

IN THE SUPREME COURT OF THE STATE OF MONTANA

CASE NO. DA 06-0287

STATE OF MONTANA,

Plaintiff and Respondent,

-v-

KARSTEN KARL SMITH,

Defendant and Appellant.

FILED

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Ed Smith
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STATE OF MONTANA

APPELLANT'S OPENING BRIEF

**ON APPEAL FROM THE MONTANA FOURTH JUDICIAL
DISTRICT COURT, MISSOULA COUNTY,
HONORABLE DOUGLAS G. HARKIN PRESIDING**

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ISSUES PRESENTED

- I. **WHETHER THE DISTRICT COURT ERRED WHEN IT FAILED TO SUPPRESS EVIDENCE THAT WAS DISCOVERED AS THE RESULT OF AN ILLEGAL SEARCH OF SMITH'S HOME.**

- II. **WHETHER THE DISTRICT COURT ERRED WHEN IT FAILED TO DISMISS THE CHARGES AGAINST SMITH BECAUSE THE STATE VIOLATED SMITH'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL UNDER BOTH THE UNITED STATES AND MONTANA CONSTITUTIONS.**

STATEMENT OF FACTS

On March 12, 2002, officers from the Missoula County Sheriff's Department assisted Tom Forsyth, Kathleen Beccari, and Dave Sonju, Adult Probation and Parole Officers, in conducting a search at 4305 ½ Highway 10 West, Missoula County, Montana (hereinafter "Smith's trailer"), the residence of Defendant-Appellant Karsten Smith (hereinafter referred to as "Smith"). (See Def. Ex. 1 and Def. Ex. 2).

Darlene Garcia was Smith's girlfriend and a probationer who reported to Officer Forsyth. (See Def. Ex. 3) Forsyth had received information that Garcia had changed her residence and was living with Smith, where he suspected she was using drugs. *Id.* Mr. Forsyth then authorized a probation

search of Smith's trailer, identifying this residence as that of Ms. Garcia, Smith's girlfriend. *Id.*

Earlier on March 12, 2002, Mr. Forsyth had summoned Ms. Garcia to the Adult Probation and Parole office. *Id.* Mr. Forsyth advised Ms. Garcia that he had learned that she had changed her residence several months before without permission and that she was driving and using drugs. Garcia provided a urinalysis upon his demand, which tested positive for methamphetamine. *Id.* Mr. Forsyth then told Ms. Garcia to complete a monthly report form, in which she was told to write the location of her new residence.

Ms. Garcia denied living at Smith's trailer but claims that she was coerced to write a new location for her residence. She was not allowed to complete or sign the monthly report form. Ms. Garcia continued to deny she had changed her residence and was searched by Ms. Baccari for a key to Smith's trailer. Despite the fact that no key was found on Ms. Garcia, Mr. Forsyth authorized a probation search of Smith's trailer. Ms. Garcia was then arrested, placed in a probation and parole vehicle and driven to the area of the Pryne Ranch, located east of the Missoula Airport, where she was told to direct the probation officers and sheriff officers to Smith's trailer. (See Def. Ex. 3.)

Probation officers Forsyth, Kathleen Beccari, and Dave Sanju, together with several sheriffs' deputies arrived at Smith's trailer in three separate vehicles. (See Def. Ex. 1, 2, 3, 4). Upon arrival, Ms Garcia recognized a young woman she knew to be "Andrea" or "AJ", sitting on the porch of the trailer. Deputy Michael Dominick approached the front door of the trailer and knocked on the door. There was no answer. Mr. Forsyth requested that entry be made by "prying open a door." (See Def. Ex. 1)

Without benefit of a search warrant or consent from Smith or the landlord, Missoula County Sheriff's Detective Tom Lewis pried open the rear door. *Id.* Ms. Garcia witnessed Dep. Dominick go around to the back of the trailer and return with a crowbar, indicating that he could get into the back door with the crowbar. She saw the officers go around back again and soon came out the front door. At that point, all of the sheriff's deputies and probation officers entered Smith's trailer by the front door, while Andrea remained outside. *Id.* Within a few minutes, she observed Forsyth and Lewis come out of the trailer's front door with several items in hand, which were then handed to Andrea.

The officers reported that they cleared the trailer of any occupants; there were none. At that point, the officers conducted a "probation" search of the entire premises, per the request of Forsyth and Lewis. (See Def. Ex. 1)

Deputy Dominick reported that during the search of the trailer he saw numerous firearms, drug paraphernalia, and substances he suspected to be methamphetamine. *Id.* Deputy Brian Keyser later assisted Dep. Dominick in photographing and cataloging the evidence located in Smith's trailer. The only item in the trailer that purportedly belonged to Ms. Garcia was her purse. (See Def. Ex. 4)

During the search of the trailer, numerous items considered as drug paraphernalia, precursors in the manufacture of distribution of drugs, and substances suspected as methamphetamine were seized by the officers. (See Def. Ex. 1) Ms. Garcia witnessed at least one officer approach an International bus owned by Smith and parked near the trailer. Although the vehicle was locked, she observed a deputy climb to the top of the bus, remove a vent and look inside the bus. Subsequently, a search warrant was obtained, the bus was searched and additional items were seized as evidence of the suspected manufacture of methamphetamine. *Id.*

While the search of the bus was being conducted, Karsten Smith drove into the driveway of this residence. Because drug paraphernalia and residue, as well as firearms had been located within the trailer and bus, Deputies Rugulieski and Dominick and the probation officers conducted a felony stop of Mr. Smith. *Id.* At the time of his arrest, the officers searched

Smith and his vehicle incident to the arrest and located additional paraphernalia and suspected drugs on his person and in his truck. *Id.*

After the search of the trailer, the adjacent bus, and the seizure of evidence, both Mr. Smith and Ms. Garcia were arrested. Smith was charged with criminal possession of dangerous drugs, a felony, criminal possession of dangerous drugs with intent to distribute, a felony, and criminal possession of drug paraphernalia, a misdemeanor. Ms. Garcia was charged with criminal possession of drug paraphernalia, a misdemeanor. Subsequently a petition to revoke her probation was also filed, alleging she changed her residence without permission and that she had proved a urinalysis positive for methamphetamine.

Because the State characterizes the search of Smith's trailer at 4305 ½ Hwy. 10 West, Missoula, Montana, as a "probation search," the following is a brief history of the co-defendant Darlene Garcia who is the probationer under the supervision of Tom Forsyth. Smith was not on probation and was not under the supervision of Adult Probation and Parole.

Darlene Garcia, Smith's girlfriend, had previously been convicted in Missoula County Cause No. DC-01-342 of criminal possession of dangerous drugs, a felony and criminal possession of drug paraphernalia, a misdemeanor. On October 23, 2001, Garcia received a deferred imposition

of sentence for three years on the felony count, to run consecutively. During the time Ms. Garcia was under Mr. Forsyth's supervision, she consistently reported her residence to be that of her sister, Delores Shepard. Mr. Forsyth approved the residence as appropriate and acceptable before Ms. Garcia's sentencing, as Mr. Shepard was also on Probation and confirmed that she had Ms. Shepard's permission to reside at that location. (See Def. Ex. 3)

In 2002, Smith filed a motion to suppress the evidence found as a result of the probation search of his trailer. The motion was denied by the district court. (See Def. Ex. 5)

After Smith's arrest, years passed before the case was resolved. The State of Montana stipulates that they are responsible for at least 1,300 days—roughly three and a half years—delay between Smith's arrest and a hearing on the speedy trial issue. (See Def. Ex. 6, Def. Ex. 7.) The lengthy delay began with Smith's arrest on March 12, 2002. Smith was charged by information on April 16, 2002, with felony criminal possession of dangerous drugs and misdemeanor possession of drug paraphernalia, and was arraigned on April 30th, 2002. At the time of arraignment an Omnibus Hearing was scheduled for May 21st, 2002. On May 21st, 2002, the State moved to continue the Omnibus Hearing. The Omnibus Hearing was then set for June 4, 2002. On June 4, 2002, the State moved for leave to file an Amended Information. The Court granted leave and

Smith was arraigned on the Amended Information. The new Omnibus Hearing date was set for June 18th, 2002. A stipulated Omnibus Hearing Memorandum was submitted to the Court and the Court set a status conference for August 27, 2002.

On August 27, 2002, the matter was continued at the request of Defendant's counsel to October 22, 2002. A total of 56 days are attributable to the Defendant for this continuance. On October 22, 2002, an Amended Omnibus Memorandum was submitted. The State also moved to consolidate Smith's two pending cases. The Court set a briefing schedule to address the State's new motion. On February 3, 2003, the Court ruled on the State's motion. The Defendant next appeared on June 10, 2003, where the Court set a Status Hearing for June 24th, 2003. On June 24, 2003, the Smith Counsel moved to continue the hearing and a new hearing date was set for July 22, 2003. On July 1, 2003, Smith appeared in Court again due to confusion regarding bail amounts and Smith's counsel moved for his release on the previously posted bail amounts. The Court released Smith on the previous bail on July 3, 2004. The time between February 3, 2003 and June 10, 2003, amounted to 127 days.

After this time, in one form or another, Smith's counsel requested the continuance until approximately October 28, 2003. These 140 days are attributable to Smith. On October 28, 2003, the parties informed the Court that

they were actively involved in plea negotiations and requested a continuance to December 23, 2003. Smith's attorney requested the matter be continued for three weeks to allow for a change of plea. Hearing was set for January 20, 2004. On January 20, 2004, Smith's attorney again asked for a continuance. A hearing was then set for February 24, 2004. On February 24, 2004, Smith did not appear and a bench warrant was issued for his arrest.

Smith was arrested on the bench warrant and appeared in Court on March 16, 2004. Defense counsel moved to quash the warrant for Smith's arrest and the Court denied the motion. Hearing was then set for April 20, 2004.

On April 20, 2004 new counsel appeared for Smith, and requested a continuance, which was not opposed, and the Court set a Hearing for May 25, 2004. On May 25, 2004, the Court set trial for August 11, 2004. A final pretrial conference was set for August 3, 2004. On July 6, 2004, Smith's attorney advised the Court that the matter regarding Smith's right to speedy need to be briefed and ruled upon. The Court set briefing schedule ending July 22, 2004. The motion was denied on July 29, 2004.

The parties then appeared on August 3, 2004. There is no indication from the minute entry whether Smith was personally present, but Smith's attorney moved to continue the matter and set a briefing schedule. After August 3, 2004, no further hearing was set in the matter until April 5, 2005. On April 5, 2005,

the matter was continued to May 3, 2005, at which time a bench warrant was issued for Smith's arrest. Smith appeared in Court on May 24, 2005, at which time the Missoula County Public Defender's Office moved to reduce his bail. The Court continued the hearing for one week so that the County Attorney could be consulted regarding the bail amount. On May 31, 2005, the Court refused to reduce the bail and set further status for June 28, 2005. In August of 2005, Smith filed a renewed motion to dismiss on the basis that his right to a speedy trial had been violated. The state responded to the motion and conceded that at least 675 and 625 days were attributable to the State. (See Def. Ex. 6). The district court held a hearing on this issue on September 6, 2005. After the hearing, the district court ordered an opinion denying the motion to dismiss based on speedy trial because the district court found that the State had met its burden in refuting the presumption of prejudice. *Id.*

STANDARD OF REVIEW

A district court's denial of a motion to suppress is reviewed to determine whether the district court's findings of fact are clearly erroneous and whether the district court's interpretation and application of the law is correct. *State v. Clifford*, 2005 MT 219, ¶ 25, 328 Mont. 300, ¶ 25, 121 P.3d 489, ¶ 25.

Whether a defendant has been denied a speedy trial presents a question of law. *State v. Bertolino*, 2003 MT 266, ¶ 10, 317 Mont. 453, ¶ 10, 77 P.3d 543, ¶ 10. A district court's legal conclusions are reviewed to determine whether its interpretations are correct. *Bertolino*, ¶ 10.

SUMMARY OF ARGUMENT

In Montana, searches of a home must be conducted pursuant to a warrant or an exception to the warrant requirement. MCA Section 46-5-101 (2005). Probationers have a lower expectation of privacy in searches of their persons, places, or things. *State v. Burke*, 235 Mont. 165, 171, 766 P.2d 254, 257 (1988).

Here, the district court found that reasonable cause existed to search Smith's house because Officer Forsyth believed that a probationer—Garcia—was living at Smith's house. Officer Forsyth had insufficient evidence to believe that a probationer was living at Smith's house. Thus, the district court erred when it ruled that the police were justified in searching Smith's home because the police believed that probationer Garcia was living with Smith.

A criminal defendant is guaranteed a speedy trial by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. If 275 or more days have elapsed between

charging and a trial date that are attributable to the State, there is a rebuttable presumption of prejudice to the defense. The burden then switches to the State to prove that the Defendant has not been prejudiced by the delay. *Bruce* at ¶ 56, 290 Mont. At 167, 965 P 2d. At 877. In rebutting the presumption of prejudice which has attached to the defendant, the State's proof should take into consideration, but need not include, all three traditional bases for prejudice: (a) pretrial incarceration, (b) anxiety and all of its attendant considerations, and (c) impairment of the defense. *Id.* at ¶ 56, 290 Mont. at 167, 965 P. 2d at 877.

Here, Smith was prejudiced by oppressive pretrial incarceration, anxiety aggravated by the delay in his trial, and impairment of his defense. The district court failed when it found that the State had met its weighty burden of rebutting the presumption of prejudice that had attached to the defendant.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT FAILED TO SUPPRESS EVIDENCE DISCOVERED AS A RESULT OF THE ILLEGAL SEARCH OF SMITH'S HOME.

The warrantless search and seizure of evidence by law enforcement violated Smith's statutory and constitutional rights and the evidence should be suppressed.

Both the Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution guarantee to the citizens of Montana that they shall not be subjected to unreasonable searches and seizures. Specifically, Article II, Sections 10 and 11 of the Montana Constitution provide:

Section 10: Right to privacy. The right of individual privacy is essential to the wellbeing of a free society and shall not be infringed without the showing of a compelling state interest

Section 11: Searches and seizures. The people shall be secure in their persons, papers, homes and effects from unreasonable searches and seizures. No warrant to search any place, or seize any person or anything shall issue without describing the place to be searched or the person to be seized. Or without probable cause, supported by oath or affirmation reduced to writing.

Article II, Sections 10 and 11, Montana Constitution

That guarantee is codified at MCA Section 46-5-101, which provides that searches may only be conducted under the authority of a search warrant, or in accordance with judicially recognized exception to the warrant requirement. Judicial interpretation of the Fourth Amendment has established that warrantless searches conducted inside a home are per se unreasonable, subject to only a few specifically established and well-delineated exceptions. *State v Hubbel*, 286 Mont. 200, 212, 951 P.2d 971, 978 (1997). “[T]he physical invasion of the home is the chief evil to which the Fourth Amendment and Montana’s Article II, Section 11, are directed.”

State v. Therriault, 2000 MT 286, ¶53, 302 Mont. 189, 14 P.3d 444. Absent an exception, that threshold may not be crossed without a warrant. *See, e.g., State v. Kao*, 215 Mont, 277, 282-83, 697 P.2d 903, 907 (1985); *State v. Bassett*, 1999 MT 109, ¶ 25, 294 Mont. 327, 982 P.2d 410. A presumption of unreasonableness attaches to all warrantless entries of a home. *Payton v. New York* (1980), 445 U.S. 573, 583, 100 Sct. 1371; *Welsh v. Wisconsin* (1984), 466 U.S. 740, 749, 104 S.Ct. 2091.

It is undisputed that a probationer has a reduced privacy interest. *State v. Burke*, 235 Mont. 165, 171, 766 P.2d 254, 257 (1988). Thus, searches of a probationer's person, place or things may be based on much less than probable cause. *Id.*

In this case, the district court found that the State had a reasonable belief that a probationer was living at Smith's residence. Thus, the district court reasoned, the police could conduct a "probationer" search of Smith's home. See Def. Ex. 5.

However in this case, Ms. Garcia was not living at Smith's trailer. Nor did Mr. Forsyth have reasonable cause to believe that she was living at Smith's trailer. Forsyth had received only second-and third hand unsubstantiated information that she had changed her residence. Therefore,

Mr. Forsyth had no power to authorize a probationary search of Smith's trailer.

The policies and procedure of the probation officer indicate that a probation officer should obtain consent from any cohabitants sharing a residence with a probationer. Because these innocent third parties are subjecting themselves to a lower expectation of privacy by sharing a residence with a probationer, it is essential that a probation officer obtain their consent and verify that the probationer in fact lives at the residence and has permission to do so. Here, Mr. Forsyth failed to verify that Darlene lived at the trailer, that she had Smith's permission to live at the trailer and that Smith understood the implications of allowing Darlene to live in the trailer.

Additionally, before a probation officer gives permission to law enforcement officers to search the home of a probationer, he should be certain that the residence in question is, in fact, the home of the probationer. In this case, Mr. Forsyth failed to verify that this was Darlene's residence. She did not even have a key to let them in, which seem fairly clear evidence that she was not a full time resident of the trailer. The suppression of the evidence derived from this search serves the purpose of the exclusionary rule.

A review of Mr. Forsyth's file regarding Ms. Garcia reveals a regular series of monthly reports made by Ms. Garcia, as well as a number of reports of a chemical dependency provider. There is no evidence that Mr. Forsyth ever obtained consent from Smith for Darlene to reside with him at 4305 ½ Hwy. 10 W. Mr. Forsyth never conducted a home visit of Darlene to verify the address or the appropriateness of the residence and any other cohabitants of the residence in accordance with the Probation and Parole Bureau Policies and Procedures. Given the fact that Mr. Forsyth did not follow the procedural rules of his department to verify the residence, he clearly acted outside the scope of his authority when he gave the sheriff's deputies permission to conduct a probation search of Smith's trailer. This warrantless search violated both the laws of the state of Montana regarding search and seizure and the policies and procedures which govern the probation officer's management of probationers.

Darlene's lower expectation of privacy as a probationer is irrelevant to the instant analysis. Mr. Forsyth did not have a justifiable basis for authorizing a search of Smith's residence. Therefore, the justification for this warrantless search must focus solely on standard search analysis, as set forth above.

II. THE STATE FAILED TO REBUT THE PRESUMPTION OF PREJUDICE THAT THE DELAY IN THE TRIAL CAUSED TO SMITH.

A criminal defendant is guaranteed a speedy trial by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. In ruling on a motion to dismiss a felony charge on speedy trial grounds, a Court must consider four factors (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant has asserted his right to a speed trial; and (4) the prejudice to the defendant caused by the delay. *City of Billings v. Bruce*, 1998 MT 186 ¶ 19, 290 Mont. 148, 156, 965 P 2d 866, 871 (citing *Barker v. Wingo*, 407 U.S. 541 (1972)). These four factors (hereinafter, “the Barker factors”) are general guidelines to be applied on a case-by-case basis to the unique circumstances of each case. The Barker factors “have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.” *Id.* at ¶ 20, 290 Mont at 157, 965 P2d at 871 (quoting *Barker*, 407 U.S. at 533).

The method adopted by the Montana Supreme Court for applying the Barker factors to a given speedy trial claim combines features of a “straight balancing test” and a “motive test.” *Id.* at ¶ 54, 290 Mont at 166, 965 P.2d at 877. A straight balancing test considers each of the four factors equally, and no single factor is decisive. For example, if the length of delay is great enough, or

the State is sufficiently culpable in causing delay, prejudice is unnecessary. On the other hand, if prejudice is extreme, the length of delay required is less. *Id.* at ¶ 51.

The first step is to consider the length of delay from the time the charge was originally filed. If 200 or more days have elapsed, the remaining *Barker* factors must be analyzed. *Id.* at ¶ 55, 290 Mont. At 167, 965 P. 2d at 877.

When 200 or more days have elapsed, the court must then consider the reason for the delay. Time is assigned to the State or to the defendant depending upon the unique facts of the case *Id.* at ¶ 52. When delay is either institutional or caused directly by the prosecution, it is attributable to the State. *Bruce* at ¶ 61, 290 Mont. at 169, 965 P. 2d at 878; *State v. Kipp*, 1999 MT 197, ¶ 10, 295 Mont. 399, 402, 984 P.2d 733, 735. This is because “the [State] bears the burden of prosecution, and a defendant is under no obligation to ensure diligent prosecution of the case against him or to help the [State] avoid dismissal for failure to timely prosecute him.” *Bruce* at ¶¶ 63 and 76, 290 Mont. At 169 and 172, 965 P. 2d at 879 and 880; *Kipp* at ¶ 10; and *Barker*, 407 U.S. at 527. The defendant’s pretrial motions that are filed in a timely fashion- i.e. so that they can be briefed and ruled on without delaying trial- do not cause delay that is attributable to the defendant. *Id.* at ¶¶ 13-15, 295 Mont. At 403-04, 984 P. 2d at 736.

If 275 or more days have elapsed that are attributable to the State, there is a rebuttable presumption of prejudice to the defense. The burden then switches to the State to prove that the Defendant has not been prejudiced by the delay.

Bruce at ¶ 56, 290 Mont. at 167, 965 P 2d. at 877.

Regarding the State's burden of proof in cases where prejudice must be presumed, the Montana Supreme Court has stated as follows:

The State's proof should take into consideration, but need not include, all three traditional bases for prejudice: (a) pretrial incarceration, (b) anxiety and all of its attendant considerations, and (c) impairment of the defense. In considering whether the State has met its burden, the district court should take into consideration the fact that direct proof of a defendant's state of mind may not always be possible, and that the State's ability to anticipate the nature of the defendant's defense may vary from case to case, therefore, there may be cases where the State can satisfy its burden without demonstrating a lack of prejudice based on each consideration. Once the State has demonstrated lack of prejudice based on one or more of these considerations, the burden will then shift to the defendant to demonstrate prejudice and the district court will have to weigh the evidence of each party.

Id. at ¶ 56, 290 Mont. at 167, 965 P. 2d at 877. In *State v. Hardaway*, the Court clarified the above pronouncement as follows:

In stating that the State may demonstrate lack of prejudice on one or more of the traditional bases of prejudice, we intended that the State offer proof on as many bases as possible and that the District Court weigh that evidence to determine whether the burden should shift to the defendant to show prejudice. We clarify that if the State can only show lack of prejudice on one of the three traditional bases of prejudice, it must, at a minimum, address the question of whether there has been impairment of the defense. That is, the bringing of the defendant to trial. If the State satisfies its burden of demonstrating that the defendant has not been prejudiced by the delay, the burden will shift to the defendant to show he/she has been prejudiced.

State v. Hardaway, 1998 MT 224, ¶ 22, 290 Mont. 516, 522-23, 966 P.2d 125, 129.

The greater the delay that has been caused by the prosecution, in contrast to institutional delay, the greater will be the State's burden in disproving prejudice. *Bruce* at ¶¶ 53-54, 290 Mont. at 166, 965 P.2d at 877; *State v. Price*, 2001 MT 212, ¶ 22, 306 Mont. 381, 386, 34 P.2d 112, 117; *State v. Haser*, 2001 MT 6, ¶ 26, 304 Mont. 63, 70, 20 P. 3d 100, 105.

Here, the district court found that the State was responsible for roughly thirteen hundred days of delay in Smith's trial. (See Def. Ex. 6) Thus, there is a presumption that Smith has been prejudiced by the lengthy delay.

Therefore, the burden then shifted to the state to rebut the presumption that Smith had suffered prejudice due to delay. The State failed to meet their burden in rebutting the presumption that the delay prejudiced Smith's defense. Therefore, the district court erred when it declined to dismiss the charges on the basis that the State violated Smith's constitutional right to a speedy trial.

A. The State's delays resulted in oppressive pretrial incarceration.

The first prejudice factor to be considered is oppressive pretrial incarceration. *Bruce* at ¶ 56, 290 Mont, at 167, 965 P. 2d at 877. The district court did not specifically address the effect of oppressive pretrial incarceration in its order denying the motion to dismiss the charges on speedy trial grounds. (See Def. Ex. 2) However, Smith was incarcerated on these two charges for

about 325 days and Smith was prejudiced by continued pretrial incarceration. Smith had repeatedly asked to be released on his prior bond on \$75,000.00 and the district court refused to lower the bond from \$100,000.00. Smith's incarceration forced him to lose employment opportunities. The incarceration led to Smith losing body tools and paint guns. (Tr. Pg. 37) Also, the district court found that the pending charges led to Smith losing the title to twenty five automobiles. (See Def. Ex. 6)

The States pre-trial incarceration of Smith was oppressive to him because it resulted in Smith suffering a financial and economic loss. The State failed to meet its heavy burden in refuting the prejudice the oppressive pre-trial incarceration caused Smith.

B. Smith's anxiety was aggravated because the State delayed his trial.

Anxiety is the second type of prejudice to be considered. *Bruce* at ¶ 54, 290 Mont, at 167, 965 P.2d at 877. A certain amount of anxiety and concern is inherent in being charged with an offense; in the context of a speedy trial analysis, the question is whether that anxiety has been aggravated by the delay. *State v. Good* 2002 MT 59, ¶ 31 (citing *State v. Highpine*, 2000 MT 368, ¶ 28, 303 Mont. 422, 428, 15 P. 3d 938, 942)).

The district court decided that Smith's anxiety had been aggravated by the delay of his trial. Specifically, the district court found that Smith:

has set forth credible evidence of pretrial anxiety, relating over [sic] one year of incarceration, depression of sufficient significance to require medication, anxiety, a health related-incident while confined, loss of personal property, including the titles to approximately 25 cars.”

See Def. Ex. 6.

Nonetheless, the district court found that Smith's anxiety, even though caused by incarceration and pending charges, was not sufficient to invoke dismissal of the charges.

The district court erred when it determined that the delay was not sufficient to dismiss the charges. As noted, Smith suffered severe health and economic consequences as a result of the State's delay of his trial. These health and economic consequences aggravated Smith's anxiety. Because the delay aggravated Smith's pre-trial anxiety, Smith was prejudiced by the State's delay of his trial. The State did not meet its heavy burden in disproving the prejudice created by Smith's aggravated anxiety.

C. The delays have impaired Smith's defense

Impairment of defense is the last type of prejudice to be considered.

Bruce at ¶¶5 and 68, 290 Mont. at 167, 965 P.2d at 877. It is the most significant for of prejudice “because the inability of the defendant adequately to

prepare his defense skews the fairness of the whole system,” *Bruce* at ¶ 19, 290 Mont at 156, 965 P.2d at 871. (quoting *Barker v. Wingo*, 407 U.S. at 532)

In the present case, the district court focused primarily on this factor in denying Smith’s motion to dismiss on speedy trial grounds. The district court, citing its earlier ruling on the speedy trial issue, wrote:

As noted by the state, this matter is not critically fact-sensitive. Defendant’s possession of drugs and paraphernalia are the sole issues to be determined. The defense has not presented a list of witnesses it intends to call, so it appears Defendant has not suffered any impairment due to unavailability of his own witness. See Def. Ex. 6.

The district court implied that because Smith had not disclosed a witness list, that Smith had not demonstrated what witnesses’ memories have been impaired by the passage of the time. *Id.* The district court noted that police officers could refresh their memories with police reports, and that the “simplicity of interactions leading to Defendant’s arrest in both instances lends credence to the State’s position that impairment of memory will not be an issue.” *Id.*

In so ruling, the district court ignored the possibility that Smith—who had an absolute right to testify whether he was disclosed in a witness list or not—might have himself suffered impaired memory as a result of the pretrial delay. Further more, impeachment witnesses who may have had to testify on

behalf of Smith could have suffered impaired memory as a result of the pre-trial delay. See *State v. Weitzel*, 2006 MT 86, 299 Mont. 192, 998 P.2d 1154 (prosecution under no duty to disclose witnesses used to impeach credibility of defense witnesses). Because Smith and perhaps impeachment witnesses could have suffered impaired memory as a result of the delay, the district court erred when it found that the State had rebutted the presumption of prejudice that their trial delay had caused.

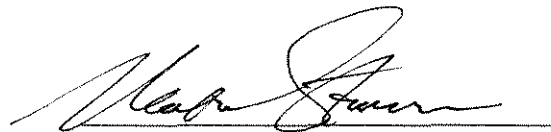
CONCLUSION

The district court erred when it failed to suppress evidence found at Smith's trailer during an illegal search by the police. Contrary to the district court's ruling, there was insufficient evidence to believe that Garcia was living at Smith's trailer and thus there was no reason for the Office of Probation and Parole to perform a probation search on Smith's residence. Therefore, the district court should have suppressed all evidence in and flowing from the search of Smith's trailer.

Smith's defense was prejudiced by the inordinately large amount of time that elapsed between his arrest and the resolution of this case. Specifically, Smith was prejudiced by the delay in his trial by oppressive incarceration, anxiety aggravated by the delay, and the impairment of memories of witnesses pertinent to his defense. The State, which was

responsible for 1,300 days of delay in this matter, did not meet their burden to refute the prejudice presumed in Smith's case. Therefore, the district court erred when it failed to dismiss the charges against Smith because the State violated his right to a speedy trial.

DATED this _____ day of September, 2006.



Mathew M. Stevenson
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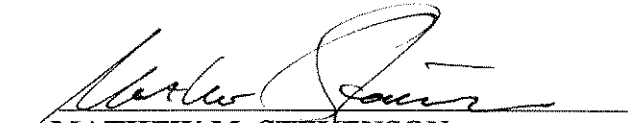
CERTIFICATE OF SERVICE

I hereby certify that I served a true and accurate copy of the foregoing Brief by delivering said copies to the U.S. Postal Service, postage prepaid to the following parties and addresses:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.


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