

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT
IN AND FOR XXXXX COUNTY, FLORIDA

STATE OF FLORIDA,

CASE #: xx-0xxxxxCF10A

vs.

Div.: Hon. XXXXX

BTJ
_____ /

**MOTION TO DISMISS FOR CONSTITUTIONAL
VIOLATION OF RIGHT TO SPEEDY TRIAL**

COMES NOW, Defendant, BTJ, by and through his undersigned counsel and submits

D Motion to Dismiss for Constitutional Violation of Right to Speedy Trial and in support thereof states as follows:

BACKGROUND FACTS

Defendant was involved in an automobile accident at approximately 12:05am on September xx, 19xx. The accident involved a total of 4 vehicles and resulted in two fatalities. Defendant was transported from the scene of the accident to ***the hospital***.

During the course of the investigation, Trooper R sent Trooper S to ***the hospital*** in order to observe defendant. Based upon his observations, Trooper S formed the opinion that defendant was impaired from the consumption of alcohol and requested a blood sample be taken.

Hospital Employee, BN, a medical technologist, drew two (2) at
Trooper S . Trooper S

was conducted on September xx, 19xx. The
registered at .15 and .16 in sequential tests.

The accident investigation concluded on November xx, 19xx.
contained in the accident investigation s Defendant was not in
custody when the investigation was closed. The state filed a seven (7) count information
charging defendant with various criminal offenses on November xx, 19xx. The information
charged defendant with 1) DUI Manslaughter; 2) Unlawful Blood Alcohol Manslaughter; 3) DUI
Manslaughter; 4) Unlawful Blood Alcohol Manslaughter; 5) DUI SBI; 6) Unlawful Blood
Alcohol SBI and 7) Driving with License Suspended/Revoked. A capias was issued for
November xx, 19xx. The stated reason for the capias was
not in custody.

Defendant relocated out of state and subsequently to another state after the accident.
Defendant did not conceal his whereabouts or identity at any point in time. Defendant lived
openly under his own name from the date of the incident until he was arrested on February xx,
20xx. During the approximate 26 year delay, defendant paid court costs and fines in order to
clear his Florida drivers license suspension and obtain a drivers license in another jurisdiction.
Defendant paid state and federal taxes while working under his own Social Security number. On
February xx, 20xx, defendant was traveling in <***Not Florida***> when a patch of snow came
off the roof of his vehicle and landed in the road. A police officer witnessed the snow fall off of
that indicated his real name and date of birth. Defendant was subsequently taken into custody for
the 19xx capias.

SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL

The Sixth Amendment of the United States Constitution made applicable to the States through the Fourteenth Amendment of the United State

trial is triggered upon arrest or filing of a formal charging document, whichever occurs first. *See Villa v. State*, 450 So.2d 305, 306 (Florida 5th DCA 1984) *see also Niles v. State*, 120 So.3d 658, 663 (Fla. 1st DCA 2013).

The United States Supreme Court has set forth four (4) factors to be balanced against each other on a case-by-case b

speedy trial has been violated. *See Fletcher v. State*, 143 So.3d 469 (Fla. 5th DCA 2014) *citing Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101(1972). These factors are: 1)

trial and 4) prejudice to the defendant caused by the delay. *See Barker* at 530. The first factor, the length of delay is merely a threshold or triggering mechanism necessary in order for the court to conduct an investigation into the remaining three factors. *See Id. see also State v. Joyner*, 460 So.2d 584, 585(Fla. 5th DCA 1984).

See Niles at 664 *citing Doggett v. United States*, 505 U.S. 647, 651-652, 112 S.Ct. 2686, 120 L.Ed.2d 101(1972) Once the defendant has shown that the interval between accusation and trial has crossed the threshold and is presumptively prejudicial, the court must then consider the extent to which the delay has extended beyond the minimum needed to trigger a judicial examination. *Id.* The longer the delay beyond the bare minimum necessary to show presumptive prejudice the stronger the presumption that the pretrial delay has actually prejudiced the defendant. *See United States v. Villarreal*, 613

F.3d 1344, 1350(11th Cir. 2010). The _____ once the initial threshold has been met. The _____ 1) the reason for the delay; 2) whether the defendant asserted his right to a speedy trial and 3) prejudice.

Pursuant to the holding in Doggett, with regard to a motion to dismiss on speedy trial grounds, delay may be characterized into one of three categories. The first category is delay in the third category is delay caused by bad faith or to gain a tactical advantage.

_____, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad faith delay would make relief virtually automatic, neither is negligence automatically tolerated simply because the accused cannot demonstrate exactly how it has prejudiced him. It was on this point that the court of appeals erred, and on the facts before us, it was

See Doggett at 657.

Negligent delay, while less intolerable than bad faith delay, remains unacceptable. It

. With

regard to negligent delay, the Doggett court held:

Although negligence is obviously to be weighted more lightly than a deliberate intent to harm the accused defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun. And such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our tolerance of such negligence varies inversely with its .and its consequent threat to the fairness of the accused trial. Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the State fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial

ce unaccompanied
by particularized trial prejudice must have lasted longer than

APPLICATION OF FACTS TO LAW

Sixth Amendment right to a speedy trial has been violated, the court apply the facts of the case to all of the Barker factors. After applying the facts of the case to the four (4) Barker factors the court must assign a certain weight to each of the factors and the final determination is a balancing test of all the factors.

I. FACTOR 1, DELAY

The first of the Barker factors that needs to be addressed is the amount of delay between . Defendant was involved in a traffic accident on September xx, 19xx. The state filed a seven count information with the Clerk of Court on November xx, 19xx. A capias was issued on November xx, 19xx. The capias was issued because defendant was not in custody. The capias was served on defendant on February xx, 20xx.

November xx, 19xx as that was the date that the charging document was filed. The total delay between filing of the information and de 3 months and 4 days.

A delay of 26 years, 3 months and 4 days between the filing of the information and arrest triggers the analysis of the remaining Barker factors as a matter of law. *See Niles* at 664 *see also Madonia v. State*, 648 So.2d 260, 261(Fla. 5th DCA 1994) *holding that delay of 3 years was presumptively prejudicial, required a Doggett trial.*

double inquiry is required in order for the court assign the appropriate amount of weight to the delay. The longer the delay the greater the prejudice to defendant. The Niles court

held that a delay of eight years was required to weigh heavily against the state because of the extraordinary length of delay between the information and the arrest. *See Niles* at 664. In the instant matter, there is a delay in excess of 26 years from filing to arrest. The delay in the instant matter is in excess of three (3) times the delay in the *Niles* case which was determined to weigh heavily against the state. As the amount of presumed prejudice is directly proportionate to the length of delay, the delay in this matter constitutes a delay of the highest order.

II. FACTOR 2, REASON FOR THE DELAY

The second Barker factor involves the reason that the state gives to justify the delay. There are 3 recognized reasons for delay. The court must assign a weight to this factor to balance against the other 3 Barker factors. It is important for the court to note that the burden of proof is on the state to establish the basis for the delay. *See United States v. Ingram*, 446 F.3d 1332, 1336(11th Cir. 2006).

The court is required to establish who is at fault for the delay when analyzing the second Barker factor. The court is required to establish whether this was a matter of 1) delay in the presence of diligence on the part of the state; 2) negligence on the part of the state or 3) bad faith on the part of the state in order to gain a tactical advantage. There is no evidence known to the defense that would establish that the delay in prosecution is due to bad faith on the part of the State or for the purpose of gaining an unfair tactical advantage. Although, the state may assert that the delay was in the presence of diligence on the part of the state, there is also no known evidence that would support such an argument. Accordingly, the defense asserts that the reason for the delay is due to negligence on the part of the state.

Negligence on the part of the state is given a weight somewhere in between diligence on the part of the state and bad faith on the part of the State. Nevertheless, negligence is not

tolerated and is weighted more heavily towards the defense. The length of the negligent delay controls to what extent, if any, defendant must make a specific showing of prejudice. The United States Supreme Court recognizes that a defendant may be unable to make a showing of specific prejudice and still be entitled to relief if the delay is due to official negligence. A specific showing of prejudice to the defendant is difficult because times erosion of exculpatory evidence and testimony can rarely be shown. *See Doggett* at 655.

There is substantial evidence to establish that the reason for the delay was negligence on the part of the State. Initially, during the approximate 26 year delay, defendant lived openly and notoriously under his own name. There is no evidence to suggest that defendant made any attempt to conceal his identity or location. To the contrary, defendant worked and paid taxes under his legal name and social security number. Furthermore, the state contends that defendant had a suspended license at the time of the car accident in September 19xx. Defendant was required to pay certain fines or costs in order to reinstate his Florida Drivers License. Defendant paid said amounts to the clerk of court in order to clear his Florida Drivers License suspension in order to obtain a drivers license in another jurisdiction. When defendant reinstated his Florida Drivers License, in order to transfer his license to another jurisdiction, defendant was required to provide the licensing jurisdiction with his current address. The State of Florida made no effort to contact defendant or serve the *capias* for whereabouts were known or easily accessible to the state for the overwhelming majority of the delay.

ability to show specific prejudice has been negatively impacted and the impact is substantial. The prejudice is a direct result of the negligent delay.

III. FACTOR 3, WHETHER DEFENDANT ASSERTS RIGHT TO SPEEDY TRIAL

right to a speedy trial. There is no credible evidence to show that defendant knew of the 19xx capias prior to his arrest on February xx, 20xx . The state bears the burden of proof to establish that defendant was aware of the capias prior to his arrest if the state intends to assert that defendant was aware of the capias. The fact that defendant paid taxes in his own name, had dealings with the State of Florida in order to clear his license suspension, had a drivers license under his own name and otherwise made no effort to conceal his location or identity is consistent with the position that defendant was unaware of a capias arising out of the September, 19xx traffic accident.

The *Doggett* court held that a defendant is unable to be taxed with his failure to assert his right to a speedy trial until after his arrest or until after the state can establish that defendant had knowledge of the capias. Accordingly, this factor is either weighted towards the defendant or gets no weight whatsoever.

IV. FACTOR 4, SPECIFIC PREJUDICE

It is the defense position that defendant is not required to establish any specific prejudice due to the negligent delay on the part of the state. As stated above, with regard to specific prejudice, the length of the negligent delay controls to what extent, if any, defendant must make a specific showing of prejudice. The United States Supreme Court recognizes that a defendant may be unable to make a showing of specific prejudice and still be entitled to relief if the delay is due to official negligence. A specific showing of prejudice by the defendant is difficult because times erosion of exculpatory evidence and witness testimony can rarely be shown. *See Doggett* at 655.

A. SPECIFIC WITNESS CONTACT INFORMATION

Nevertheless, a showing of specific prejudice is readily apparent on the face of the state s initial discovery exhibit. The State is unable to provide contact information for 24 out of its 35 Category A witnesses. Included in the 24 witnesses lacking contact information are:

- a) Trooper H who completed the accident report and conducted the accident investigation;
- b) Trooper S who was sent to the hospital to observe defendant and ordered the
- c) BN, Medical Tech who conducted the blood draw at the request of Trooper Stewart. BN is not listed as a witness;
- d) M

witness.

B. 6TH AMENDMENT CONFRONTATION CLAUSE – TOXICOLOGY

Trooper S Trooper S made observations of defendant who was apparently unconscious from the accident at the time. Based upon his observations, Trooper S made the determination that defendant was under the influence of alcohol. Based upon his observations, Trooper S ordered a blood draw. Defendant has the right and desires the opportunity to examine Trooper S regarding his observations.

Trooper S was also the individual responsible for transporting the blood sample from the hospital to the County Medical Examiner. The chain of custody indicates that BN transferred the blood samples to Trooper S at 1:59am and 2:35am on September xx, 19xx. Trooper S than, by hand to hand transfer, delivered the blood samples to WB at the

Office on September xx, 19xx at 8:00am. This constitutes a period of time in excess of 26 hours between hand to hand transfers.

As the court is well aware, proper storage and handling of a blood sample is crucial to the accuracy of the scientific tests. Excessive heat can result in microscopic decomposition resulting in an artificial increase in BAC. These results can be exacerbated if the vials do not contain the proper amounts of the preservative sodium fluoride. The vials are typically identifiable by the color of the stopper on the top of the vial. Accordingly, Defendant must be able to insure that the specimen was properly drawn into an appropriate vial and properly stored in an appropriate location and temperature.

Defendant is prejudiced because of Trooper unavailability and, in the event that he is able to be located, prejudiced to the extent that he is unable to recall precise events from 26 years ago.

Medical Tech BN Medical Tech BN performed the blood draw at the request of Trooper S. BN is not listed as a witness on the State state will be unable to lay the foundation for the admission of the blood draw without testimony.

Defendant is prejudiced by unavailability and/or the lack of contact information. Furthermore, defendant is prejudice to the extent that she is unable to recall the precise events from 26 years ago. In order to lay the appropriate foundation to admit the blood test into evidence, the state is required to establish that the individual conducting the blood draw is qualified to do so. Currently, the defense is unable to ensure that the blood draw was conducted in a fashion so as to render the results accurate and reliable. The defense needs additional information in order to establish a defense which includes, but is not limited to, the type of

antiseptic used prior to conducting the blood draw, the specific type of vial used to store the blood sample, the chemical contents of the vial, the quantity and ratio of the chemicals contained vials. Defendant is further entitled to confront this witness regarding her qualifications to draw a blood sample, the method used to obtain the sample and the specific types of vials used to

Toxicologist M The United States Supreme Court holdings in *Melendez-Diaz v. Massachusetts & Bullcoming v. New Mexico* (Citations Omitted) require that the actual toxicologist who conducted the scientific testing be present and testify in order for the results of the scientific testing to be admissible. Upon information and belief, M passed away in 19xx. Pursuant to the holdings in *Melendez-Diaz & Bullcoming*, the state for the testimony of the actual toxicologist who conducted the test.

Due to the passing of M, it is not possible for the state to introduce the results of the blood alcohol test into evidence. Notwithstanding, the defense is entitled to cross examine the toxicologist on the methodology for the blood test including, but not limited to, sample storage, sample preparation, the known standard used in the blood sample, manipulation of the X axis in order to create an artificially high blood alcohol reading, carrier gas, specific GC column, flame ionization detector, headspace chromatography, direct sampling, auto sampling as opposed to single sample injection port, quality control measures, visual observations to confirm or rule out the possibility of microscopic decomposition or hemocytolysis. Further areas of inquiry include quality control measures such as a quantitative measurement of the sodium fluoride and potassium oxalate in the blood sample.

While the undersigned respects knowledge, skill and ability, WB is not competent

to testify to the above as a matter of law. The right to confrontation of the actual toxicologist is required under the Sixth Amendment of the United States Constitution made applicable through the Fourteenth Amendment.

C. Other Specific Prejudice

Trooper H Trooper H was responsible for conducting the accident investigation including the reconstruction of the accident. Trooper H was also the individual who dispatched Trooper S to the hospital in order to conduct a blood draw on defendant.

Trooper H is listed as a Category A witness, but his contact information has not been provided by the State. Trooper H is one of, if not the most, important witnesses in the state s case. Defendant is prejudiced due to the lack of contact information, Trooper H unavailability, and in the event that he is able to be located, prejudiced to the extent that he is unable to recall precise events from 26 years ago.

Driver of Vehicle # 2 - the car accident which took place on September xx, 19xx involved a total of four vehicles. At least one witness statement contained the allegation that defendant was attempting to pass vehicle number 2 and lost control of his vehicle. The diagram of the traffic accident drawn by Trooper H indicates that the operator of vehicle number 2 made contact with the side of the vehicle driven by defendant.

The driver of vehicle number 2 fled the scene and his identity remains unknown. A diligent investigation by the defense at a point in time near the accident may have revealed the identity of v

. It is the defense position that the driver of vehicle number two was responsible for the accident. Defendant has been prejudiced by the negligent delay

conduct his own investigation which could provide exculpatory evidence beneficial to defendant. Due to the delay, defendant has been permanently deprived of his right and ability to conduct his own investigation in order to prepare a defense to the charges.

CONCLUSION

WHEREFORE, Defendant, BTJ, respectfully requests this honorable court enter an order dismissing this matter with prejudice due accordance with the Sixth and Fourteenth Amendments of the United States Constitution and for such other and further relief as this court may deem just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered via electronic mail to the Office of the State Attorney this the ___ day of July, 20XX.

Respectfully submitted,

/s/ Michael A. Dye
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