

**STATE OF MICHIGAN**  
**IN THE COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN**

Plaintiff-Appellee

**Court of Appeals No.**

**Lower Court No. 05-12920**

-vs-

**JAMES McCAA**

Defendant-Appellant.

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**WAYNE COUNTY PROSECUTOR**

Attorney for Plaintiff-Appellee

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**CHRISTINE A. PAGAC (P67095)**

**HENRY L. GREENWOOD (P 14349)**

Attorney for Defendant-Appellant

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**MOTION FOR STAY AND FOR IMMEDIATE CONSIDERATION**  
**(TRIAL SET FOR TOMORROW, APRIL 25, 2006)**  
**(APPENDIX FILED UNDER SEPARATE COVER)**

PROOF OF SERVICE

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NOW COMES JAMES McCAA, Defendant-Appellant in the above captioned cause, through his attorneys, the **STATE APPELLATE DEFENDER OFFICE**, by **CHRISTINE A. PAGAC**, and moves this Honorable Court to grant his Motion for Stay and for Immediate Consideration and states the following:

1. I am counsel for Defendant for purposes of this interlocutory appeal of the denial of Defendant's Motion for Adjournment of Trial in this first degree murder case. The State Appellate Defender's Office was appointed late Friday afternoon, April 21, 2006. Trial is set to begin tomorrow, April 25, 2006. (See docket entries, attached hereto as Appendix A) Counsel has concurrently submitted an emergency application for leave to appeal the denial of a motion for continuance.

2. As stated above, Defendant James McCaa is charged with first degree murder in the death of Anthony Kirk on September 3, 2005, and faces a mandatory life sentence if convicted. The complainant, Mr. Kirk, was shot at a party attended by 35 people. (Preliminary Examination Tr p 68 attached hereto as Appendix B) Trial counsel in this matter, Henry L. Greenwood, sought and was

approved, funds in January, 2006, to hire a private investigator to assist him in interviewing potential witnesses in this matter. (*See* Motion for Adjournment, attached hereto as Appendix C) Counsel retained Michael Martin for this purpose. (*Id.*) On March 10, 2006, trial counsel filed a motion for discovery. Among the items Mr. Greenwood sought was the transcript from, and affidavit supporting, an investigative subpoena for Kelly Forsythe. (Motion for Discovery, attached hereto as Appendix D) Ms. Forsythe was the sole witness to testify at the preliminary examination. (PE Tr) This material was necessary for the defense to have before they spoke with this key witness. The transcript was not received until April 3, 2006 and the Petition and Order until April 12, 2006. (See Proofs of Service attached hereto at Appendix E.) Ms. Forsythe, who was placed on a \$500 personal bond as a material witness, (PET pp 107-109), failed to comply with the conditions and a warrant was issued. On April 21, the prosecutor told trial counsel that Ms. Forsythe was arrested the night before and was lodged in the Wayne County Jail.

3. Investigator Martin telephoned trial counsel at approximately 1:00 a.m. on April 18, 2006 to inform him that he had a detached retina and was scheduled for emergency surgery that day. (Motion for Adjournment of Trial) As a result of his surgery for this serious condition, Investigator Martin will be unavailable for three weeks. (*Id.*) Trial counsel has been unable to retain another investigator on such short notice. (Motion for Stay, attached hereto as Appendix I)

4. On April 20, 2006, trial counsel filed a motion seeking adjournment of the trial due to the injury suffered by the investigator. (Docket Entries) In his motion, counsel explained that he could not effectively represent Defendant at trial without the services of an investigator to interview witnesses. (Motion for Stay) Defendant consented to the adjournment. (*Id.*) No other

continuances had been sought previously. (Docket Entries) The People did not file an opposition to the motion, or take any position on the record with respect to the adjournment.<sup>1</sup> (Docket Entries)

5. As trial counsel explained, proceeding to trial on April 25, 2006 without the services of an investigator, would deprive Defendant of his rights under the federal and state constitutions to due process, effective assistance of counsel, and to confront witnesses. US Const Amends VI, XIV; Mich Const 1963, art 1, § 17, 20. Although not noted in the motion, Defendant's right to present a defense, derived from these same rights, will also be compromised under these circumstances.

6. On April 20, 2006, Judge Thomas explained that the Docket Review Committee had prohibited her from granting *any* adjournment or continuance. Any request for a continuance or adjournment had to be sought before the chief judge.

7. Trial counsel went immediately before the acting chief judge, the Honorable Thomas Jackson, to seek an adjournment for the reasons stated above.

8. In ruling on a motion for an adjournment, the trial court is to consider whether 1) the defendant was asserting a constitutional right; 2) he had a legitimate reason for asserting the right; 3) he was not guilty of negligence; and 4) prior adjournments of trial were not at the defendant's behest. *People v Lawton*, 196 Mich App 341; 348; 492 NW2d 810 (1992).

9. Judge Jackson denied the motion for adjournment because he believed that counsel should have completed the investigation earlier. (*See* Order Denying Adjournment, attached hereto as Appendix F) Before denying the motion, Judge Jackson did not consider when discovery had been received by trial counsel, the unexpected and emergency nature of the investigator's injury, or even the critical nature of the services being provided by the investigator. Despite the serious nature of the charge against Mr. McCaa, the court did not consider the nature of the constitutional right he

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<sup>1</sup> The transcript of the hearing on the motion is attached hereto as Appendix G.

was asserting, the fact that he had a legitimate reason for asserting the right, or the fact that there had been *no* previous adjournments of the trial.

10. As explained in the accompanying application for leave to appeal, Judge Jackson abused his discretion when he denied the adjournment. As the Michigan Supreme Court has stated, "the desire of the trial courts to expedite court dockets is not a sufficient reason to deny an otherwise proper request for a continuance." *People v Jackson*, 467 Mich 272, 279 n7; 650 NW2d 665 (2002). This is particularly true when Defendant is facing first degree murder charges. As stated in the dissent in *Mitchell v Mason*, 325 F3d 732, 749 (CA6 2003):

I fault the trial court for its inexplicable failure to have taken the time before commencing a first degree murder trial to inquire effectively into the circumstances, and to have ensured that the petitioner's counsel was reasonably well prepared to defend his client. The trial court's failure, in the face of the petitioner's unanswered claims of lack of contact with his attorney and the lawyer's eve-of-trial suspension from practice, to grant a short continuance is, in a word, incomprehensible. The compulsion to maintain a tidy docket should never, as it so clearly did here, place fundamental rights at risk. Would a week's delay have really mattered?

The message of this case is not that federal courts are quick to intervene into state proceedings; the message is, rather, that the state trial court in this case could and should have done a better job of upholding the Constitution. Had it taken but a few moments to consider the petitioner's complaints meaningfully, or had it postponed the trial for a brief period to make certain that Evelyn was truly ready for trial, this case would not be here. The time the trial court may have saved has led to a great and otherwise unnecessary expenditure of time on the part of the Michigan courts of review, the district court, and this court.

11. Forcing Defendant to go to trial immediately under these circumstances is unreasonable, and will result in a deprivation of Defendant's constitutional rights. Defendant's statements to the police suggest that he acted in self-defense. Without the assistance of the investigator, previously appointed by the court, defense counsel has been unable to finish

interviewing the prosecution's witnesses, as well as other people who were at the party who may have material, potentially exculpatory information. If trial starts on April 25, 2006, as scheduled, defense counsel will be unable to cross-examine the prosecution's witnesses effectively, and present a defense fully. Defense counsel has already informed the trial court that he cannot effectively represent Defendant at trial without the services of an investigator.

12. Defense counsel has tried, but been unable, to retain a new investigator to help him prepare for trial tomorrow. (Motion for Stay; Transcript of Stay Proceedings)

13. On April 21, 2006, defense counsel made an oral request for Judge Thomas to grant a stay of proceedings, but Judge Thomas concluded that the directive from the Docket Review Committee prevented her from doing so. Later that day, Judge Jackson denied Defendant's motion to stay the proceedings to allow him to appeal the order denying the adjournment. (April 21, 2006 Order, attached hereto as Appendix H.)

14. Absent this Court's intervention to stay the proceedings pending appeal of the denial of the adjournment order, this charade of a trial will proceed on Tuesday, in clear violation of Defendant's Sixth and Fourteenth Amendment rights, as well as his rights under the Michigan Constitution. The judicial inefficiencies rightfully deplored by the dissenting judge in *Mitchell v Mason* will occur again. A short delay of the trial will harm nothing other than the trial court's docket; no delay will result in the deprivation of Defendant's fundamental rights. Under these circumstances, the choice is clear. A stay is warranted and permitted under MCR 7.209(D).

15. Accordingly, Defendant requests that this Court grant a stay of proceedings pending appeal of the denial of the requested adjournment. Moreover, because trial on the first degree murder charges is currently set for tomorrow, April 25, 2006, counsel respectfully requests that this

Court immediately consider this Motion, as well as the accompanying Application for Leave to Appeal.

**WHEREFORE**, for the reasons stated above, Defendant-Appellant respectfully asks that this Court grant his Motion for Stay and for Immediate Consideration.

Respectfully submitted,

**STATE APPELLATE DEFENDER OFFICE**

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Date: April 24, 2006