IN THE
MISSOURI SUPREME COURT

State of Missouri ex rel David Garcia, v. Honorable Steven H. Goldman	No. SC90833

BRIEF OF AMICUS CURIAE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

John L. Davison MB# 25847
John L. Davidson, P.C.
8015 Forsyth Blvd.
St. Louis, MO 63105
Telephone (314) 725-2898
Facsimile (314) 966-3095
Attorney for Missouri Association for Criminal Defense Lawyers

Table of Contents

TABLE OF AUTHORITIES

Federal Cases

Missouri State Cases

Missouri State Constitution and Statutes

Other Authorities

STATEMENT OF INTEREST

Amicus curiae Missouri Association of Criminal Defense Lawyers MACDL is a voluntary association of criminal defense lawyers, organized to insure justice and due process for persons accused of crime or other misconduct. Membership includes private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

MACDL promotes study and research in the field of criminal law to disseminate and advance knowledge of the law in the area of criminal practice. The organization seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in insuring that legal proceedings are handled in a proper and fair manner. An organization objective is promotion of the proper administration of justice. In furtherance of that objective, at times, the organization files amicus briefs in both federal and state courts.

MACDL's interest in this proceeding is to inform the Court that its current speedy trial jurisprudence works to cover up, rather than expose, police and prosecutor conduct that under lies delays in arrest, charge, and prosecution and to suggest evidentiary approaches to create appropriate antidotes.

CONSENT OF THE PARTIES

The Defendant has consented to the filing of this brief by amicus curiae Missouri Association of Criminal Defense Lawyers. The State has been asked to consent but has refused sans any statement of reasons. The Association has moved for leave to file this brief.

If We Desire Respect For The Law, We Must First Make Law Respectable.

Louis D. Brandeis

Every System Is Perfectly Designed to Achieve Exactly the Results it Gets

Common Six-Sigma Wisdom

ARGUMENT

Speedy trial motions frustrate Victims, the Public, and Defendants because those in charge of assuring a speedy trial (the police and prosecutors) have "gamed" the system so that there are no anti-gaming features to assure compliance with Missouri's constitutional imperative.

Charles T. Munger,[1] whose insights on incentives and gaming of systems

---

[1]Mr. Munger is well known as Warren Buffet's acerbic partner. Unfortunately, neither his thoughts nor his biography are as well known. Mr. Munger graduated at the top of Harvard Law School's largest class following World War II. He then moved to Los Angeles to form Munger, Towles and Olson, leaving that firm to enter the investment business with Mr. Buffett.

power the narrative of Michael Lewis in **THE BIG SHORT**, at 43 (2010) has written:

> Another generalized consequence of incentive caused bias is that man tends to "game" all human systems, often displaying great ingenuity in wrongly serving himself as the expense of others. Anti-gaming features, therefore, constitute a huge and necessary part of almost all system design. Charles T. Munger, Speech at Harvard Law School (1995) revised and printed as ***The Psychology of Human Misjudgement***, at 8 c.1 (hereinafter Munger).[2](included in Appendix)

Current doctrine on speedy trial has resulted in poor criminal justice system design, leading to denials of speedy trials, for current law has no anti-gaming features. Respectfully, MACDL urges the Court to carefully consider Mr. Munger's entire essay, for it is an in-depth criticism of both legal education and the law business's failure to understand incentives and to incorporate that understanding into legal rules and the civil and criminal justice systems.

Amicus urge this Court to use this case to adopt two anti-gaming features—two irrebutable or conclusive presumptions. ***See generally***

---

[2]available at, ***e.g.***, http://www.jeremybroomfield.com/munger2.pdf

MCCORMICK ON EVIDENCE § 342, at 966 (3rd Law. Ed. 1984):

> First, that there is a conclusive presumption that unrecorded evidence is to viewed most favorably to the Defendant, when police officers fail to make written records of evidence as required by Section § 109.240 ; and
>
> Second, that when facts and circumstances show or tend to show negligence by an officer during the investigation, and no meaningful good faith investigation is conducted of such putative officer misconduct, such negligence should be conclusively presumed and the jury so instructed.

It is undisputable that Victims, Defendants, and the Public all have a right to and substantial interest in "speedy public trial[s]." Mo. Con. Art. I, § 18(a).

However, current doctrine leaves enforcement of the right entirely to Defendants, who often uses the threat of a motion to dismiss as a bargaining tool in plea negotiations.

This is cognitive irrationality from a system point of view. What rational system would lodge its incentives in such a way? For example, if the prosecutor fails to push a case to trial, How are either Victim or Public served by a plea

bargain extracted by the threat of a successful speedy trial motion that leaves the delict hidden and unaccountable?

In this case its is self-evident that the Victim, the Public, and the Defendant David Garcia have all been denied a speedy trial. No reported or unreported case of any jurisdiction supports the circuit court's actions in the case below. A decision not to dismiss is beyond the outlier in this case with its unexplained eleven year delay between alleged crime and arrest.

The facts and law in this case are simple and plain. Missouri law places an affirmative duty upon all Missouri law enforcement personal (including Kirkwood City police officers) to create regular written records of their attempts to locate a Defendant. RSMo § 109.240 provides:

> 109.240. The head of each agency shall:
>
> > * * *(2) Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities

The Kirkwood Police Department (being a part of the government of the City of

Kirkwood) is an agency within Section 109.240 for RSMo § 109.210(1) defines: "(1) 'Agency', [as] any department, office, commission, board or other unit of state government or any political or administrative subdivisions created for any purpose under the authorities of or by the state of Missouri . . ."

Contrary to Section 109.240(2), during the eleven years between April 16, 1998 (when Kirkwood's police made their last handwritten Supplemental Investigative and/or Disposition Report) and Defendant's arrest about February 19, 2009, Kirkwood's responsible police officers (including Sergeant Steven Guyer, TR15:24) made no written records documenting their alleged attempts to "diligently purse" Defendant, for bringing about his arrest, charge, and trial.

This mere lack of documentation, alone, cries out for an investigation into:

(1) the officers actions;

(2) the officer's veracity; and

(3) possible negligent supervision of their actions?

Why? Because the absence of statutorily required documentation, alone, is strong circumstantial evidence that Kirkwood's police officers did not diligently pursue the prosecution of Defendant Garcia.

We all know there was no investigation of the investigation. Why do we

know?

Under the doctrine of ***Brady v. Maryland***, 373 U.S. 83 (1963). especially as interpreted in ***Kyles v. Whitley***, 514 U.S. 419 (1995) the fact and results of any investigation would have to be turned over to the Defendant Garcia because evidence "that the police have been guilty of negligence,", in the conduct of their investigation is ***Brady*** material. 514 U.S. at 447 No results of an investigation has been disclosed to Defendant Garcia:

> [The] defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted. ***See, e. g.***, ***Bowen v. Maynard***, 799 F. 2d 593, 613 (CA10 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation"); ***Lindsey v. King***, 769 F. 2d 1034, 1042 (CA5 1985) (awarding new trial of prisoner convicted in Louisiana state court because withheld Brady evidence "carried

within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case"). 514 U.S. at 448.

When a situation cries out for investigation and no investigation is conducted, only one inference can be drawn—the results of the investigation are already known. The conclusion arises from the application of the willful blindness doctrine, a doctrine most familiar to the Federal criminal bar, but no stranger to Missouri's jurisprudence.

Missouri's fullest development of the willful blindness doctrine was in ***Curlee v Donaldson***, 233 S.W.2d 746 (Mo. App. 1950), which rejected any need for a plaintiff seeking to prove more than constructive knowledge when a corporate officer had failed to investigate:

> The failure to prove by direct evidence the existence of actual knowledge on the part of Donaldson that these trespasses were occurring does not relieve Donaldson of liability. There was circumstantial evidence of knowledge on his part, including the statement, "I kept in touch with the progress of the work by periodic reports", and in any event, he had constructive knowledge of what was happening. It was his duty to inform himself with respect to the

> forces he had set in motion, particularly after the departure of his forest foreman. With his complete and "one-man" control of the company business, and easy access to the means of knowledge, Donaldson could and should have known of the trespasses. He is charged with the knowledge of that of which it was his duty to inform himself. He comes within the rule of acquiescence warranting an inference of consent, as stated in Fletcher's Encyclopedia on Corporations, Vol. 3, Section 1135, p. 708: "* * * corporate officers, charged in law with affirmative official responsibility in the management and control of the corporate business, cannot avoid personal liability for wrongs committed by claiming that they did not authorize and direct that which was done in the regular course of that business, * * * with such acquiescence on their part as warrants inferring * * * consent or approval." 233 S.W.2d at 754

Those who practice inside the Federal criminal bar will recognize this as either the ***Jewell*** rule, ***United States v. Jewell***, 532 F.2d 697, 704 n.21 (CA9 1976)) or a ***Cincotta*** (***United States v. Cincotta***, 689 F.2d 238, 244 (CA1 1982)) or ***Kaplan*** (***United States v. Kaplan***, 832 F.2d 676, 682 (CA1 1987)) instruction:

> "Knowledge under the mail fraud statute could be satisfied by proof that Kaplan 'deliberately closed his eyes to what otherwise would have been obvious to him,' that '[r]efusing to investigate something that cries out for investigation may indicate that the person knows what the investigation would show,'and that willful blindness constitutes knowledge if the defendant 'was aware of a high probability that particular facts existed and he did not subjectively disbelieve the facts.'"832 F.2d at 682.

Failing to investigate when the facts cry out for investigation is circumstantial evidence of knowledge of the results which would be yielded by inquiry:

> The conscious avoidance principle means only that specific knowledge may be inferred when a person knows other facts that would induce most people to acquire the specific knowledge in question. Thus, if someone refuses to investigate an issue that cries out for investigation, we may presume that he already "knows" the answer an investigation would reveal, whether or not he is "certain". ***See generally United States v. Jewell***, 532 F.2d 697, 699-704 (9th Cir. 1976). Evidence of conscious avoidance is merely circumstantial

> evidence of knowledge; a defendant who seeks to refute such evidence follows the same course no matter how the evidence is labeled. In short, a defendant accused of a crime involving knowledge must be prepared to meet both direct and circumstantial evidence, of which "conscious avoidance" is a major subset. ***United States v. Cincotta***, 689 F.2d 238, 244 (CA1 1982).

Conscious avoidance or blind eye or willful blindness has been a part of Missouri's jurisprudence of knowledge and notice since at least 1877. ***Bucker v. Jones***, 1 Mo. App. 538, 542 (1877) ("that defendant knew the fact, or would have known it had he not willfully closed his eyes lest he should plainly see the whole truth–which for the purposes of this case, is just the same thing"). ***See generally*** Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens* Rea, 81 **J. CRIM. L & CRIMINOLOGY** 191 (1990) (tracing history of willful blindness).

We also know why no investigation has been conducted of the negligence of Kirkwood's two officers—because no one is willing to create evidence favorable to the defendant arising from such an investigation.

This is gaming the system. The Victim and the Public, each of whom has

been denied their rights to speedy trial by the negligence of the police officers are left out in the cold and the police officers, in effect, immunized from their own misconduct.

There is only one way to prevent this gaming of the system. That is to presume a lack of due diligence from the absence of records and to presume, if no investigation is undertaken, that the an investigation would have shown negligence.

The effect of both presumptions will stop gaming of system by police officers and prosecutors by removing the advantage gained from the failure to create written records and the failure to investigate the negligence of, here, the investigating officers.

Munger writes of the need for "antidotes" to counteract incentive caused bias. "The strong tendency of employees to rationalize bad conduct in order to get rewards requires many antidotes." Munger, ***supra***, at 6.

But for the rule on subsequent remedial repairs, ***e.g., Atcheson v. Braniff Int'l Air.***, 327 S.W.2d 112, 116 (Mo. 1959), Missouri 's jurisprudence has pretty much turned a blind eye on counteracting incentive caused bias by antidotes.

The judicial power under Section 1 of Article V is complete. In adjudicating

a constitutional claim in a criminal case, this Court must consider both the rights of the Victim and of the Public and must provide a full and complete remedy including antidotes. Otherwise, the criminal justice system will continue to suffer, as it does now, with cognitive irrationality. It is bad enough that when the officer stumbles the defendant may be freed of a charge. It is worse yet that, now, current practice assures that the officer will not be disciplined, that no one will be accountable.

Rules of law need to be adopted that force immediate investigation of officer misconduct and which deter game playing over ***Brady*** obligations.

Standard of Review. Even if these arguments were not made before the trial court, they are properly before this Court because these proceedings are interlocutory. Defendant Garcia may renew these grounds in his motion or motions for a directed verdict or acquittal and Missouri is a new trial state, permitting Mr. Garcia to also raise the points by post trial and verdict motion.

CONCLUSION

Munger concludes, "Anti-gaming features, therefore, constitute a huge and necessary part of almost all system design. . . . Yet our legislators and judges, including many lawyers educated in eminent universities, often ignore this injunction. And society consequently pays a huge price in the deterioration of behavior . . ., as well as incurrence of unfair costs."Munger, ***supra***, at 8 c.1

MACDL takes no joy in the result driven by the facts in this case. Such will be a hollow victory if the police officers who failed to fulfill their statutory duties and public trust escape without consequence. Adoption of rules that drive investigation and discipline of police officers or others who work the denial of a speedy trial, instead of incentivizing cover ups, will assure fewer such injustices will occur in the future.

Respectfully submitted,

JOHN L. DAVIDSON, MB 25847
% JOHN L. DAVIDSON, P.C.
11906 Manchester Road, Suite 303
Saint Louis (Des Peres), Missouri 63105
314.725.2898
314.966.3095 (facsimile)
jldavidson@att.net

Attorney for Missouri Association of Criminal Defense Lawyers

Friday, May 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was hand delivered or served by email on May 17, 2010 to the following:

David R. Truman, Esq.
Assistant Prosecuting Attorney
St. Louis County
100 South Central Avenue, Second Floor
Clayton, MO 63105
Telephone: 314.615.2600
Facsimile: 314.615.2611

Grant J. Shostak, Esq.
SHOSTAK & SHOSTAK, LLC
8015 Forsyth Boulevard
St. Louis, MO 63105
Telephone: 314-725-3200
Facsimile: 314-725-3275

Honorable Steven H. Goldman
Circuit Court, Saint Louis County
Division No. 12
Saint Louis County Courthouse
7900 Carondelet
Clayton, MO 63105
Telephone: 314-615-1512
Facsimile: 314-615-8280

John L. Davidson

CERTIFICATE OF COMPLIANCE

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of Amicus Curiae Missouri Association of Criminal Defense Lawyers in support of Relator David T. Garcia is attached to the Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 3602 words, as calculated by the Wordperfect software used to prepare this brief.

_____

John L. Davidson