[t]he State specifically asked [Detective] whether Forbush waivered [sic] at all in her identification two days after the shooting, and Det[ective] ... replied, 'not in the least,' " his testimony was "critically important" to the jury's determination of Forbush's credibility. We disagree. Forbush knew Vickers and Briggs from high school and recognized them immediately on the night of the charged crimes. She consistently repeated this identification to multiple officers and not just Detective. And, to the extent his testimony established that her identification was consistent, it was merely cumulative of the other evidence demonstrating her consistent identification of her assailants.[15] Detective was not the officer that showed Forbush any photographic lineups from which she identified Vickers, and Detective's function in relation to her was merely to record her statement for evidentiary purposes. Accordingly, the allegedly undisclosed impeachment evidence does not meet the *Brady* materiality standard.

Point IV is denied.

Other Crimes Evidence

In his final point, Vickers argues that the trial court abused its discretion in denying his request for a mistrial after one of the State's witnesses mentioned something about Vickers being "into drugs."

A. Background Facts

Before trial, Vickers filed a motion in limine seeking to preclude the State from making any "reference to any of his prior bad acts or uncharged crimes ..., including, but not limited to, the Defendant being a drug dealer and/or associated with drugs." The court granted the motion. During Sergeant Clinton Sanders's testimony, he stated that Forbush identified Vickers as one of her assailants. The State asked Sergeant Sanders, "Did she tell you how she knew it was [Vickers] that night?" Sergeant Sanders replied, "She said she knew him as a wanna-be rapper that was into drugs." Vickers objected on the ground that the testimony violated the court's ruling on the motion in limine and *27 requested an immediate mistrial. Vickers requested no other relief. The trial court denied the requested mistrial, finding that, "under all the circumstances in this case that have been developed so far," the reference was not "so prejudicial to the defendant that it would justify mis-trying the case."

B. Standard of Review

[60] [61] "We review the trial court's denial of a motion for mistrial for abuse of discretion." *State v. Neighbors*, 502 S.W.3d 745, 748 (Mo. App. W.D. 2016). "Judicial discretion is deemed abused only when a trial court's ruling is clearly against the logic of the circumstances

then before it and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* (quoting *State v. Pope*, 50 S.W.3d 916, 922 (Mo. App. W.D. 2001)).

C. The trial court did not abuse its discretion in denying Vickers's request for a mistrial.

[62] **[63]** Vickers argues that the trial court erred in denying his motion for mistrial because Sergeant Sanders's testimony constituted impermissible evidence of uncharged crimes. "As a general rule, 'evidence of prior uncharged misconduct is inadmissible for the purpose of showing the propensity of the defendant to commit such crimes.' " *State v. Barriner*, 34 S.W.3d 139, 144 (Mo. banc 2000) (quoting *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993)). "When not properly related and logically relevant to the crime at issue, the introduction of other crimes evidence violates the defendant's right to be tried only for the offense for which he is charged." *Id.* (quoting *State v. Clover*, 924 S.W.2d 853, 855 (Mo. banc 1996)).

[64] "A mistrial is a drastic remedy that should be granted in only extraordinary circumstances." *State v. Costa*, 11 S.W.3d 670, 677 (Mo. App. W.D. 1999). "The trial court is in the best position to determine whether the incident caused prejudice." *Id.*

In response to Vickers's objection, the prosecutor indicated, "I wasn't expecting him to say drugs.... I merely wanted him to identify the fact that she knew who [Vickers] was. That is what I was trying to get to." Accordingly, we are faced with an uninvited reference to other crimes.

"Missouri courts have generally examined five factors in determining the prejudicial effect of an uninvited reference to other crimes." *State v. Goff*, 129 S.W.3d 857, 866 (Mo. banc 2004).

> These five factors are: 1) Whether the statement was, in fact, voluntary and unresponsive to the prosecutor's questioning or caused by the prosecutor; 2) whether the statement was singular and isolated, and whether it was emphasized or magnified by the prosecution; 3) whether the remarks were vague and indefinite, or whether they made specific reference to crimes committed by the accused; 4) whether the court promptly sustained defense counsel's objection to the statement, and instructed the jury to disregard the volunteered statement; and 5) whether, in view of the other evidence presented and the strength of the State's case, it appeared that the comment played a decisive role in the determination of guilt.

Id. at 866 n.7.

[65] **[66]** An analysis of these five factors demonstrates that the trial court did not abuse its discretion in denying Vickers's motion for a mistrial. First, the prosecutor's question was not designed to elicit any information about Vickers being involved in drugs. The prosecutor asked *how* Forbush knew Vickers, not what she knew *of* him. Forbush knew Vickers because ***28** they attended high school together—that was the information the question sought. Second, after Sergeant Sanders's answer and Vickers's objection, the prosecutor advised, "We can leave that alone. I won't bring it up anymore." And there is nothing else in the record to suggest that the prosecutor did otherwise. Third, the remark itself was somewhat vague. It mentioned that Vickers was "into drugs," but did not specify what that meant. It did not indicate that he had been charged or convicted of any drug offenses, nor did it state that he used or sold drugs. But, even accepting that it would be reasonable to infer illegal activity from the reference, Vickers still cannot prevail on this claim. As to the fourth factor, though the trial court did not sustain the objection and instruct the jury to disregard, the reason it did not do so is because Vickers declined the court's offer of any other form of relief besides a mistrial. "The fact that a defendant limits his request for relief to that of a mistrial rather than making a request for a less drastic corrective action cannot aid him." *State v. Wright*, 383 S.W.3d 1, 11 (Mo. App. W.D. 2012) (quoting *State v. Porter*, 241 S.W.3d 385, 399-400 (Mo. App. W.D. 2007)). And, as to the final factor, there is no reason to believe that this single, isolated reference, which amounted to nothing more than Forbush's reported impression of Vickers,

played a decisive role in the jury's verdict. The entire case hinged on Forbush's identification of her assailants, two of whom she knew from high school. The jury apparently accepted her identification and, therefore, found Vickers guilty.

In short, because the reference was brief, isolated, and unlikely to have affected the verdict, Vickers has not demonstrated that the trial court abused its discretion in denying his request for a mistrial.

Point V is denied.

Conclusion

Vickers has failed to demonstrate any reversible error made by the trial court. Accordingly, his convictions and sentences are affirmed.

Alok Ahuja and Edward R. Ardini, Jr., Judges, concur.

All Citations

560 S.W.3d 3

Footnotes

1 All statutory citations are to the Revised Statutes of Missouri (2000), as updated through the 2010 Cumulative Supplement, unless otherwise noted.

2 "We view the evidence in the light most favorable to the verdict and disregard contrary evidence." *State v. Jindra*, 504 S.W.3d 187, 188 n.2 (Mo. App. W.D. 2016).

3 At that point, Forbush recognized the car as belonging to Ransom.

4 Forbush, Ewing, Ransom, Briggs, and Vickers had all attended high school together at Hickman Mills.

5 Further facts will be identified as needed in the analysis portion of this opinion.

6 Despite the fact that Vickers had a pending motion for continuance that had not yet been ruled, Vickers claimed in his later-filed motion to dismiss that he objected to any further continuances at the August 15, 2013 pretrial conference. This court asked Vickers to provide a transcript of the pretrial conference, but his efforts to do so revealed that no transcript of the proceeding exists.

7 The record reflects that Vickers bonded out of jail on February 6, 2012, but it does not indicate when he was taken back into custody. In his motion to dismiss, Vickers argues that he was immediately returned to custody for a parole violation in a different matter, but he also states that he was out on bail for a total of ten days. We need not resolve this discrepancy, however, for purposes of determining the length of delay.

8 Because the parties agree that the delay, regardless of how it is calculated, exceeded eight months, we do not need to calculate how much of the delay should actually be considered. Instead, we address the effect of continuances and other delays in the second *Barker* factor regarding the reason for various delays.

9 Vickers argues, accurately, that the State was also still investigating the case to discover the identity of the third perpetrator and thereby also benefited from the dismissal and refiling. Below, as an alternative to dismissal, Vickers requested that the State be precluded from presenting any evidence obtained as a result of this delay. The State never obtained the identity of the third perpetrator, however, and the only evidence the State obtained following dismissal was the discovery of Keith Jones. Vickers has not re-raised a challenge to the admission of Jones's testimony on appeal; instead, he has chosen to focus solely on the requested dismissal. Accordingly, we will not further address this reason for delay.

10 In making this assertion in *Sisco*, the Court also noted that "[t]he trial court found the state did not act negligently or in bad faith," a finding to which the Court gave "considerable deference." *State v. Sisco*, 458 S.W.3d 304, 315 (Mo. banc 2015).

11 The negligence at issue in *Doggett* was the government's failure to arrest the defendant for a period of eight and one-half years after securing an indictment, despite the facts that, during that period, the defendant had "married, earned a college degree, found a steady job as a computer operations manager, [and] lived openly under his own name." *Doggett v. United States*, 505 U.S. 647, 649, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). There is nothing similar in Vickers's case.

12 *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

13 Vickers has raised his claim as one of newly discovered evidence. Typically, to succeed on a claim of newly discovered evidence, Vickers would have to show:

1) the evidence has come to the knowledge of the party since the trial; 2) failure to discover the evidence sooner was not the result of a lack of due diligence; 3) *the evidence is so material that a new trial would produce a different outcome*; and 4) it is not cumulative only or merely impeaching the credibility of a witness.

Hancock v. Shook, 100 S.W.3d 786, 798 (Mo. banc 2003) (emphasis added). But, "the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial." *United States v. Agurs*, 427 U.S. 97, 111, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). "For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." *Id.* Accordingly, the *Brady* "reasonable probability" standard of materiality is the applicable standard, rather than the outcome-determinative standard applied to claims of newly discovered evidence.

An added layer of complexity exists in this case because the motion for new trial at issue was untimely, rendering it a procedural nullity. In such cases, however, appellate courts will consider granting relief if the alleged error constituted "extraordinary circumstances" that resulted in either a manifest injustice or a miscarriage of justice. *State v. Shelton*, 529 S.W.3d 853, 867 (Mo. App. E.D. 2017). Here, because Vickers fails to meet the less rigorous *Brady* standard of materiality, he necessarily fails to meet the more demanding standard of "extraordinary circumstances" resulting in manifest injustice.

14 "[T]here are exceptional circumstances in which impeachment is reason to remand to the trial court to grant a new trial at the appellate court's discretion." *State v. Terry*, 304 S.W.3d 105, 110 (Mo. banc 2010). Such "exceptional circumstances," however, are not present under the facts before us.

15 Vickers's entire misidentification defense hung on Forbush's single prior inconsistent statement to the 911 operator when she called for help. When Forbush called 911, the operator asked who shot her and she replied, "I don't fucking know." The operator asked her a second time, and she responded, "I think so." During her testimony, Forbush explained that she was frustrated by the question initially because she was trying to get medical help for herself and Ewing and did not see how identity of the shooters mattered at that point. Vickers was able to elicit this information and question Forbush about her identification through cross-examination.

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IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. WD80148
	)	
VICTOR VICKERS,	)	
	)	
Appellant.	)	

MOTION FOR REHEARING OR TRANSFER TO MISSOURI SUPREME COURT

Appellant, Victor Vickers, pursuant to Rules 30.26, 30.27, 83.02, and 84.17, moves for a rehearing of this Court's July 31, 2018, opinion (Mitchell, C.J., Ahuja, J. and Ardini, J.), which affirmed his convictions for first degree murder, first degree assault and two counts of armed criminal action, or in the alternative for transfer to the Missouri Supreme Court to resolve conflicts in the law and to answer questions of general interest and importance arising from this Court's opinion:

Rehearing - This Court's Opinion is based on Multiple Mistakes of Fact

1. This Court's opinion, citing Rule 81.12, accuses undersigned counsel of not providing documents in the record on appeal that are necessary for this Court's review. Specifically, in footnote 6, the opinion states that counsel "did not provide this court with a transcript of the [August 15, 2013] pretrial conference," and, in footnote 7, states that counsel "did not include the State's response [to the motion to dismiss] in the record on appeal." (Slip op. at 6). Both statements are factually incorrect and should be removed from the opinion or corrected.

2. On May 11, 2018, more than one month before oral argument in this case, and in response to this Court's inquiry of May 4, 2018, undersigned counsel filed a Third Supplemental Legal File, which contained therein the "State's Response to Defendant's Motion to Dismiss for Violation of Sixth Amendment Right to a Speedy Trial, or in the Alternative, Exclude Subsequent Evidence to the Last Trial Date." (See 3rd Supp. LF 1-7). The Court's statement that "Vickers did not include the State's response in the record on appeal," (Slip op. at 6), is objectively false and should be corrected.

3. On May 4, 2018, this Court's Clerk sent a request letter to undersigned counsel, asking counsel to provide a supplemental legal file containing the "State's Response to Defendant's Motion to Dismiss" (referenced in paragraph 2 above), as well as "a copy of the transcript of the pretrial conference held August 15, 2013, if available." (Appendix A). On May 11, 2018, in addition to filing the Third Supplemental Legal File (referenced in paragraph 2 above), undersigned counsel filed a letter with the Court indicating:

> [A]fter extensive consultation with and research by Judge Midkiff's then-court reporter, Connie Solomon, and Judge Midkiff's Judicial Administrative Assistant, Charmaine Willis, it has been determined that the pretrial conference held on August 15, 2013, in Jackson County Case Number 1116-CR03744-01, was not recorded in any fashion. Therefore, I am unable to file any further transcripts with the Court.

(Appendix B) (This was also stated in Mr. Vickers' reply brief at page 6.)

4. Therefore, this Court's statement, that "Vickers did not provide this court with a transcript of this pretrial conference to support his assertion" [that] "he objected to any further continuances at [that conference]," is not wholly accurate (Slip op. at 6, fn 6). Mr. Vickers *could not* provide the transcript to this Court because this pretrial conference was not recorded and does not exist.

5. Undersigned counsel suggested a solution to this problem. At oral argument before this Court on June 25, 2018, undersigned counsel acknowledged that the actual facts surrounding the August 15, 2013 pretrial hearing and September 23, 2013 trial, were critical to resolving the timing issues for Mr. Vickers' speedy trial claim, but were also in dispute. Therefore, counsel suggested that this Court could remand the case to the trial court, pursuant to the Court Rules, to resolve the factual disputes concerning what prompted the State's dismissal and refiling of Mr. Vickers' case on September 23, 2013 – the date Mr. Vickers was prepared to go to trial. Mr. Vickers asserted then, and continues to assert, that after the trial court denied any further continuances of the September 23, 2013 trial date, he was ready, willing and able to proceed to trial, and wanted no further continuances. Rather, it was the State that unilaterally dismissed and refiled the case to avoid a trial on September 23, 2013. As discussed in paragraphs 9-16 below, Mr. Vickers has evidence to prove these facts at a hearing on remand to the trial court.

6. This Court has the authority to order a remand to correct or settle a disputed record under Rules 30.04(d), 81.12(f), and 81.15(b). Specifically, Rule 81.12(f) provides that "[i]f anything material is omitted from the record on appeal: ...(2) The appellate court, on a proper suggestion or of its own motion, may: ... (B) Order that either party or the clerk of the trial court prepare and file a supplemental record on appeal, including any additional part of the trial record, proceedings, and evidence."

7. Rule 81.15(b) also provides a remedy to resolve disputes about the record:

> (b) ...If there is any dispute concerning the completeness of the record on appeal, additional parts of the record on appeal may be filed pursuant to Rule 81.12. The filing of the legal file or the transcript shall not operate as a waiver by the filing party of the right to dispute the correctness thereof. If there is any dispute concerning the correctness of any legal file or transcript, the party disputing the correctness thereof shall designate in writing to the appellate court those portions of the legal file or transcript that are disputed. Such designation shall be filed with the appellate court within 15 days after the legal file or the transcript, whichever is in dispute, is filed. The appellate court, either on application or on its own motion, may enlarge the time within which any such designation shall be filed. The appellate court shall direct the trial court to settle the dispute and to certify the correct contents of such

portion to the appellate court, and such certification by the trial court shall become a part of the record on appeal.

8. Mr. Vickers requests that this Court remand to the trial court, pursuant to these above-cited rules, to resolve this disputed factual issue regarding the record. He is prepared to present affirmative evidence at a hearing on remand which will show that the State purposefully and unilaterally dismissed and refiled the case to avoid a September 23, 2013 trial. Therefore, the subsequent delay was without Mr. Vickers' consent and attributable solely to the State because it was not ready for trial. This Court's statement that Mr. Vickers' assertions are "simply implausible" (Slip op. at 6), is in error. Not only are they plausible, they can be affirmatively proven at a hearing.

9. Mr. Vickers' retained private attorney in 2013, John Humphrey, has submitted a 31-page affidavit of his recollection of the events from August-September, 2013, with supporting documentation of his conversations with the prosecutor at that time, Dawn Parsons. (Appendix C attached). Again, neither Mr. Humphrey nor Ms. Parsons were involved in Mr. Vickers' 2016 trial, but their interactions are critical in determining why Mr. Vickers' trial did not occur in September, 2013, and to whom that delay is attributable for purposes of the speedy trial analysis.

10. Mr. Humphrey's affidavit recounts the dates leading up to the 2013 events. (App. C, p.1-2). Mr. Humphrey acknowledges that in August, 2013, he requested a continuance due to an emergency illness of a family member that summer. (App. C, p.2). However, he notes that Mr. Vickers was opposed to any further delay of

his September 23, 2013 trial. (App. C., p.2). Mr. Humphrey's affidavit states that, on August 9, 2013, the trial court continued ***ONLY*** the pre-trial conference, resetting it to August 15, 2013, while leaving the matter set for trial on September 23, 2013. (App. C., p.2).

11. On September 4, 2013, in preparation for trial, Mr. Humphrey emailed prosecutor Parsons to let her know that he would be filing notices to depose several of the State's witnesses the following week. (App. C., p. 2). Mr. Humphrey includes the actual emails between himself and prosecutor Parsons regarding this trial preparation in his affidavit, which reveals the obstreperous nature of the prosecutor's replies to Mr. Humphrey regarding the coordination of pretrial depositions with state witnesses (App. C., p. 2-6).

12. On September 10, 2013, Mr. Humphrey notified prosecutor Parsons that he intended to use a detailed 3D virtual rendering of the crime scene for demonstrative purposes at trial and he sent her a video animation of a walk-through of the rendering, as well as the still rendering of the model (App. C., p. 6).

13. Later that same day, prosecutor Parsons advised Mr. Humphrey by phone that "she absolutely was not trying the case on the date set, 9-23-13, as she had been engaged in or was going to be engaged in other trials immediately preceding the week of 9-23-13." (App. C., p.6). Prosecutor Parsons also advised Mr. Humphrey that "because [his] client had a federal case, he wouldn't be going anywhere and she could just dismiss and refile the case." (App. C., p. 6).

14. Prosecutor Parsons dismissed case number 1116-CR03744-01 on 9-10-13 at 3:37 p.m. (the same day Mr. Humphrey had sent her a copy of his demonstrative exhibit that he intended to use at trial on 9-23-13). (App. C., p. 6).

15. Prosecutor Parsons subsequently re-filed the case by Complaint on 9-23-13, and it was assigned case number 1116-CR03744-02. (App. C., p. 7). Prosecutor Parsons called Mr. Humphrey to let him know that she had re-filed the case, which he was able to briefly verify on Case.Net; however, within a period of days, that case's appearance on Case.Net was gone. (App. C., p. 7).

16. In a subsequent phone conversation, Prosecutor Parsons advised that she intentionally made certain that the case did not appear on Case.Net and that she intentionally refrained from having the warrant served on Mr. Vickers. (App. C., p. 7). They discussed the pros and cons, from both of their perspectives, of resolving the federal or the state case first. (App. C., p. 7).

17. Because of the State's delay, Mr. Vickers was essentially denied his counsel of choice to represent him at his trial, and he was subsequently unable to retain Mr. Humphrey for the 2016 trial, given his lengthy incarceration and diminishing funding resources. He was left without counsel to assert his speedy trial rights until June 12, 2015, when he was indicted on the State charges – a delay of at least 21 months that this Court should have attributed to the State.

18. Therefore, both this Court's reliance and the trial court's reliance on what Prosecutor Covinsky (the trial prosecutor) assumed had happened in 2013, when Prosecutor Parsons was actually handling the case, is faulty. This Court's opinion

relies on Prosecutor Covinsky's assurance that "the decision to dismiss and refile was based, in large part, on Vickers's desire to resolve his federal case first." (Slip op. at 6). Covinsky stated that "it is my understanding the State dismissed it so he would face the charges in federal court with the understanding that then it would be more likely they can run concurrent times under the two cases And I know there were negotiations going on between the parties at all times." (Slip op. at 6-7).

19. Mr. Humphrey's affidavit flatly disputes this account (App. C). Instead, it makes clear that he was ready, willing and able to proceed to trial on September 23, 2013, which was Mr. Vickers' desire, but Prosecutor Parsons stated she "absolutely was not trying the case" on that date. (App. C, p. 6). "Because the State deliberately delayed trial to avoid an adverse ruling, the delay resulting from the [S]tate's nolle prosequi must be weighed heavily against the [S]tate." *See State v. James*, 2018 WL 1276977, at *5 (Mo. App. W.D. Mar. 13, 2018). Where the Government intentionally holds back its prosecution of the defendant to gain an impermissible advantage at trial, such bad faith in causing delay must be weighed heavily against the Government. *See Doggett v. United States*, 505 U.S. 647, 656 (1992) (citing *Barker v. Wingo*, 407 U.S. 514, 531 (1972)).

20. To infer the implausibility of Mr. Vickers version of what happened at that hearing simply because it was not on the record, while at the same time crediting the prosecutor's version of what happened - when he was not involved in the case in

2013, and was not present at the hearing or for trial preparation - defies logic. His assertions have no factual evidentiary support.

21. This Court should not permit the State to sit back and watch these events unfold, resting on an erroneous account by its trial prosecutor to Judge Torrence, when the actual truth is that the original prosecutor was not ready for trial on September 23, 2013, and unilaterally dismissed the case for the State's benefit. The entire amount of time between that 2013 dismissal and the 2016 trial should have been attributed to the State alone, but this Court's opinion attributed it to Mr. Vickers in its speedy trial analysis, "because of [his] complicity in the twenty-one-month delay" (Slip. Op. at 10-11). It did so, even after acknowledging that the factual record on this issues was "sparse." (Slip op. at 7). But not only did the record before Judge Torrence have no factual support, the actual assertions by Prosecutor Covinsky were incorrect. As such, this Court's opinion is based of mistakes of fact and should be reheard after a remand to resolve the record.

22. Prosecutors and Attorneys General are representatives "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). "It is as much [their] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.* This Court must remand this case to settle the factual record and then rehear the case.

Rehearing or Transfer – Misapplication of Law – Speedy Trial

23. Regarding Mr. Vickers' speedy trial claim, this Court held that, "[b]ecause of Vickers's complicity in the twenty-one-month delay between September 2013 and June 2015, that delay cannot establish a speedy trial violation." (Slip op. at 10). Although acknowledge that the trial court records is "sparse" (Slip op. at 7), this Court nevertheless based its reasoning on the trial court's findings that "The choice to dismiss was the result of 'some recognition joined by both lawyers for both parties which concluded that the defendant would like to get the federal case resolved before the State case was resolve.'" (Slip op. at 10). However, the trial court's ruling was merely an adoption of the State's bald assertion, unsupported by any articulable facts in the trial record. In fact, as discussed in the preceding section, Mr. Humphrey's affidavit and testimony would show that the prosecutor's assertion is grossly inaccurate and completely false.

24. The burden rests with the "State to afford the accused a speedy trial, and if there is a delay it becomes incumbent upon the State to show reasons which justify that delay." *State v. Greenlee*, 327 S.W.3d 602, 612 (Mo. App. E.D. 2010). "The burden is on the Government to assign reasons to justify the delay." *Amos v. Thornton*, 646 F.3d 199, 207 (5th Cir. 2011). The State cannot meet its burden simply by relying on bald assertions unsupported by any articulable facts in the record. Therefore, this Court should hold that the State has not met its burden.

25. Further, Respondent argued that the State filed to dismiss the case against Mr. Vickers in September 2013 to aid him in resolving his federal charges prior to

resolving the instant case. (Resp. Br. 15-16). In this Court's opinion, this Court inaccurately held that Mr. Vickers "did not refute the State's assertion." (Slip op. at 7). This is incorrect. In his reply brief, Mr. Vickers vigorously disputed Respondent's assertion and provided a thorough analysis of why it would have been illogical to seek resolution of the federal case prior to resolution of the instant case (Reply Br. 7-10).

26. Additionally, Mr. Vickers' disputed the State's claim at the motion to dismiss hearing at trial (TR.10). Defense counsel asserted that, prior to the State's dismissal, "Mr. Vickers wanted this case resolved. And it is my understanding that this case when it was previously in Division 1, which, she was not going to grant any more further continuances, and that was Mr. Vickers' wish." (TR.10). The trial sought clarification, asking, "What was his wish?" (TR.10). Defense counsel stated that Mr. Vickers did not want any further continuances because he wished "[t]o proceed to trial." (TR.10).

27. The trial court was faced with sharply conflicting assertions by both parties. However, the trial court's findings were clearly erroneous because there was no evidence anywhere in the record to support the State's false assertions. On the other hand, Mr. Vickers' assertion, that he wished to proceed to trial, *was supported* in the record, by the fact that, right after the August 2013 pretrial conference, and before the State dismissed the charges, Mr. Vickers filed Notices to take depositions on September 5 and September 7, 2013. (LF 30, 41). These pretrial motions filed by Mr. Vickers strongly support his assertion that he wished

to proceed to trial, and, in fact, was diligently preparing to proceed to trial. Therefore, the trial court's findings were erroneous. The trial court erred in accepting the State's factually unsupported assertions over Mr. Vickers' assertion, which *was supported*, by the record.

28. Similarly, there is no basis in the record to support the trial court's erroneous finding that "both lawyers...concluded that the defendant would like to get the federal case resolved before the State case was resolved." (Slip op. at 10). Indeed, "both lawyers" were no longer involved in the case at the time of Mr. Vickers' Motion to Dismiss hearing. John Humphrey no longer represented Mr. Vickers and Dawn Parsons was no longer with the Jackson County Prosecutor's Office. Neither made a written statement regarding the 2013 dismissal. And, as discussed above, there is no transcript available for the final pretrial conference that took place before the dismissal on August 15, 2013. As such, the trial court had no evidence in the record to support its erroneous finding that "both lawyers...would like to get the federal case resolved before the State case was resolved." (Slip op. at 10). There is nothing in the record to support a finding that Mr. Vickers acquiesced in the dismissal. In fact, the sparse record suggests the exact opposite. The record proves that Mr. Vickers began preparing for trial before the State decided to unilaterally dismiss the case.

29. Because Mr. Vickers was not "complicit" in the twenty-one-month delay between September 2013 and June 2015, and because the State's assertions are unsupported by the record, this Court should rehear this case and the delay should be attributed

to and weighed heavily against the State. Alternatively, it should remand for a hearing to settle the factual record, which is disputed.

30. Additionally, in addressing the reason for the delay, this Court held that "Vickers argues, accurately, that the State was also still investigating the case to discover the identity of the third perpetrator and thereby also benefitted from the dismissal and refiling." (Slip op. at 11, fn 10). The Court also acknowledge that "the only evidence the State obtained following the dismissal was the discovery of Keith Jones." *Id.* However, the Court then held that, because Mr. Vickers "has not re-raised a challenge to the admission of Jones's testimony on appeal[,]... we will not further address this reason for delay." *Id.*

31. This Court, however, must address this aspect of the State's reason for the delay. Even if Mr. Vickers did abandon his challenge to the admissibility of Jones' testimony, Mr. Vickers did not abandon his argument that the State dismissed the case to gather additional evidence and gain an impermissible advantage at trial. The State must be held accountable for its impermissible tactics in delaying Mr. Vickers' trial. And because Mr. Vickers "accurately" argues that the State dismissed to gather additional evidence against him, this Court should hold that such a delay is "impermissible," and the reason for the delay must be weighed heavily against the State. *See Doggett v. United States*, 505 U.S. 647, 656 (1992) (holding that where the Government intentionally holds back its prosecution to gain an impermissible advantage at trial, such bad faith in causing delay must be weighed heavily against the Government.)

32. Also, in addition to the State's reason for delaying the case being impermissible, it is also clear that the State dismissed the case to avoid an unfavorable ruling. At the May, 2013 pretrial conference, and again at the August 2013 pretrial conference, Judge Midkiff denied any further continuances. Because of the State's admission that it was still investigating the case after the dismissal, it is reasonably inferable from the record that the State dismissed the case to avoid Judge Midkiff's adverse ruling that no further continuances would be allowed. "Because the State deliberately delayed trial to avoid an adverse ruling, the delay resulting from the [S]tate's nolle prosequi must be weighed heavily against the [S]tate." *State v. James, supra.*

33. Finally, in relation to the prejudice prong of the speedy trial analysis, this Court held that Mr. Vickers failed to "identify any real prejudice from the delay." (Slip Op. at 14). Specifically, the Court held that Mr. Vickers "does not identify any witnesses experiencing memory issues, nor any evidence lost as a result of the delay." *Id.* However, Mr. Vickers argued in his opening brief (App. Br. at 31), in his reply brief (Reply Br. 10), and at oral argument, that the State's inexcusable delay of his trial caused him to lose his ability to testify without being impeached with his federal conviction. As he pointed out in his reply brief, the State did not dispute the fact that Mr. Vickers was prejudiced by the delay and his impaired ability to testify on his own behalf illustrates this is so. Instead, the State erroneously contended that "the only alleged effect on [Mr. Vickers'] defense was at his own insistence." (Resp. Br. 22). But this prejudice was even more

significant after the exclusion of Mr. Vickers' alibi witness. The jury was left with no explanation of Mr. Vickers' version of the events and no explanation of his whereabouts at the time of the crime. The prejudice Mr. Vickers suffered is readily apparent, and very severe. Although this issue was properly brief and argued, the Court either overlooked it or failed to address it.

34. Also at oral argument, counsel also argued that the dismissal of the charges prejudiced Mr. Vickers because it left him without an attorney for two full years, which made it impossible to assert his right to a speedy trial during that time frame. As these forms of prejudice were readily apparent from the record, Mr. Vickers respectfully asks this Court to grant his motion for rehearing and to address his specific claims of prejudice.

Rehearing or Transfer – Misapplication of Law – Exclusion of Alibi Witness

35. This Court's opinion denied Mr. Vickers' relief after the trial court's complete exclusion of Mr. Vickers' alibi witness and denial of his right to present a defense. (Slip op. at 15-18). In doing so, this Court acknowledged that "[t]he remedy of disallowing an alibi witness to the defendant is almost as drastic, if not as drastic, as declaring a mistrial." (Slip op at 16) (quoting *State v. Mansfield*, 637 S.W.2d 699, 703 (Mo. banc 1982)), but it ultimately determined that the late endorsement "took the State by surprise and would have resulted in fundamental unfairness to the State." (Slip op. at 18).

36. This Court's opinion elevates the consideration of prejudice to the State to a new level that has never before been sanctioned, under similar facts, to deny the

defendant's right to present a defense. It stands in conflict with the notion that "where the prejudice to the State is nonexistent or negligible, the imposition of the drastic sanction of witness exclusion is not necessarily appropriate." *State v. Martin*, 103 S.W.3d 255, 260 (Mo. App. W.D. 2003). The opinion points to nothing that supports any surprise to the State that could not be easily cured by a short continuance. The trial had not yet begun, and clearly, Mr. Vickers offered the remedy of a continuance on the record, which would have relieved the State of any responsibility regarding a speedy trial claim. Yet this Court opined that accepting a continuance would have put the State in an "awkward position." (Slip op. at 18). Nothing "awkward" would have befallen the State in the speedy trial context when the defense *offered* a continuance. Clearly, that time period would count against Mr. Vickers, and not the State. Further, it is unclear how the State can "suffer prejudice" from the admission of evidence suggesting actual innocence, when the State's duty is "not to convict at any cost but to see that justice is done," *Berger, supra,* and when there are less drastic remedies than total exclusion for a defendant's untimely endorsement.

37. The trial court was tasked with the responsibility of fashioning an appropriate sanction to ensure fairness to both Mr. Vickers and to the State. In Mr. Vickers' brief, he noted that other courts have previously reversed judgments of conviction and remanded for a new trial, even when the defendant's alibi witness was not disclosed until the morning of trial and the defense's only "good cause" was "lack of time and manpower" in the Public Defender's office. *See State v. Gooch,* 659

S.W.2d 342 (Mo. App. S.D. 1983). In *Gooch,* a rape case, the assistant public defender trying the case did not "personally" know that the defendant had an alibi until the day of trial. *Id.* at 343. He stated that "due to lack of time and manpower his office had not been able 'to do everything' regarding this case." *Id.* The court concluded that in a rape prosecution where the defendant says he was not with the victim on the date in question, disallowing an alibi witness was too drastic a remedy. *Id.* at 344.

38. Similarly, in *State v. Hopper*, 315 S.W.3d 361, 370 (Mo. App. S.D. 2010), the Court reaffirmed *Gooch*, noting that it "cannot say that the "cause" asserted in this case—that trial counsel was the fourth attorney assigned to the case and had originally planned to follow a previous attorney's strategy in the case—was not as good as that asserted in *Gooch.*

39. Here, as in *Gooch*, the minute that counsel "personally" became aware that she could establish where Mr. Vickers was at the time of the offense, she moved to endorse Ms. DeMarea as an alibi witness. Furthermore, as this Court is well-aware, thirty-five years after *Gooch*, the Missouri Public Defender's Office caseload issues have only gotten worse, not better.[1] The public defender assigned to Mr. Vickers' case entered her appearance on August 26, 2015. Statistically

[1] Mr. Vickers cited ACLU and ABA studies that show Missouri's public defenders are unable to devote adequate time to each case. For murder, nearly 107 hours should be spent on each case, but only 84.5 can be spent, on average. See "Missouri Project: A Study of the Missouri Public Defender and Attorney Workload Standards," www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf

speaking, it is not surprising that counsel did not learn of Ms. DeMarea's existence until two weeks before trial began, if the average time spent on a murder case is 84.5 hours (TR 76, see fn 4).

40. This Court's reliance on the fact that Mr. Vickers' case had been pending for 56 months before trial and that therefore Mr. Vickers was somehow to blame that the alibi witness was not investigated or discovered for nearly five years before trial (Slip op. at 17-18), completely ignores multiple facts, namely: 1) Mr. Vickers was without counsel for 21 of those 56 months because of the State's manipulation in dismissing and refiling the case; 2) he originally had no need to explore additional witnesses for an alibi defense because he planned on testifying (before the State manipulated the timing of his state case with his federal case, and he could no longer testify after his federal conviction); 3) he was denied his counsel of choice when the State manipulated his charges so that he could not post bond in federal court and earn an income to hire counsel of his choosing, as he initially had done; and; 4) he was stuck with the overworked Kansas City public defender trial office who did not have time to adequately investigate his case until just before the trial. These are the facts, and this Court's opinion ignored them. It should grant rehearing.

41. Alternatively, this Court should transfer this case to the Missouri Supreme Court because it conflicts with the opinions in *State v. Gooch, supra*, (reversed and remanded to for exclusion of defendant's alibi witness disclosed the morning of trial); *State v. Hopper, supra*, (reversed for excluding alibi witness as a sanction

for late disclosure); *State v. Simonton*, 49 S.W.3d 766, 781 (Mo. App. W.D. 2001) (reversed where expert disclosed on the first day of trial was excluded), and *State v. Mansfield*, 637 S.W.2d 699 (Mo. banc 1982) (reversed and remanded for new trial, even though alibi witness in murder case not discovered until the morning of the last day of trial, and other remedies were available to alleviate any possible prejudice to the State); *State v. Kimmell*, 720 S.W.2d 790 (Mo.App.1986) (reversed and remanded for new trial, even though defense witness was not endorsed until the morning of trial); and *State v. Massey*, 867 S.W.2d 266, (Mo. App. E.D. 1993) (abuse of discretion to exclude alibi witnesses from trial). All of these cases were reversed where there was complete exclusion of defense witnesses suggesting innocence.

WHEREFORE, Mr. Vickers, respectfully requests that this Court grant his motion for rehearing, or in the alternative, transfer this case to the Missouri Supreme Court for the reasons stated.

Respectfully submitted,

/s/ Amy M. Bartholow

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CERTIFICATE OF SERVICE

On this 15th day of August, 2018, electronic copies of Appellant's Motion for Rehearing or Transfer to Missouri Supreme Court were placed for delivery through the Missouri e-Filing System to Richard A. Starnes, Assistant Attorney General, at richard.starnes@ago.mo.gov.

/s/ Amy M. Bartholow

Amy M. Bartholow

Missouri Court of Appeals

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IMPORTANT NOTICE

August 28, 2018

STATE OF MISSOURI, RESPONDENT,

vs. WD80148

VICTOR D VICKERS, JR. #1107648, APPELLANT.

TO ALL PARTIES OF RECORD:

Please be advised that Appellant's Motion for Rehearing is **OVERRULED** and Motion to Transfer to the Supreme Court is **DENIED**. See Rule 83.01. The opinion is modified on Court's Own Motion. A copy of the modified opinion is attached.

Susan C. Sonnenberg

Susan C. Sonnenberg, Clerk

cc: RICHARD ANTHONY STARNES
AMY MARIE BARTHOLOW

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, Respondent vs. VICTOR VICKERS Appellant.	))))))))))	Supreme Court No. _____ Court of Appeals, Western District, No. WD80148 Circuit Court of Jackson County No. 1116-CR03744-03

APPLICATION FOR TRANSFER
TO THE MISSOURI SUPREME COURT

Comes now appellant, Victor Vickers, through undersigned counsel, pursuant to Rule 83.04, and applies for transfer of his first degree murder case to resolve a conflict in the law created by the opinion below and to answer these important questions:

- Does excluding a defendant's alibi witness as a discovery sanction, when good cause is shown for late-disclosure, and prejudice to the State can be ameliorated, conflict with *State v. Mansfield,* 637 S.W.2d 699 (Mo. banc 1982), *State v. Gooch,* 659 S.W.2d 342 (Mo. App. S.D. 1983), *State v. Hopper,* 315 S.W.3d 361 (Mo. App. S.D. 2010), and *State v. Massey*, 867 S.W.2d 266, (Mo. App. E.D. 1993), which reversed when alibi witnesses were excluded under similar circumstances?
- Can "fundamental unfairness" to the State result from allowing untimely alibi evidence, when the State's duty is "not to convict at any cost but to see that justice is done," especially when less drastic remedies than total exclusion are available?

FACTS

Appellant, Victor Vickers, was alleged to have been one of three people who, on August 15, 2011, forced their way into a home where Edward Ewing was later shot and killed and Kristen Forbush was shot and injured. (Slip Op. at 2-4). Mr. Vickers was charged and convicted of first degree murder, first degree assault and two counts of armed criminal action, under an accomplice liability theory. (Slip op. at 1).

No forensic or other physical evidence tied Mr. Vickers' to the scene of these crimes; investigators processed the scene and collected evidence, including gel lifts of twelve fingerprints, DNA samples, and bloody shoe print evidence (Tr.307-310, 319-20, 334-335, 345-50), but Mr. Vickers' DNA and fingerprints did not match any evidence collected from the scene. (Tr.353-354, 364). He was also excluded as a contributor to any DNA found in Ewing's fingernail scrapings (Tr.354).

Rather, the State's case against Mr. Vickers was built upon an identification by the surviving victim, Ms. Forbush. When Ms. Forbush called 911 after the perpetrators had left, the operator asked if she knew who had shot her, and Ms. Forbush replied, "I don't f**king know." (Ex.2; Tr.278). Later, when officers arrived, she told them that there were three black male suspects; she identified one of the men as Garron Briggs and that they were driving a silver Pontiac Grand Prix. (Tr.293, 300).[1] Officer Sanders relayed this information to dispatch, and Garron Briggs' name

[1] This car was searched, but no blood, guns, bullets, or any other incriminating evidence was found. (Tr.400, 511).

was the only name provided. (Tr.299-300).

Later at the hospital, Ms. Forbush told officers that she recognized the vehicle driven by the suspects as belonging to Kyesia Ransom, Garron Briggs' girlfriend. (Tr.255, 293, 368). Ms. Forbush then claimed that she recognized two of the three individuals that approached her in her front yard; she again named Garron Briggs as a suspect, and added that she also recognized a person that she knew only by the name of "V.V." (Tr.370). She later identified "V.V." as Victor Vickers, Appellant. (Tr.242). Ms. Forbush could not identify a third male suspect. (Tr.260). She stated that the men had on hoodies, but she could not tell the color of the hoodies. (Tr.245, 270-71). She could not tell if the men had facial hair. (Tr.271). There were no lights on in the house, (Tr.249), and it was dark outside. (Tr.309).

Mr. Vickers presented evidence from a neighbor in the area, John Adams, which contradicted the description of the suspects given by Ms. Forbush. Mr. Adams told the police that he heard a loud noise and when he went to his front door to see what was going on, he saw a "white" vehicle leaving the scene. (Tr.500, 518). Adams also testified that the same vehicle was at Forbush's house earlier in the day. (Tr.500). Additionally, Mr. Adams testified that the subjects walking to the vehicle were wearing white t-shirts, not hoodies. (Tr.499). This was consistent with Mr. Vickers' defense that he was not at the scene, and that Ms. Forbush was filling in the gaps in her memory by associating Mr. Vickers with his cousin, Mr. Briggs. (Tr.564-577).

Mr. Vickers case had been pending since August 19, 2011, but the public defender ultimately assigned to Mr. Vickers' case did not her appearance until four

years later, on August 26, 2015. (LF.1, 13). On the morning of trial, May 16, 2016, defense counsel moved to endorse an alibi witness, Emily DeMarea. (Tr.75). The existence of Ms. DeMarea had come to defense counsel's attention two weeks before trial but she had not personally talked to Ms. DeMarea until the morning of trial, when she confirmed her memory of events to defense counsel's investigators (Tr.75-76).[2] DeMarea would have testified that Mr. Vickers was with her on the evening of August 15 and leading to the morning of August 16, 2011. (Tr.75).

Defense counsel specifically offered to agree to a continuance to give the State additional time to investigate Mr. Vickers' alibi witness and to cure any prejudice from the late-endorsement, relieving the State of any fault in relation to Mr. Vickers' speedy trial request. (Tr.75). The State objected to the endorsement arguing that it was untimely. (Tr.75-76). The trial court denied the endorsement, and did not permit Ms.

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[2] Studies from the ACLU and the American Bar Association have shown that Missouri's Public Defenders have extremely heavy workloads and are unable to devote an adequate amount of time to the cases of each defendant that they represent. These findings include: For murders, Missouri PDs should spend nearly 107 hours on each case, but they actually spend an average of 84.5 hours. See "Missouri Project: A Study of the Missouri Public Defender and Attorney Workload Standards," americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report_authcheckdam_pdf

DeMarea to testify at all, stating that it would be "fundamentally unfair to the State." (Tr.77-78).

Mr. Vickers raised the exclusion of his alibi witness as error in his direct appeal, which the Western District denied in a modified opinion of August 28, 2018. (Slip Op. 15-18). While recognizing that "[t]he remedy of disallowing an alibi witness to the defendant is almost as drastic, if not as drastic, as declaring a mistrial," (Slip Op. at 16) (quoting *State v. Mansfield*, 637 S.W.2d 699, 703 (Mo. banc 1982)), the Western District ultimately determined that the late endorsement "took the State by surprise and would have resulted in fundamental unfairness to the State." (Slip Op. at 18).

LEGAL BASIS FOR TRANSFER

The Western District's opinion below conflicts with opinions from every other Missouri appellate court by approving the complete exclusion, as a discovery violation, of an alibi witness. *See State v. Mansfield,* 637 S.W.2d 699 (Mo. banc 1982), *State v. Gooch*, 659 S.W.2d 342 (Mo. App. S.D. 1983), *State v. Hopper,* 315 S.W.3d 361 (Mo. App. S.D. 2010), and *State v. Massey*, 867 S.W.2d 266, (Mo. App. E.D. 1993), all of which reversed convictions where an alibi witness, even though disclosed late, was completely excluded.

The Western District's opinion justified the complete exclusion of Mr. Vickers' alibi witness by noting that if would be "fundamentally unfair to the State" if this alibi witness would have been allowed to testify. (Slip Op. at 15-18). But the State cannot "suffer prejudice" from evidence of innocence because the State's duty is "not to

convict at any cost but to see that justice is done," and there are less drastic remedies than total exclusion.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi,* 410 U.S. 284, 301 (1973). When fashioning remedies for discovery violations, courts must remember that one of the fundamental rights of due process afforded to a defendant is "the right to present witnesses in his defense[.]" *State v. Simonton*, 49 S.W.3d 766, 781 (Mo. App. W.D. 2001) (quoting *State v. Allen*, 800 S.W.2d 82, 86 (Mo. App. W.D. 1990). This Court has urged caution in excluding the testimony of defense witnesses:

> The remedy of disallowing the relevant and material testimony of a defense witness essentially deprives the defendant of his right to call witnesses in his defense. This is not to say it should never be done, but it is certainly a drastic remedy that should be used with the utmost caution.

State v. Mansfield, 637 S.W.2d 699, 703 (Mo. banc 1982) (overruled on other grounds in *State v. Clark*, 652 S.W.2d 123, 127 n.4 (Mo. banc 1983).

Here, the Western District sanctioned the total exclusion of Mr. Vickers' alibi witness. (Slip. Op. 15-18). But the opinion points to nothing that supports any surprise to the State that could not easily be cured by a short continuance. The trial had not yet begun, and clearly, Mr. Vickers offered the remedy of a continuance on the record, which would have relieved the State of any responsibility regarding a speedy trial claim. Yet, the Western District held that accepting a continuance would

have put the State in an "awkward position." (Slip Op. at 18). But nothing "awkward" would have befallen the State in the speedy trial context when the defense *offered* a continuance. Clearly, the time period would count against Mr. Vickers, and not the State.

Further it is unclear how it could possibly be "fundamentally unfair to the State" for evidence of the defendant's actual innocence to be presented, when the State's duty is "not to convict at any cost but to see that justice is done and that the accused receives a fair and impartial trial." *See State v. Hopper*, 315 S.W.3d 361, 370 (Mo. App. S.D. 2010) (quoting *State v. Massey*, 867 S.W.2d 266, 270 (Mo. App. E.D. 1993)). *See Simonton,* 49 S.W.3d at 785–86 ("The trial court should have fashioned some other remedy to alleviate any harm to the State, while at the same time protecting [the defendant's] right to present such [ ] vital witness[es] to his defense.").

In regards to the reason for the late endorsement, the facts of this case are similar to the facts of *State v. Gooch*, 659 S.W.2d 342 (Mo. App. S.D. 1983). In *Gooch*, "[t]he public defender said that he 'personally' did not know until that day that he could establish where appellant was at the time of the offense. The public defender stated that due to lack of time and manpower his office had not been able 'to do everything' regarding this case." *Id.* at 343. Despite the lack of "good cause," the appellate court held that disallowing an alibi witness was too drastic a remedy. *Id.* at 344.

In *Hopper*, the Court expressly reaffirmed the holding in *Gooch* by noting that even "when the defendant's alibi witness was not disclosed until the morning of trial

and the defense's only 'good cause' was 'lack of time and manpower' in the Public Defender's office...disallowing an alibi witness was too drastic a remedy." 315 S.W.3d at 370 (citing *Gooch*, 659 S.W.2d at 343-344).

Here, as in *Gooch*, the minute that counsel "personally" became aware that she could establish where Mr. Vickers was at the time of the offense, she moved to endorse Ms. DeMarea as an alibi witness. Furthermore, as this Court is well-aware, thirty-five years after *Gooch*, the Missouri Public Defender's Office caseload issues have only gotten worse, not better. The public defender assigned to Mr. Vickers' case entered her appearance on August 26, 2015. Statistically speaking, it is not surprising that counsel did not learn of Ms. DeMarea's existence until two weeks before trial began, if the average time spent on a murder case is 84.5 hours (See fn 2).

In *Mansfield*, this Court reversed the defendant's conviction for murder in the second degree when the trial court refused to permit Geneva Abbott to testify in the defendant's case. 637 S.W.2d at 699. The state objected to Abbott's testimony because the defense had not disclosed her as an alibi witness, and the trial court excluded her testimony. 637 S.W.2d at 701. The Mansfield Court reversed, holding that Abbott's testimony was "clearly material, relevant and important to the defense in the circumstances of this case." *Id.* at 702. Defense counsel had located the witness the night before trial. *Id.*

The Court held that the refusal to permit Abbott to testify was fundamentally unfair and constituted prejudicial error. *Id.* at 703-704. It stated, "[t]he remedy of disallowing the relevant and material testimony of a defense witness essentially

deprives the defendant of his right to call witnesses in his defense. This is not to say that it should never be done, but it is certainly a drastic remedy that should be used with the utmost of caution." *Id.* at 703.

Here, Ms. DeMarea's testimony was equally important to Mr. Vickers' defense because she would have supported the defense theory that Ms. Forbush mistakenly identified one of the assailants as Mr. Vickers because Mr. Vickers was with her and not present at the scene of these crimes. Refusing to permit DeMarea to testify was fundamentally unfair to Mr. Vickers' right to present a defense. As in *Mansfield*, the trial court certainly had other remedies available short of excluding DeMarea's testimony altogether. A continuance to allow the prosecutor to interview the witnesses would have cured any potential prejudice to the state arising from the late disclosure. *Id. See also State v. Massey*, 867 S.W.2d at 270 ("The standard by which the exclusion of testimony for failure to comply with discovery rules must be tested is whether such action resulted in *fundamental unfairness to the defendant.*") (emphasis added).

The Western District's opinion conflicts with cases from every appellate court in this State on the standard for reviewing total exclusion of an exonerating defense witness. Instead of applying the test of "fundamental fairness to the defendant," which is "[t]he standard by which the exclusion of testimony for failure to comply with discovery rules must be tested," *see Id.* at 270 (and *State v. Mansfield,* 637 S.W.2d 699 (Mo. banc 1982), *State v. Simonton*, 49 S.W.3d 766 (Mo. App. W.D.

2001), *State v. Hopper,* 315 S.W.3d 361 (Mo. App. S.D. 2010)), the Court allowed "prejudice to the State" to be the overriding consideration. This is improper.

Therefore, this Court should transfer this case to resolve the conflict created by the Western District's opinion and to resolve the proper standard to apply when examining the exclusion of an alibi witness as a discovery violation.

WHEREFORE, for the reasons stated above, Mr. Vickers prays that this Court transfer his cause from the Western District Court of Appeals to this Court to resolve these conflicts in the law and to address the questions of general interest and importance.

Respectfully submitted,

/s/ Amy M. Bartholow

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2018, true and correct copies of the Application for Transfer and attachments thereto were e-mailed to Richard Starnes, Assistant Attorney General, at richard.starnes@ago.mo.gov, and that a Notice of Filing Appellant's Application for Transfer to the Missouri Supreme Court was e-filed in the Missouri Court of Appeals, Western District.

/s/ Amy M. Bartholow

Amy M. Bartholow

Supreme Court of Missouri
en banc

SC97410
WD80148

September Session, 2018

State of Missouri,
Respondent,

vs. (TRANSFER)

Victor D. Vickers, Jr.,
Appellant.

Now at this day, on consideration of the Appellant's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session, 2018, and on the 4th day of December, 2018, in the above-entitled cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 4th day of December, 2018.

SEAL OF THE SUPREME COURT OF MISSOURI

Betsy AuBuchon, Clerk

Deputy Clerk