APPENDIX A DECISION OF STATE COURT OF APPEALS

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

D. Jeremy Whitmire
Post Office Box 249
Jackson, Mississippi 39205-0249
Telephone: (601) 359-3694
Facsimile: (601) 359-2407

(Street Address)
450 High Street
Jackson, Mississippi 39201-1082

e-mail:sctclerk@courts.ms.gov

November 9, 2021

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 9th day of November, 2021.

Court of Appeals Case # 2020-KA-00710-COA
Trial Court Case # CR17-183

Brian Scott Berryman a/k/a Brian Berryman v. State of Mississippi

Current Location:
MDOC #44499
P.O. Box 1419
Leakesville, MS 39451

Affirmed. Tishomingo County taxed with costs of appeal.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *
If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: https://courts.ms.gov, and selecting the appropriate date the opinion was rendered under the category "Decisions."

APPENDIX B DECISION OF STATE TRIAL COURT

STATE OF MISSISSIPPI

In the Circuit Court of TISHOMINGO COUNTY Cause Case: CR17-183

TO THE MISSISSIPPI DEPARTMENT OF CORRECTIONS ORI:

NOTICE OF CRIMINAL DISPOSITION

You are hereby notified that at the JUNE VACATION 2020 Term of the Circuit Court, Judge Kelly Lee Mims presiding, the following disposition was imposed for the crime(s) hereinafter described:

I. A. Disposition(s) Reported: X Prisoner Commitment _ Suspended Sentence/Probation
_ Revocation _ Acquittal _ Re-Sentence _ Other

A-1. Provisional Sentence _ Non-Adjudication _ RRP _ Drug Court
_ Bad Check Div. Pgm. _ Restituion in _____ CNTY
_ House Arrest/ISP _ Parchman Alcohol & Drug Program

B. Conviction as a Result of: _ Guilty Plea _ Guilty Plea after ___ days Trial
X Jury Verdict after 3 Days in Trial _ Rev. Hearing

II. Name BRIAN SCOTT BERRYMAN Alias _____
SSN 427217079 Race W Sex M Date of Birth 06/18/1963
Last Known Residence 9 CR 344
IUKA MS 38852
Place of Birth IUKA MS Country of Citizenship _____
Alien Registration/Immigration # _____ FBI # _____

III. Count 1 Charge SHOOTING INTO A DWELLING
Sentenced MSCode 97-37-29 Indicted MS Code 97-37-29
Count 2 Charge FELON WITH A WEAPON HABITUAL
Sentenced MSCode 97-37-5 Indicted MS Code 97-37-5
Count Charge _____
Sentenced MSCode _____ Indicted MS Code _____

IV. Date of Sentence 06/24/2020 Indictment Date 09/22/2017 DA Bar# 000000000
Sentence(s) Imposed by Order: Count 1 DISMISSED
Credit (Days) Count 2 LIFE WITHOUT THE POSSIBILITY OF PAROLE
Count

	TO BE SERVED	SUSPENDED	PROBATION	POST RELEASE	METHOD OF DISP.
Count 1					DISMISSED
Count 2					GLT
Count					
Conc:					
Cons:	TISH CO CAUSE 3409		LEE CO CAUSE 18,822		

Conditions of Sentence: X Habitual _ Psychological/Psychiatric _ Alcohol/Drug
Other: _____

V. Dates Confined _____ to _____ _____ to _____ _____ to _____
_____ to _____ _____ to _____ _____ to _____
_____ to _____ _____ to _____
Released on Bond Pending Appeal _____ to _____
Currently Housed In _____

VI. Fine 1000.00 Indigent Fee _____ Restitution _____ Court Costs 441.50
_____ _____ MCVCF 100.00 DAI 200.00 TSI 200.00
Conditions of Payment _____

Josh McNatt
Circuit Clerk
By: _____
June 25, 2020

CIRCUIT COURT SEAL TISHOMINGO COUNTY, MS

Send Prisoner Commitments, Provisional Sentence Orders and Revocation Orders To:
Records Department
MDOC (Fax: 601-973-3879)
P.O. Box 24388
Jackson, MS 39205

Court Statistics Division
Administrative Office of Courts (AOC)
P.O. Box 117
Jackson, MS 39205-0117

Send Suspended Sentence/Probation Notices, Provisional Sentence Orders and Rev. Orders to:
Data Operations
MDOC (Fax: 601-973-3879)
P.O. Box 24388
Jackson, MS 39205

Court Statistics Division
Administrative Office of Courts (AOC)
P.O. Box 117
Jackson, MS 39205-0117

Send Acquittal/Other Notices to: Court Statistics Division, AOC at its address listed above.

STATE OF MISSISSIPPI
COUNTY OF TISHOMINGO

I, JOSH MCNATT, Clerk of the Circuit Court of the said County and State do hereby certify that the foregoing constitutes a true and correct copy of said instrument of writing as appears of record in Circuit Book, on page LR17-183 of records now on file in said clerk's office.

Given under my hand and official seal, this 6th day of July, 20 20

JOSH MCNATT, D.C.

By _____

IN THE CIRCUIT COURT OF TISHOMINGO COUNTY, MISSISSIPPI

JUNE VACATION TERM, SPECIAL SETTING 2020

Jury Trial, Criminal Case, " Guilty Verdict"

STATE OF MISSISSIPPI

VS CAUSE NO. CR17-183

BRIAN S. BERRYMAN

AMENDED

Came on this day for hearing, the Defendant being before the Court in person and with his Attorney, Honorable **William Bristow**. Said Defendant being before the Court on charge of **CT II: Felon in the Possession of a Weapon** on indictment against him, and said defendant having entered a plea of not guilty to said charge on a former day of this Court and said cause being called for hearing on this date. Came the State of Mississippi by its Prosecuting Attorneys and came the Defendant in person and represented by his counsel, as stated above, and each side announced ready for trial. Came a jury of 12 good and lawful men and women and two alternate jurors, of Tishomingo County, Mississippi, who after being duly empanelled and especially sworn to try this cause, were accepted by both sides without objections or exceptions, and after hearing evidence of the witnesses, the argument of counsel, and being instructed by the Court as to the law, all jurors, except the alternate jurors who were excused by the Judge, retired to consider their verdict and afterwards returned into open Court in the presence of the Defendant and the Attorney for the Defendant, the following verdict: **"WE, THE JURY, FIND THE DEFENDANT BRIAN S. BERRYMAN, GUILTY OF FELON IN THE POSSESSION OF A WEAPON AS CHARGED IN THE INDICTMENT".**

Whereupon, on such verdict, it is ORDERED AND ADJUDGED by the COURT, that the Defendant **be sentenced to a term of LIFE in the custody of the Mississippi Department of Corrections without the possibility of parole or probation of any**

TISHOMINGO COUNTY
FILED

JUN 30 2020

JOSH MCNATT, CIRCUIT CLERK
BY Amanda Glasgow

kind, as a Habitual Offender under MS Code 99-19-83. Defendant shall pay court costs, a $1000.00 fine, an assessment of $100.00 to the Mississippi Crime Victims Compensation Fund, $200.00 investigative fee to the District Attorney's Office and $200.00 investigative fee to the Tishomingo County Sheriff's Department. This sentence shall run consecutive to the sentence imposed in Tishomingo County cause 3409 and Lee County cause 18,822. The Defendant shall be remanded to the custody of the Tishomingo County Sheriff's Department to await transportation.

SO ORDERED AND ADJUDGED this the 24th day of June, 2020.

CIRCUIT COURT JUDGE

STATE OF MISSISSIPPI
COUNTY OF TISHOMINGO
I, JOSH MCNATT, Clerk of the Circuit Court of the said County and State do hereby certify that the foregoing constitutes a true and correct copy of said instrument of writing as appears of record in Circuit Book. on page CR 17-83 of records now on file in said clerk's office.

Given under my hand and official seal. this 6th day of July 20 20

JOSH MCNATT, D.C.

By _____

APPENDIX C DECISION DENYING REHEARING BY STATE COURT OF APPEALS

APPENDIX C

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Office of the Clerk

D. Jeremy Whitmire
Post Office Box 249
Jackson, Mississippi 39205-0249
Telephone: (601) 359-3694
Facsimile: (601) 359-2407

(Street Address)
450 High Street
Jackson, Mississippi 39201-1082

e-mail:sctclerk@courts.ms.gov

February 15, 2022

This is to advise you that the Mississippi Court of Appeals rendered the following decision on the 15th day of February, 2022.

Court of Appeals Case # 2020-KA-00710-COA
Trial Court Case # CR17-183

Brian Scott Berryman a/k/a Brian Berryman v. State of Mississippi

Current Location:
MDOC #44499
P.O. Box 1419
Leakesville, MS 39451

The motion for rehearing filed by Brian Scott Berryman, pro se, is denied. Westbrooks and McDonald, JJ., would grant.

The motion for rehearing filed by Office of State Public Defender is denied. Westbrooks, McDonald and McCarty, JJ., would grant.

* NOTICE TO CHANCERY/CIRCUIT/COUNTY COURT CLERKS *
If an original of any exhibit other than photos was sent to the Supreme Court Clerk and should now be returned to you, please advise this office in writing immediately.

Please note: Pursuant to MRAP 45(c), amended effective July, 1, 2010, copies of opinions will not be mailed. Any opinion rendered may be found by visiting the Court's website at: https://courts.ms.gov, and selecting the appropriate date the opinion was rendered under the category "Decisions."

Serial: 241780

IN THE SUPREME COURT OF MISSISSIPPI

No. 2020-CT-00710-SCT

BRIAN SCOTT BERRYMAN A/K/A BRIAN BERRYMAN — *Appellant/Petitioner*

v.

STATE OF MISSISSIPPI — *Appellee/Respondent*

ORDER

This matter is before the Court on the Petition for Writ of Certiorari filed by Brian Scott Berryman, *pro se*. After due consideration, the Court finds that this petition should be denied.

IT IS, THEREFORE, ORDERED that the Petition for Writ of Certiorari filed by Brian Scott Berryman, *pro se*, is hereby denied.

SO ORDERED.

TO DENY: ALL JUSTICES.

DIGITAL SIGNATURE
Order#: 241780
Sig Serial: 100005397
Org: SC
Date: 05/10/2022

James D. Maxwell II

James D. Maxwell II, Justice

TISHOMINGO COUNTY
FILED
MAY 12 2022
JOSH MCNATT, CIRCUIT CLERK
BY Kimberly Wilson

CR17-183

Serial: 241779

IN THE SUPREME COURT OF MISSISSIPPI

No. 2020-CT-00710-SCT

BRIAN SCOTT BERRYMAN A/K/A BRIAN BERRYMAN ***Appellant/Petitioner***

v.

STATE OF MISSISSIPPI ***Appellee/Respondent***

ORDER

This matter is before the Court on the Petition for Writ of Certiorari filed on behalf of Appellant Brian Scott Berryman by the Office of State Public Defender - Indigent Appeals Division. After due consideration, the Court finds that this petition should be denied.

IT IS, THEREFORE, ORDERED that the Petition for Writ of Certiorari filed on behalf of Appellant Brian Scott Berryman by the Office of State Public Defender - Indigent Appeals Division is hereby denied.

SO ORDERED.

TO DENY: RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND GRIFFIS, JJ.

TO GRANT: ISHEE, J.

DIGITAL SIGNATURE
Order#: 241779
Sig Serial: 100005396
Org: SC
Date: 05/10/2022

James D. Maxwell II

James D. Maxwell II, Justice

TISHOMINGO COUNTY
FILED
MAY 12 2022
JOSH MCNATT, CIRCUIT CLERK
BY Kimberly Wilson

APPENDIX D 1. DECISION OF STATE SUPREME COURT DENYIN CERTIORARI
2. PRO-SE PETITION AND OFFICE OF STATE PUBLIC DEFENDER orders
3. MISS. RULES OF APPELLATE PROCEEDURES, RULE 17 (F)
RECONSIDERATION NOT PERMITTED

Serial: 241780

IN THE SUPREME COURT OF MISSISSIPPI

No. 2020-CT-00710-SCT

BRIAN SCOTT BERRYMAN A/K/A BRIAN BERRYMAN — *Appellant/Petitioner*

v.

STATE OF MISSISSIPPI — *Appellee/Respondent*

ORDER

This matter is before the Court on the Petition for Writ of Certiorari filed by Brian Scott Berryman, *pro se*. After due consideration, the Court finds that this petition should be denied.

IT IS, THEREFORE, ORDERED that the Petition for Writ of Certiorari filed by Brian Scott Berryman, *pro se*, is hereby denied.

SO ORDERED.

TO DENY: ALL JUSTICES.

DIGITAL SIGNATURE
Order#: 241780
Sig Serial: 100005397
Org: SC
Date: 05/10/2022

James D. Maxwell II

James D. Maxwell II, Justice

TISHOMINGO COUNTY
FILED
MAY 12 2022
JOSH MCNATT, CIRCUIT CLERK
BY Kimberly Wilson

CR17-183

Serial: 241779

IN THE SUPREME COURT OF MISSISSIPPI

No. 2020-CT-00710-SCT

BRIAN SCOTT BERRYMAN A/K/A BRIAN BERRYMAN ***Appellant/Petitioner***

v.

STATE OF MISSISSIPPI ***Appellee/Respondent***

ORDER

This matter is before the Court on the Petition for Writ of Certiorari filed on behalf of Appellant Brian Scott Berryman by the Office of State Public Defender - Indigent Appeals Division. After due consideration, the Court finds that this petition should be denied.

IT IS, THEREFORE, ORDERED that the Petition for Writ of Certiorari filed on behalf of Appellant Brian Scott Berryman by the Office of State Public Defender - Indigent Appeals Division is hereby denied.

SO ORDERED.

TO DENY: RANDOLPH, C.J., KITCHENS AND KING, P.JJ., COLEMAN, MAXWELL, BEAM, CHAMBERLIN AND GRIFFIS, JJ.

TO GRANT: ISHEE, J.

DIGITAL SIGNATURE
Order#: 241779
Sig Serial: 100005396
Org: SC
Date: 05/10/2022

James D. Maxwell II

James D. Maxwell II, Justice

TISHOMINGO COUNTY
FILED
MAY 12 2022
JOSH MCNATT, CIRCUIT CLERK
BY Kimberly Wilson

RULE 17. REVIEW IN THE SUPREME COURT FOLLOWING DECISION BY THE COURT OF APPEALS

(a) Decisions of Court of Appeals Reviewable by Writ of *Certiorari*. A decision of the Court of Appeals is a final decision which is not reviewable by the Supreme Court except on writ of *certiorari*. Review on writ of *certiorari* is not a matter of right, but a matter of judicial discretion. The Supreme Court may grant a petition for writ of *certiorari* on the affirmative vote of four of its members and may, by granting such writ, review any decision of the Court of Appeals. Successive review of a decision of the Court of Appeals by the Supreme Court will ordinarily be granted only for the purpose of resolving substantial questions of law of general significance. Review will ordinarily be limited to:

(1) cases in which it appears that the Court of Appeals has rendered a decision which is in conflict with a prior decision of the Court of Appeals or published Supreme Court decision;

(2) cases in which it appears that the Court of Appeals has not considered a controlling constitutional provision;

(3) cases which should have been decided by the Supreme Court because:

(i) the statute or these rules require decision by the Supreme Court, or

(ii) they involve fundamental issues of broad public importance requiring determination by the Supreme Court.

Notwithstanding the presence of one or more of these factors, the Supreme Court may decline to grant a petition for *certiorari* for review of the decision of the Court of Appeals. The Court may, in the absence of these factors, grant a writ of *certiorari*.

(b) Time for Filing Petition for Writ of *Certiorari*; Content and Length of Petition. A party seeking review of a judgment of the Court of Appeals must first seek review of that court's decision by filing a motion for rehearing in the Court of Appeals. If a party seeks review in the Supreme Court, a petition for a writ of *certiorari* for review of the decision of the Court of Appeals must be filed in the Supreme Court and served on other parties within fourteen (14) days from the date of entry of judgment by the Court of Appeals on the motion for rehearing, unless extended upon motion filed within such time. An untimely petition may be summarily dismissed by a single justice of the Supreme Court. The petition for writ of *certiorari* may not exceed ten (10) pages in length and must briefly and succinctly state the precise basis on which the party seeks review by the Supreme Court, and may include citation of authority in support of that contention. No citation to authority or argument may be incorporated into the petition by reference to another document. The petitioner must file an

(j) Mandate. The timely filing of a petition for a writ of *certiorari* shall stay the issuance of the mandate of the Court of Appeals. Upon the issuance of an order of denial of a petition for a writ of *certiorari* or upon the expiration of the period allowed for the Supreme Court's consideration of such a petition, the clerk of the Supreme Court shall issue the mandate, pursuant to M.R.A.P. 41.

[Amended February 10, 1995; amended effective September 28, 1995; amended June 21, 1996; amended effective January 1, 1999; amended July 1, 1999.]

(k) Motions to dismiss or withdraw opinion filed after petition for writ of certiorari. Where motions to dismiss an appeal or motions to withdraw or alter an opinion of the Court of Appeals are filed after petitions for writ of certiorari have been filed in the Supreme Court, the proceedings on the petitions for writ of certiorari will be suspended and the cases will be remanded to the Court of Appeals to address the motions. After the Court of Appeals has addressed the motions, the matter shall proceed in the Supreme Court, and, if the motion to dismiss the case has been granted, the petition may be dismissed as moot.

[Adopted to govern matters filed on or after January 1, 1995; amended February 10, 1995; amended effective September 28, 1995; amended June 21, 1996; amended October 15, 1998, effective from and after January 1, 1999; amended June 24, 1999; amended effective January 3, 2002; amended effective July 1, 2012 to revise subsection (f).]

Advisory Committee Historical Note

Effective January 3, 2002, a new Rule 17(k) was adopted. 803-804 So.2d XIX (West Miss.Cases 2002).

Effective June 24, 1999, Rule 17(b) was amended to effect editorial changes. 735 So.2d XIX (West Miss.Cases 1999).

Effective January 1, 1999, Rule 17(b) was amended to provide that untimely certiorari petitions may be summarily dismissed by a single justice and to provide that motions to extend the time to file a certiorari petition must be made within the original 14 days. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective January 1, 1999, Rule 17(e) was amended to effect a technical change. So.2d 717-722 XXVII (West Miss.Cases 1998).

Effective June 21, 1996, Rule 17 (e) was amended to enlarge the period for acting on certiorari petitions from sixty to ninety days. In addition, Rule 17(b) was amended to redesignate rehearing "petitions" as "motions," and Rule 17 (d) was amended to

original and ten (10) copies of the petition. The petitioner must attach, as appendices to the petition, a copy of the opinion and judgment of the Court of Appeals, and a copy of the motion for rehearing filed in the Court of Appeals.

(c) Briefs and Oral Argument Not Permitted. Neither briefs nor oral argument shall be allowed in support of a petition for a writ of *certiorari*, unless requested by the Supreme Court.

(d) Response to Petition for Writ of *Certiorari*. Within seven (7) days after the filing of a petition for a writ of *certiorari*, any other party to the case may, but need not, file and serve an original and 10 copies of a written response in opposition to the petition. The response may not exceed ten (10) pages in length. No citation to authority or argument may be incorporated into the response by reference to another document. The respondent may attach, as an appendix, his or her response to the motion for rehearing filed in the Court of Appeals.

(e) Decision by the Supreme Court. The Supreme Court shall act upon a petition for a writ of *certiorari* within ninety (90) days of the filing of the response provided for in subsection (d) above, or, should no response be filed, the final date upon which such response could be filed. The failure of the Court to issue such a writ within that period shall constitute a rejection of the petition and the petition shall be deemed denied.

(f) Reconsideration Not Permitted. Neither an acceptance nor a rejection of a petition for *certiorari* shall be subject to further pleading by a party for rehearing or reconsideration. Prior to final disposition, the Supreme Court may, on its own motion, find there is no need for further review and may dismiss the *certiorari* proceeding.

(g) Notification of Grant of Petition for *Certiorari*. Upon the Supreme Court's disposition of a petition for a writ of certiorari, the clerk of the Supreme Court shall immediately notify the parties.

(h) Supplemental Briefs; Record on Review. Upon notice of a grant of *certiorari*, any party may, whether requested by the Court or not, within 10 days, file an original and 10 copies of a supplemental brief not to exceed 10 pages. No additional time or pages shall be allowed for supplemental briefs. The Supreme Court may require supplemental briefs on the merits of all or some of the issues for review. The Supreme Court's review on the grant of *certiorari* shall be conducted on the record and briefs previously filed in the Court of Appeals and on any supplemental briefs filed. The Supreme Court may limit the question on review.

(i) Oral Argument. Oral argument shall not be allowed, unless requested by the Supreme Court. The Court may require oral argument.

RULE 18. [OMITTED]

consistently designate certiorari "petitions" as "petitions" and effect another technical change. 673-678 So.2d XXXIX-XL (West Miss. Cases 1996).

Effective September 25, 1995, Rule 17(b) was amended to make clear that the time for filing a petition a writ of certiorari begins to run with the entry of the judgment of the Court of Appeals on the required petition for rehearing, and to effect unrelated technical changes. 660 So.2d LXXXIII-LXXXIV (West Miss.Cases 1995).

Effective February 10, 1995, Rule 17(j) was amended to state that the clerk shall issue the mandate in accordance with Miss.R.App.P. 41. 648 So.2d XXXII (West Miss.Cases 1995).

Effective January 1, 1995, the Supreme Court promulgated Miss.R.App.P. 17, entitled "Review in the Supreme Court Following Decision by the Court of Appeals." Miss.Sup.Ct.R. 17 had been designated reserved. 644-647 So.2d LI-LIII (West Miss.Cases 1994).

Comment

Rule 17 provides a procedure by which parties may seek Supreme Court review of a judgment of the Court of Appeals. Section (a) follows Miss. Code Ann. § 9-4-3(2)(Supp. 1994) which provides that "[d]ecisions of the Court of Appeals are final and are not subject to review by the Supreme Court, except by [grant of] writ of *certiorari* . . . by the affirmative vote of four (4) of [the Supreme Court's] members."

APPENDIX E MANDATE OF STATE COURT OF APPEALS

MANDATE
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

To the Tishomingo County Circuit Court - GREETINGS:

In proceedings held in the Courtroom in the City of Jackson, Mississippi, the Court of Appeals of the State of Mississippi entered a judgment as follows:

Court of Appeals Case # 2020-CT-00710-COA
Trial Court Case #CR17-183

Brian Scott Berryman a/k/a Brian Berryman v. State of Mississippi

Tuesday, 9th day of November, 2021
Affirmed. Tishomingo County taxed with costs of appeal.

Tuesday, 15th day of February, 2022
The motion for rehearing filed by Brian Scott Berryman, pro se, is denied. Westbrooks and McDonald, JJ., would grant.

Tuesday, 15th day of February, 2022
The motion for rehearing filed by Office of State Public Defender is denied. Westbrooks, McDonald and McCarty, JJ., would grant.

Thursday, 19th day of May, 2022
DISPOSITION OF THE MISSISSIPPI SUPREME COURT - Petition for Writ of Certiorari filed by Brian Scott Berryman, pro se, is denied. To Deny: All Justices. Order entered 5/10/22.

Thursday, 19th day of May, 2022
DISPOSITION OF THE MISSISSIPPI SUPREME COURT - Petition for Writ of Certiorari filed on behalf of Appellant Brian Scott Berryman by the Office of State Public Defender - Indigent Appeals Division is denied. To Deny: Randolph, C.J., Kitchens and King, P.JJ., Coleman, Maxwell, Beam, Chamberlin and Griffis, JJ. To Grant: Ishee, J. Order entered 5/10/22.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

I, D. Jeremy Whitmire, Clerk of the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi, certify that the above judgment is a true and correct copy of the original which is authorized by law to be filed and is actually on file in my office under my custody and control.

Witness my signature and the Court's seal on May 31, 2022, A.D.

CLERK

APPENDIX F GENERAL DOCKET (CERTIFIED) - RECORD OF THE CASE

 General Docket, Criminal Cases, Circuit Court, Circuit Clerk

No. CR17-183 CFN 8290

STATE OF MISSISSIPPI
VS.

BRIAN SCOTT BERRYMAN
CTI:SHOOTING DW CTII:FELON WEAPON HAB
SHOOTING INTO A DWELLING
FELON WITH A WEAPON HABITUAL

Counsel for Plaintiff

Counsel for Defendant
William C. Bristow
JUDGE Kelly Lee Mims

97-37-29
97-37-5

DATE	ORDERS, JUDGMENTS, ETC.	
9/22/17	Indictment Filed	
9/22/17	Capias Issued	
10/05/17	MDOC DETAINER PER JUDY	
6/16/18	Demand for Trial; Motion to Dismiss, and Appointoment of Counsel	
6/16/18	Motion to Proceed in Forma-Pauperis Status	
10/10/18	Motion for Speedy and Public Trial	
10/12/18	mailed letter and filed copy of motion to defendant, emailed copy of motion to Megan at the court admin office, ADA Kyle Robbins and ADA Ray Oneal as well as DA Investigator David Austin	
11/07/18	Capias Returned Served 110718	
11/07/18	Arraignment Order 110718	103 253A
11/21/18	Motion for Preconviction Writ of Habeas Corpus	
11/21/18	Motion for Appointment of Counsel	
11/21/18	Motion to Proceed in Forma-Pauperis Status	
11/21/18	Demand for Trial; Motion to Dismiss; and Appointment of Counsel	
11/21/18	Motion to Proceed in Forma-Pauperis Status	
1/14/19	Petition for Writ of Habeas Corpus Ad Prosequendum	
1/14/19	Order for Writ of Habeas Corpus Ad Prosequendum	314
1/14/19	Writ of Habeas Corpus Ad Prosequendum	
1/15/19	Order Setting Aside Writ of Habeas Corpus Ad Prosequendum	103 353
2/04/19	Defendant's request for court docket	
2/04/19	mailed copy of court docket to defendant	
4/18/19	Assertion of Constitutional and Statutory Speedy Trial Rights from Defendant	
4/18/19	Sent copy of Assertion of Constitutional and Statutory Speedy Trial Rights to Defendant, Susan Winters, Ray, and Kyle.	
4/18/19	Mailed Defendant Copy of Docket	
6/03/19	Letter from Defendant	
6/03/19	Mailed Defendant Copy of All Court Documents	
6/21/19	Order Continuing Cause 061219	104 783
9/03/19	Petition for Writ of Habeas Corpus Ad Prosequendum	
9/03/19	Order for Writ of Habeas Corpus Ad Prosequendum 090319	105 204
9/03/19	Writ of Habeas Corpus Ad Prosequendum	
10/15/19	Motion for Appointment of Counsel	
10/15/19	Motion to Dismiss for Want of Prosecution	
10/16/19	Mailed Defendant	

** CONTINUED ON NEXT PAGE **

CIRCUIT COURT SEAL TISHOMINGO COUNTY, MS

STATE OF MISSISSIPPI
COUNTY OF TISHOMINGO
I, JOSH MCNATT, Clerk of the Circuit Court of the said County and State do hereby certify that the foregoing constitutes a true and correct copy of said instrument of writing as appears of record in CR17-183 Book on page CR17-183 of records now on file in said clerk's office.
Given under my hand and official seal, this 22 day of July 20 20
JOSH MCNATT D.C.
By

No. CR17-183 CFN 8290

STATE OF MISSISSIPPI
VS.

BRIAN SCOTT BERRYMAN
CTI:SHOOTING DW CTII:FELON WEAPON HAB
SHOOTING INTO A DWELLING
FELON WITH A WEAPON HABITUAL

Counsel for Plaintiff

Counsel for Defendant
William C. Bristow
JUDGE Kelly Lee Mims

97-37-29
97-37-5

DATE	ORDERS, JUDGMENTS, ETC.

** CONTINUED FROM PREVIOUS PAGE **

11/04/19 Letter from Defendant
11/04/19 Mailed Copy of Order and Docket to Defendant
11/13/19 Letter from Defendant
11/13/19 Mailed Copy of Docket to Defendant
11/25/19 Designation fo Record for filing in Cause(s) CR17-151, Cr17-182 and Request for Copy(s) of General Dockets in those cases from Defendant, Brian Scott Berryman
12/06/19 Motion to Proceed in Forma Pauperis, Motion Appoint Counsel
12/06/19 Notice of Appeal,With documnets sent by Mr. Berryman
12/17/19 Motion for Dismissal of Action without Prejudice
12/17/19 Proposed Order or Judgment in Defendant's Motion to Dismiss for Want of Prosecution
12/17/19 Mailed stamped filed copies of Motions and the general docket to defendant
1/21/20 Motion For Recusal of Judge Honorable Paul S. Funderburk
1/21/20 Copy of Motion for Recusal emailed to Kyle Robbins and Ray ONeal at DA's office and emailed to Jill Reinhard at the Court Administrator's Office
1/21/20 Copy of Filed Motion for Recusal of Judge Funderburk mailed to Defendant and also a copy of docket page
2/24/20 Petition for Writ of Mandamus from Defendant
2/24/20 Emailed copy of Petition for Writ of Mandamus; Kyle Robbins at DA's Office and emailed to Jill Reinhard at the Court Court Administrator's Office. Mailed filed copy to Defendant
2/27/20 Notice of Appeal with Certified Copies Sent to Supreme Court
2/27/20 Letter of Explanation Mailed to Supreme Court
2/28/20 MSSC Letter NOA rec. & Invoice
3/03/20 Invoice from MSSC
3/03/20 Letter to MSSC With Check from Tishomingo County
3/03/20 Letter to MSSC along with Certified Copy of Order to Proceed in Forma Pauperis
3/04/20 Notice of Appeal to Appelant and Certificate of Service
3/04/20 Letter from Clerk about NOA; Documents listed in letter was included
3/09/20 Show Cause Notice from Supreme Court to Defendant
3/10/20 Order Granting Defendant to Proceed in Forma Pauperis

** CONTINUED ON NEXT PAGE **

No. CR17-183 CFN 8290

STATE OF MISSISSIPPI
VS.

BRIAN SCOTT BERRYMAN
CTI:SHOOTING DW CTII:FELON WEAPON HAB
SHOOTING INTO A DWELLING
FELON WITH A WEAPON HABITUAL

Counsel for Plaintiff

Counsel for Defendant
William C. Bristow
JUDGE Kelly Lee Mims
97-37-29
97-37-5

DATE	ORDERS, JUDGMENTS, ETC.	
	** CONTINUED FROM PREVIOUS PAGE **	
3/16/20	Order (appointing Daniel Sparks as counsel) 031120	106 595
	Mailed to Mr. Berryman & Daniel Sparks 3/17/20	
	Mialed to MSSC 3/23/20	
3/16/20	Recusal Order 030620	106 597
	Mialed to Mr. berryman & Daniel Sparks 3/17/20	
	Mialed to MSSC 3/23/20	
3/23/20	Motion to Show Cause, response to MSSC show cause notice wit h letter and cert of service	
3/23/20	Letter from Clerk to MSSC with Motion to Show Cause enclosed	
4/09/20	Motion for Discovery	
4/24/20	Petition for Writ of Mandamus	
4/24/20	Motion to Proceed in Forma Pauperis Status	
4/27/20	Letter from Mississippi Supreme Court to Judge Mims Requesting a Ruling	
5/07/20	Order Requiring State to Respond	107 380
5/07/20	Trial Court's Response to Petition for Writ of Mandamus	107 381
5/07/20	Mailed stamped filed copies of Orders to defendant along with a copy of the general docket. Emailed Orders to D. Sparks, and DA's office.	
5/13/20	MSSC Order Dismissed Writ of Mandamus. Mailed copy to Mr. B erryman, DA office, and Daniel Sparks	
6/10/20	State's Response to Motions for Speedy Trial	
6/10/20	Order Setting 062220	107 458
6/10/20	Mailed Copy of Order to All Parties	
6/12/20	Request for Subpoenas	
6/12/20	Subpoenas Issued by State X 6	
6/15/20	Order Appointing Counsel	107 481
6/15/20	Order for Writ of Habeas Corpus Ad Prosequendum	107 482
6/19/20	Defendant's Rebuttal	
6/22/20	Motion to Suppress (Statement from Defendant)	
6/22/20	Motion to Suppress (Evidence)	
6/22/20	Jury Instructions Filed By Defense	
6/22/20	Exhibits from Hearing on June 22,2020	
6/23/20	Final Jury List	
6/24/20	ORDER 062420	107 524

** CONTINUED ON NEXT PAGE **

No. CR17-183 CFN 8290

STATE OF MISSISSIPPI
VS.

BRIAN SCOTT BERRYMAN
CTI:SHOOTING DW CTII:FELON WEAPON HAB
SHOOTING INTO A DWELLING
FELON WITH A WEAPON HABITUAL

Counsel for Plaintiff

Counsel for Defendant
William C. Bristow
JUDGE Kelly Lee Mims
97-37-29
97-37-5

DATE	ORDERS, JUDGMENTS, ETC.	
	** CONTINUED FROM PREVIOUS PAGE **	
6/24/20	Order Granting Motion to Dismiss Count I of CR17-183 and Denying Motion to Dismiss Count II of CR17-183, Count I and II of CR17-151	107 526
6/24/20	Order Denying Defendants Motion to Suppress	107 532
6/24/20	Jury Instructions 1-12 Given	
6/24/20	Court Reporters List of Exhibits and Estimate of an Appeal	
6/24/20	VERDICT	
6/25/20	Notice of Criminal Disposition	
6/25/20	AMENDED ORDER 062520	104 540
7/01/20	Motion for J.N.O.V, or, in the Alternative, Motion for New Trial	
7/01/20	Order Denying Defendant's Motion for J.N.O.V, or in the Alternative, A New Trial	107 571
7/01/20	Notice of Appeal	
7/01/20	Designation of Record	
7/01/20	Motion for Leave of Court to Proceed on Appeal in Forma Pauperis	
7/01/20	Order Granting Leave of Court to Proceed on Appeal in Forma Pauperis	107 572
7/01/20	Motion to Withdraw as Counsel	
7/01/20	Order Granting Withdrawal of Counsel	107 573
7/01/20	Motion for Compensation	
7/01/20	Order for Compensation	107 574
7/07/20	Mailed Notice of Appeal to the MS Supreme Court	
7/07/20	Copy of Check for Appeal	
7/07/20	Certificate of Compliance with Rule 11(b)(1)	
7/20/20	Notice of Amended Appeal	
7/20/20	Order Denying Continuance	
7/20/20	Letter from MS Supreme Court	
7/23/20	Letter Addressing Amended Appeal Documents	

APPENDIX G Miss. Code Ann. § 99-17-1

West's Annotated Mississippi Code
Title 99. Criminal Procedure
Chapter 17. Trial

Miss. Code Ann. § 99-17-1

§ 99-17-1. Trial within 270 days of arraignment

Currentness

Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned.

Credits
Laws 1976, Ch. 420, § 1, eff. July 1, 1976.

Notes of Decisions (649)

Miss. Code Ann. § 99-17-1, MS ST § 99-17-1
The Statutes and Constitution are current with laws from the 2021 Regular Session effective through July 1, 2021. Some statute sections may be more current, see credits for details. The statutes are subject to changes provided by the Joint Legislative Committee on Compilation, Revision and Publication of Legislation.

End of Document

APPENDIX H

MISS. CODE ANN. § 99-19-81 (FRONT)
MISS. CODE ANN. § 99-19-83 (BACK)
HABITUAL CRIMINAL STATUES

West's Annotated Mississippi Code
Title 99. Criminal Procedure
Chapter 19. Judgment, Sentence, and Execution
Sentencing of Habitual Criminals

Miss. Code Ann. § 99-19-81

§ 99-19-81. Habitual criminals; maximum term

Effective: July 1, 2018
Currentness

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony unless the court provides an explanation in its sentencing order setting forth the cause for deviating from the maximum sentence, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Credits

Laws 1976, Ch. 470, § 1, eff. January 1, 1977. Brought forward by Laws 2014, Ch. 457 (H.B. No. 585), § 79, eff. July 1, 2014. Amended by Laws 2018, Ch. 416 (H.B. No. 387), § 12, eff. July 1, 2018.

Notes of Decisions (585)

Miss. Code Ann. § 99-19-81, MS ST § 99-19-81
The Statutes and Constitution are current with laws from the 2021 Regular Session effective through July 1, 2021. Some statute sections may be more current, see credits for details. The statutes are subject to changes provided by the Joint Legislative Committee on Compilation, Revision and Publication of Legislation.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or Preempted Validity Called into Doubt by Graham v. Florida, U.S., May 17, 2010

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Annotated Mississippi Code
Title 99. Criminal Procedure
Chapter 19. Judgment, Sentence, and Execution
Sentencing of Habitual Criminals

Miss. Code Ann. § 99-19-83

§ 99-19-83. Habitual criminals; life imprisonments

Currentness

Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more, whether served concurrently or not, in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence, as defined by Section 97-3-2, shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole, probation or any other form of early release from actual physical custody within the Department of Corrections.

Credits

Laws 1976, Ch. 470, § 2, eff. January 1, 1977. Amended by Laws 2014, Ch. 457 (H.B. No. 585), § 78, eff. July 1, 2014.

Notes of Decisions (306)

Miss. Code Ann. § 99-19-83, MS ST § 99-19-83

The Statutes and Constitution are current with laws from the 2021 Regular Session effective through July 1, 2021. Some statute sections may be more current, see credits for details. The statutes are subject to changes provided by the Joint Legislative Committee on Compilation, Revision and Publication of Legislation.

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APPENDIX I Miss. Code Ann. § 97-37-5

APPENDIX I

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's Annotated Mississippi Code
Title 97. Crimes
Chapter 37. Weapons and Explosives
General Provisions

Miss. Code Ann. § 97-37-5

§ 97-37-5. Possession by felon

Effective: July 1, 2021
Currentness

(1) It shall be unlawful for any person who has been convicted of a felony under the laws of this state, any other state, or of the United States to possess any firearm or any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, or any muffler or silencer for any firearm unless such person has received a pardon for such felony, has received a relief from disability pursuant to Section 925(c) of Title 18 of the United States Code, or has received a certificate of rehabilitation pursuant to subsection (3) of this section.

(2) Any person violating this section shall be guilty of a felony and, upon conviction thereof, shall be fined not more than Five Thousand Dollars ($5,000.00), or committed to the custody of the State Department of Corrections for not less than one (1) year nor more than ten (10) years, or both.

(3) A person who has been convicted of a felony under the laws of this state, under the laws of another state, under federal law or in state military court may apply for a certificate of rehabilitation as provided in this section. If the person was convicted of a felony under the laws of this state, he or she may apply to the court in which he was convicted for a certificate of rehabilitation. If the person was convicted of a felony under the laws of another state, under federal law or in state military court, he or she may apply to the court in the person's county of residence for a certificate of rehabilitation. A person convicted of a felony under the laws of another state, under federal law or in state military court shall attach a certified copy of his or her judgment and a certified copy of his or her completion of sentence to the petition for a certificate of rehabilitation. The court may grant such certificate in its discretion upon a showing to the satisfaction of the court that the applicant has been rehabilitated and has led a useful, productive and law-abiding life since the completion of his or her sentence and upon the finding of the court that he or she will not be likely to act in a manner dangerous to public safety.

(4)(a) A person who is discharged from court-ordered mental health treatment may petition the court which entered the commitment order for an order stating that the person qualifies for relief from a firearms disability.

(b) In determining whether to grant relief, the court must hear and consider evidence about:

(i) The circumstances that led to imposition of the firearms disability under 18 USCS, Section 922(d)(4);

APPENDIX J STATE COURT OF APPEALS OPINION

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2020-KA-00710-COA

BRIAN SCOTT BERRYMAN A/K/A BRIAN BERRYMAN — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	06/25/2020
TRIAL JUDGE:	HON. KELLY LEE MIMS
COURT FROM WHICH APPEALED:	TISHOMINGO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: MOLLIE MARIE McMILLIN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ALLISON ELIZABETH HORNE
DISTRICT ATTORNEY:	JOHN DAVID WEDDLE
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 11/09/2021
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

WILSON, P.J., FOR THE COURT:

¶1. Brian Berryman was arrested for unlawful possession of a firearm by a felon and other offenses. Prior to his arrest, Berryman had been on parole from a life sentence for capital murder and had absconded from supervision. Based on his prior parole violations, Berryman's parole was revoked, and he was returned to the custody of the Mississippi Department of Corrections (MDOC) while he awaited trial in the present case. Berryman eventually was tried and convicted of unlawful possession of a firearm by a felon. The trial judge sentenced Berryman as a violent habitual offender to a term of life imprisonment

without eligibility for parole.

¶2. On appeal, Berryman argues that his constitutional right to a speedy trial was violated by the forty-month delay between his arrest and trial; that his statutory right to a speedy trial was violated by the nineteen-month delay between his arraignment and trial; and that he should not have been sentenced as a violent habitual offender because his indictment did not put him on notice that the State was seeking a life sentence. For the reasons discussed below, we find no reversible error and affirm.

FACTS AND PROCEDURAL HISTORY

Berryman's Arrest

¶3. In the early morning hours of February 6, 2017, David Thacker called 911 and reported that his neighbor, Berryman, had come inside his trailer and fired a gun into his bedroom. Deputy Scott Dalton from the Tishomingo County Sheriff's Office responded to the trailer on County Road 344 in the Goat Island area in the northern part of Tishomingo County. Dalton took statements from Thacker and Thacker's girlfriend, Tina Alexander. Thacker and Alexander both identified Berryman as the shooter. Dalton then entered the trailer and recovered eight spent shell casings from a .22 caliber gun, one live round for a .22-caliber gun, and a pink dog leash that did not belong to Thacker or Alexander. Dalton also observed bullet holes in the bedroom door and in the wall inside the bedroom.

¶4. Dalton and two other deputies then proceeded to Berryman's house, which was two houses away. Two large dogs were chained up outside the home, and the deputies ordered Berryman to come out and put up the dogs. Berryman put the dogs in a pen and was then

arrested. Berryman's face was bruised and bloodied, and he claimed that Thacker had "beat him up." Berryman then told the deputies that he did not have any guns in his house but that they "were free to check." The deputies entered the house and found a .380-caliber pistol behind a speaker in the living room and a .22-caliber rifle in the laundry room behind the washer and dryer. The deputies also found a box of .22-caliber ammunition in the bedroom and a box containing both .22-caliber and .380-caliber ammunition in the laundry room. The deputies also found hydrocodone and oxycodone inside the house.

¶5. Berryman was taken to the Tishomingo County Sheriff's Office. He was advised of and waived his *Miranda* rights and agreed to talk to Investigator Greg Mitchell. Berryman subsequently signed a written statement setting out his version of events. In his written statement, Berryman claimed,

> I have known my neighbor "Tennessee" for less than a year. That was the nickname I knew him by. I was told today by the investigator that his name was David Thacker. I told "Tennessee" that my name was "Rick." I had let "Tennessee" borrow tools from me and DVDs. When he would borrow DVDs, they would be scratched up or something would be wrong with them. "Tennessee" worried me to death about one movie all the time and finally this past weekend, he knew I had some moonshine and asked me to bring it to him where he could get a few shots of it. I went over to his trailer and let him and his girlfriend, Tina, have a couple shots of the "shine." While I was sitting on the couch, "Tennessee" began asking me again about borrowing that DVD. I told him again he couldn't borrow it and the next thing I knew, "Tennessee" had hit me across the face and knocked my glasses off. He hit me about three times in the face and was telling me, like he has always, that I didn't know who I was messing with. I left and I was really pissed about him hitting me, so a little bit later, I grabbed my .22 rifle and my .380 pistol and drove over to "Tennessee" trailer. I went up the back porch and opened the door. The bedroom was to the right and I yelled "Hey Tennessee!" At this time, he jumped up from the bed and grabbed the barrel of my rifle. [Tina] ran toward the front door and I then fired off what I thought was three or four rounds to make him let go of the barrel. When he let go, "Tennessee" ran past me on the

> wooden porch and fell through it. He pulled himself up and ran down the stairs of the porch heading back down the road toward my house. At some point, my dog lead fell out of my jacket and I didn't know that it had until I was shown a picture of it laying in the floor of "Tennessee" trailer by the investigator. I walked back to my vehicle and drove back to my house. I knew the law would be coming, so I turned on the lights to my house and started getting drunk. My only intention that night was to "scare" him and I think I done that. I wasn't going to kill them because if I was, I would had just shot them both while they were in bed, but I didn't.

¶6. Berryman had been paroled from his life sentence for capital murder in 2009, but he had absconded from supervision in 2013. Thus, by the time of Berryman's arrest in this case, there was already an outstanding warrant for his arrest for parole violations. After Berryman's arrest, he was remanded to MDOC's custody, and his parole was revoked.

Pretrial Proceedings

¶7. In September 2017, a Tishomingo County grand jury indicted Berryman for shooting a firearm into a dwelling and unlawfully possessing a firearm as a felon.[1] Berryman was indicted as a violent habitual offender based on his prior convictions for robbery, armed robbery, burglary of a dwelling, and capital murder.

¶8. In June 2018, Berryman filed a pro se demand for trial and motion to dismiss in which he alleged a denial of his right to a speedy trial. Berryman also requested appointed counsel. In October 2018, Berryman filed another pro se demand for trial and motion to dismiss.

¶9. On November 7, 2018, Berryman was finally arraigned. The court appointed John White to represent Berryman. However, White had been elected to the circuit court (without opposition) on November 6, 2018. Therefore, White was unable to represent Berryman after

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[1] Berryman was also separately indicted for two counts of possession of a controlled substance (hydrocodone and oxycodone). Those charges are not at issue in this appeal.

his arraignment. The arraignment order, which both White and Berryman signed, stated that the case was "continued on motion of the Defendant and set for trial during the next regularly scheduled term." On November 21, 2018, Berryman filed another pro se demand for trial, motion to dismiss, and motion for appointed counsel.

¶10. On January 7, 2019, the court entered an order appointing Richard Bowen to represent all indigent defendants in Tishomingo County. However, the order was not filed in this case, and Berryman was never told that Bowen was representing him. Bowen was listed as Berryman's attorney on the criminal dockets for the May 2019, September 2019, January 2020, and April 2020 court terms. However, sometime in the first half 2019, Bowen, a former assistant district attorney, realized that he had a conflict because he had previously prosecuted Berryman for capital murder. Bowen then informed Daniel Sparks, who was the conflict public defender, that he would need to represent Berryman.

¶11. In April 2019, Berryman filed another pro se demand for trial and motion to dismiss.

¶12. In June 2019, the court entered an order continuing the case. The order stated that the continuance was granted "on Motion of the Defendant" and was signed by Sparks as counsel for Berryman. However, the record does not contain a prior motion for a continuance, entry of appearance by Sparks, or order appointing Sparks. At a subsequent hearing, Berryman testified that he met Sparks for the first and only time in September 2019. He said that Sparks "introduced himself" and that they "had about a fifteen minute conversation."

¶13. In October 2019, Berryman filed a pro se motion to dismiss for want of prosecution, again alleging a denial of his right to a speedy trial. He also filed another pro se motion for

appointed counsel.

¶14. In November and December 2019, Berryman attempted to appeal the June 2019 order continuing his case. Berryman alleged that he had only recently become aware of the order. He also alleged that Sparks lacked authority to request a continuance because Sparks had never been appointed to represent him. Berryman also continued to maintain that he had been denied a speedy trial. However, the Supreme Court dismissed Berryman's appeals for lack of an appealable final judgment. *Berryman v. State*, No. 2020-TS-00198 (Miss. July 9, 2020); *Berryman v. State*, No. 2020-TS-00218 (Miss. July 9, 2020).

¶15. In January 2020, Berryman filed a motion for the recusal of Circuit Judge Paul Funderburk. Berryman argued that Judge Funderburk should recuse because he had been a prosecutor in a case in which Berryman was convicted of robbery in 1983. In March 2020, Judge Funderburk recused himself "[t]o avoid even the appearance of impropriety."

¶16. In March 2020, Circuit Judge Kelly Mims (the trial judge) ruled on Berryman's multiple motions to appoint counsel. The trial judge stated that although Berryman was correct that no order appointing counsel had been entered, Berryman had been and continued to be represented by counsel. The judge noted that White had been appointed to represent Berryman at his arraignment, although White could not continue the representation due to his election to the circuit court. Therefore, Berryman's case was eventually assigned to Sparks, although no order appointing Sparks had been entered. Therefore, on March 16, 2020, the judge entered an order appointing Sparks "nunc pro tunc."

¶17. In April 2020, Bowen filed a motion for discovery on behalf of Berryman. As noted

above, however, prior court orders and statements in the record indicate that Bowen had realized a conflict and ceased representing Berryman months earlier. There is no explanation in the record for why Bowen filed this motion.

¶18. In April 2020, Berryman filed a petition for writ of mandamus in which he asked the Supreme Court to order the trial court to rule on his October 2019 motion to dismiss for want of prosecution. In response, the trial judge informed the Supreme Court that Berryman had never attempted to notice his pro se motion for a hearing. In addition, the trial judge ordered the State to respond to Berryman's motion and set the motion for a hearing on June 22, 2020. Based on the trial judge's response and order, the Supreme Court dismissed Berryman's mandamus petition. *Berryman v. State*, No. 2020-TS-00198 (May 5, 2020); *Berryman v. State*, No. 2020-TS-00218 (May 5, 2020).

¶19. On June 11, 2020, the trial judge appointed Will Bristow to represent Berryman. Bristow was appointed because Sparks had been elected to the Mississippi Senate in 2019, and the 2020 Regular Session of the Legislature continued until October 2020. It does not appear that Sparks ever played any substantive role in this case.

¶20. On June 22, 2020, Bristow filed a motion to suppress Berryman's post-arrest statements to law enforcement and a motion to suppress the guns found during the search of Berryman's home. The motions alleged that Berryman was intoxicated at the time he made his statements and consented to the search.

Speedy-Trial Hearing

¶21. On June 22, 2020, the trial judge held a hearing on Berryman's speedy-trial motion

and motions to suppress. During the hearing, Berryman testified that potential defense witness Marshall Edge had died on February 22, 2018. Berryman testified that Edge lived in a house between the house where Berryman was staying and the Thacker/Alexander trailer. According to Berryman, Edge was sitting on his porch during part of the night in question and could have testified that Berryman did not have a gun with him when he walked back to the Thacker/Alexander trailer. Berryman had attached Edge's obituary in support of his prior pro se motions.

¶22. Berryman also testified that another neighbor, Nancy Brooks, had told him that Edge wanted to testify in his behalf. Berryman said that Brooks knew Edge and was with him when he died. Berryman also testified that he had communicated with Brooks by letter and telephone while he was incarcerated. However, Berryman did not call Brooks as a witness at the hearing. Berryman also claimed that Edge had written a letter to the Parole Board in support of Berryman. However, Berryman could not produce a copy of the letter.[2]

¶23. Following the hearing, the trial judge found that Edge's death had prejudiced Berryman's defense on Count I of the indictment (shooting into a dwelling) but that Berryman had not suffered any prejudice with respect to the Count II (unlawful possession of a firearm by a felon) or the two separate drug charges. *See supra* note 1. In addition, after

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[2] Berryman also testified that another potential defense witness, Clinton Buddy Holley, died about six months after Edge. Berryman claimed that Holley could have testified that Thacker had attempted to sell him a .22-caliber rifle. However, Berryman offered no other evidence of Holley's existence or his death. The trial judge found that Berryman's claim regarding Holley was too "speculative" and not credible, and Berryman does not mention Holley in his brief on appeal.

considering the totality of the circumstances and the *Barker* factors,[3] the trial judge found that Berryman's right to a speedy trial had been violated with respect to Count I but not with respect to Count II or the drug charges. Accordingly, the trial judge dismissed Count I of the indictment only and denied Berryman's motion to dismiss Count II and the drug charges. The trial judge subsequently entered a written order summarizing his findings and rulings. The trial judge also denied both of Berryman's motions to suppress.[4]

Trial

¶24. Berryman's trial began the next day. Deputy Dalton, Investigator Mitchell, and the two other deputies involved in Berryman's arrest testified. The State also introduced Berryman's written statement. Neither Thacker nor Alexander testified.[5]

¶25. Berryman was the only defense witness. His testimony at trial varied significantly from his written statement. We summarize his testimony as follows: Berryman's brother, who lived in Chicago, owned the house on County Road 344 where Berryman was arrested. Berryman stayed there off and on while he did work on the house for his brother. Thacker and Alexander lived in a trailer nearby, and Berryman had known them for about a year. Around 8 p.m. on February 6, 2017, Thacker invited Berryman over to his trailer. Berryman

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[3] *Barker v. Wingo*, 407 U.S. 514 (1972).

[4] On appeal, Berryman does not challenge the denial of his motions to suppress.

[5] Mitchell testified that he tried to talk to Thacker and Alexander a few days after the shooting but could not find them. He further testified that he had "tried to locate [Thacker and Alexander] through various means through law enforcement and could not locate them." Mitchell also acknowledged that Thacker and Alexander had provided "misleading information as far as Social Security numbers and whatnot."

brought some moonshine, and he, Thacker, and Alexander drank for about two hours.

¶26. Around 10 p.m., Thacker asked Berryman to borrow $25 to buy some crystal meth, but Berryman refused. A short time later, Thacker left the room, and Alexander urged Berryman to loan Thacker the money. Alexander told Berryman that she wanted to get high, that she would make sure he got his money back, and that she would have sex with him while Thacker was gone. Berryman then loaned Thacker the money. Thacker asked Berryman if he wanted to go with him to buy the drugs, but Berryman asked Thacker just to drop him off at his house. After Thacker drove Berryman home, Berryman walked back to the Thacker/Alexander trailer, and Alexander began performing oral sex on him.

¶27. Thacker walked in on Berryman and Alexander. Thacker "was very upset" and carrying a rifle. Berryman tried to close the bedroom door on Thacker, but Thacker fired several shots into the bedroom. Berryman tried to take the rifle from Thacker, but "it fired a couple of more times" while they struggled over it. While the two men fought, Alexander ran out of the trailer. Berryman finally took the gun from Thacker. Thacker threatened to kill Berryman but then ran away, leaving Berryman alone in the trailer.

¶28. Berryman returned to his brother's house with the rifle. He hid the rifle in the laundry room behind the washer and dryer. Berryman knew that as a convicted felon he was not allowed to possess a gun,[6] but Thacker "was trying to kill [him] with [the rifle]," and he "wasn't fixing to leave [Thacker] nothing to kill [him] with." Berryman drank some whiskey and did a line of crystal meth while he "kept a watch out" for Thacker. Around 11 p.m.,

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[6] Berryman stipulated that he had a prior felony conviction, and the stipulation was read to the jury.

Thacker entered the house unannounced. The two men argued and began fighting again, and Thacker pulled out a pistol, which he fired into the floor during the altercation. Then one of Berryman's dogs, a German Shepherd-and-Chow mix named Eli, "bit [Thacker] on the back side of his leg and snatched him to the ground." Berryman called Eli off of Thacker, and Thacker left the house, cursing and threatening to kill Berryman as he went. Berryman thought that Thacker must have dropped his pistol during their fight and that it was the same pistol that deputies later found behind a speaker in the living room.

¶29. Berryman then drank some more whiskey and did some more crystal meth, and the deputies arrived and arrested him a few hours later. Berryman denied that he consented to a search of his brother's house, he denied that he made any oral statement to Mitchell, and he denied that he signed or ever saw the written statement that was admitted into evidence at trial. He claimed that the signature on the statement was forged.

¶30. On cross-examination, Berryman was unable to explain the boxes of .22-caliber and .380-caliber ammunition found in the house. He testified that he did not take any boxes of ammunition with him when he left Thacker's trailer.

¶31. The jury found Berryman guilty of unlawfully possessing a firearm as a felon, and the court sentenced him as a violent habitual offender to life imprisonment without eligibility for parole. Berryman filed a motion for judgment notwithstanding the verdict or a new trial, which was denied, and a notice of appeal. On appeal, he argues that the felon-in-possession charge should have been dismissed because he was denied a speedy trial and that he should not have been sentenced as a violent habitual offender because his indictment did not put him

on notice that the State would seek a sentence of life without parole.

ANALYSIS

I. Speedy Trial

A. Constitutional Right

¶32. The Mississippi Constitution and the United States Constitution both protect the defendant's right to "a speedy . . . trial." Miss. Const. art. 3, § 26; U.S. Const. amend. VI. "When considering an alleged violation of a defendant's [state or federal constitutional] right to a speedy trial, [the Mississippi Supreme] Court applies the four-part test developed by the United States Supreme Court in *Barker*," *supra* note 3. *Newell v. State*, 175 So. 3d 1260, 1269 (¶19) (Miss. 2015). "The *Barker* test 'requires a balancing of four factors: (1) length of delay; (2) reasons for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant.'" *Reed v. State*, 191 So. 3d 134, 139 (¶8) (Miss. Ct. App. 2016) (quoting *Taylor v. State*, 162 So. 3d 780, 783 (¶6) (Miss. 2015)). *Barker* "held that courts must 'engage in a difficult and sensitive balancing process' of the four factors because none of the factors is 'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.'" *Id.* (quoting *Barker*, 407 U.S. at 533). "No mathematical formula exists according to which the *Barker* weighing and balancing process must be performed." *Flora v. State*, 925 So. 2d 797, 815 (¶61) (Miss. 2006).

¶33. A trial judge's ruling on a speedy-trial claim encompasses questions of fact, including whether there was "good cause" for a delay and whether the defendant has been prejudiced

by any delay. *State v. Woodall*, 801 So. 2d 678, 680-81, 687 (¶¶7, 29, 31) (Miss. 2001). We must affirm the trial judge's factual findings if they are "supported by substantial, credible evidence." *Id.* (quotation marks omitted). We will reverse the trial judge's factual findings only if there is "no probative evidence" to support them and they are "clearly erroneous." *Id.*

1. Length of the Delay

¶34. "[T]he constitutional right to a speedy trial attaches when a person has been accused." *Stark v. State*, 911 So. 2d 447, 450 (¶7) (Miss. 2005) (quoting *Hersick v. State*, 904 So. 2d 116, 121 (¶5) (Miss. 2004)). Therefore, the speedy-trial clock begins running "with the defendant's arrest, indictment, or information," whichever occurs first. *Id.* "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. It is now well settled that "any delay exceeding eight months is presumptively prejudicial" and requires analysis of the remaining *Barker* factors. *Stark*, 911 So. 2d at 450 (¶7) (citing *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989)).

¶35. In this case, Berryman was arrested on February 6, 2017, but was not tried until June 23, 2020, a delay of more than forty months. Thus, the length of the delay is presumptively prejudicial. However, our Supreme Court has made "clear" that this "does not mean that *actual* prejudice to the defendant exists. Rather, actual prejudice is determined at a different point in the *Barker* analysis." *Graham v. State*, 185 So. 3d 992, 1005 (¶41) (Miss. 2016) (quoting *Johnson v. State*, 68 So. 3d 1239, 1242 (¶7) (Miss. 2011)). A delay in excess of

eight months simply means that we must analyze the remaining *Barker* factors. *Id.* at (¶40).

2. Reasons for the Delay

¶36. "When the length of the delay is presumptively prejudicial, the burden shifts to the prosecution to produce evidence justifying the delay." *Bateman v. State*, 125 So. 3d 616, 629 (¶45) (Miss. 2013). "This Court must then determine whether the delay is attributable to the State or the defendant." *Collins v. State*, 232 So. 3d 739, 745 (¶20) (Miss. Ct. App. 2017), *cert. denied*, 229 So. 3d 123 (Miss. 2017). Different reasons for delay are assigned different weights. *Barker*, 407 U.S. at 532. "'Deliberate attempts to delay the trial in order to hamper the defense are weighed heavily against the State. On the other hand, '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.'" *Collins*, 232 So. 3d at 745 (¶20) (quoting *Hardy v. State*, 137 So. 3d 289, 299 (¶30) (Miss. 2014)). Basically, "the State must prove either that the defendant prompted the delay or that the State had good cause." *De La Beckwith v. State*, 707 So. 2d 547, 606 (Miss. 1997). "We will uphold a trial court's factual determination regarding whether delay arose from good cause if it is based on substantial, credible evidence." *Reed*, 191 So. 3d at 139 (¶9) (citing *DeLoach v. State*, 722 So. 2d 512, 516 (¶12) (Miss. 1998)).

i. Arrest to Indictment

¶37. In this case, approximately seven months elapsed between Berryman's arrest in February 2017 and his indictment in September 2017. The State argues that this delay should

not be counted against the State because it was still attempting to locate the victims, and its investigation of the crime was not yet complete on May 22, 2017, when the next available grand jury was empaneled following Berryman's arrest. The State presented the case to the next grand jury in September 2017. Citing *Woodall, supra*, the trial judge found this to be a reasonable investigative delay and, thus, a "neutral delay" that should not be weighed against the State or Berryman. There is substantial evidence to support the trial judge's finding. In *Woodall*, our Supreme Court stated that "investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused." *Woodall*, 801 So. 2d at 682 (¶15) (quoting *United States v. Lovasco*, 431 U.S. 783, 795 (1977)). The trial judge did not err by finding that the investigative delay in this case is neutral or weighs "only slightly against the State." *Id.* at 684 (¶19).

ii. Indictment to Arraignment

¶38. About fourteen more months passed between Berryman's indictment and his arraignment in November 2018. The State says that this delay occurred because the capias and indictment had not been served on Berryman. Although the State's explanation is not entirely clear, the State seems to say, as the trial judge put it, that "the State was unaware of where [Berryman] was." The trial judge rightly found this explanation to be inadequate because Berryman was "in the custody of the State" the entire time, and "it's incumbent on the State to know where [persons in its custody] are." *Cf. Cressionnie v. State*, 797 So. 2d 289, 292 (¶8) (Miss. Ct. App. 2001) (stating that for speedy-trial purposes "the State of Mississippi is a monolithic entity" and that the "prosecution cannot excuse the failure of the

State to act by ascribing that inactivity to the Governor"). Moreover, despite not having been served with an indictment or arraigned, Berryman filed two pro se demands for trial and motions to dismiss during this time, both of which clearly showed that he was being held at the South Mississippi Correctional Institute in Leakesville. A simple search of MDOC's public website or a phone call should have revealed the same. The trial judge found that this delay had to be weighed against the State, but citing *Adams v. State*, 583 So. 2d 165, 168 (Miss. 1991), he found that it should not "weigh . . . heavily" against the State "because it was negligent and not intentional." While we agree with the trial judge that there is no evidence of bad faith or malicious intent on the part of the State, we conclude that such a lengthy delay in arraigning an unrepresented defendant who is already in state custody must weigh more heavily against the State.

iii. Arraignment to First Trial Setting

¶39. About two months passed between Berryman's arraignment and the first available trial setting in January 2019. The trial judge found that this delay was attributable to and weighed against Berryman because Berryman and his new counsel, John White, who was appointed at the arraignment, both signed a standard form arraignment order continuing the case to the next trial setting "on motion of the Defendant." The trial judge reasoned that a new attorney needed time to request discovery, meet with the defendant, and investigate the charges.

¶40. Ordinarily we would agree that a continuance requested by defense counsel for such reasons would weigh against the defendant. *May v. State*, 285 So. 3d 639, 649 (¶30) (Miss. Ct. App. 2019) (holding that a defendant "is bound by his lawyer's decisions as to the timing

of trial and the need for a continuance" despite the defendant's prior "pro se demand for a speedy trial"), *cert. denied*, 284 So. 3d 751 (Miss. 2019). But in the circumstances of this case, we cannot weigh this delay against Berryman, who by this time had already been in state custody for almost two years. The fact that Berryman still had not been appointed counsel or received any discovery at this late date is the fault of the State, not Berryman. Furthermore, it was known at the time of White's appointment that he could not represent Berryman because he had already been elected to the circuit court and would take office prior to the next available trial setting.

iv. January 2019 to September 2019

¶41. The next period of delay is attributable to Bowen's withdrawal due to a conflict and a request for a continuance made by Sparks, albeit without Berryman's consent or approval. The trial judge found that the delay caused by Bowen's withdrawal was neutral and that the delay caused by Sparks's request for a continuance counted against Berryman. Ordinarily we would agree with this analysis. *See, e.g.*, *Wiley v. State*, 582 So. 2d 1008, 1012 (Miss. 1991) (stating that delays caused by the withdrawal of defense counsel "cannot be weighed against the State"); *May*, 285 So. 3d at 649 (¶30). But in the particular circumstances of this case, we cannot attribute any part of this delay to Berryman. Sparks requested a continuance only because the case had only recently been assigned to him. The fact that Berryman was without counsel who could actually represent him for more than two years after his arrest was not Berryman's fault. Indeed, Berryman had made multiple requests for appointed counsel prior to this time. Accordingly, we conclude that this eight-month delay related to Bowen's

withdrawal is simply neutral.

v. September 2019 to January 2020

¶42. Berryman's case was assigned to Circuit Judge James L. Roberts Jr., since-retired, during the September 2019 term of court. However, Judge Roberts was ill and unable to preside during that term. The trial judge found that delay due to Judge Roberts's unavailability could not be counted against the State. We agree that this delay is neutral. *See State v. Magnusen*, 646 So. 2d 1275, 1281 (Miss. 1994).

vi. January 2020 to April 2020

¶43. Judge Roberts was still unavailable in January 2020. As a result, on January 13, 2020, Judge Funderburk entered an order cancelling the January 2020 term of court for Tishomingo County. On January 21, 2020, Berryman filed a pro se motion to recuse Judge Funderburk on the ground that he had prosecuted Berryman in an unrelated case in 1983. Several weeks later, Judge Funderburk recused himself "[t]o avoid even the appearance of impropriety." It does not appear that Judge Funderburk's recusal caused any delay in the case. In any event, a judge's unavailability due to illness and a judicial recusal are both neutral reasons for delay that do not count against either party. *Magnusen*, 646 So. 2d at 1281; *Scott v. State*, 231 So. 3d 1024, 1041 (¶72) (Miss. Ct. App. 2016), *aff'd by an equally divided court*, 231 So. 3d 995 (Miss. 2017).

vii. April 2020 to June 2020

¶44. No trials could be held during the next scheduled term of court in April 2020 because MDOC was not transporting prisoners due to the COVID-19 pandemic. *See also* Emergency

Administrative Order–2, *In re Emergency Order Related to Coronavirus (COVID-19)*, No. 2020-AD-00001-SCT (Miss. Mar. 15, 2020) (authorizing judges "to postpone any jury trials . . . scheduled through May 15, 2020"). The resulting delay is not weighed against either party. Berryman's case finally proceeded to trial on June 23, 2020.

viii. Summary of Reasons for Delay

¶45. In summary, the approximately seven-month delay between arrest and indictment is neutral or weighs slightly against the State; the approximately fourteen-month delay between indictment and arraignment weighs against the State; and the post-arraignment delay of approximately nineteen months—due to changes in counsel, the illness of a judge, and COVID-19—is neutral and is not weighed against either party.

3. Assertion of the Right to a Speedy Trial

¶46. Berryman clearly and repeatedly asserted his right to a speedy trial, beginning before he was even arraigned. The trial judge found, and the State concedes, that this factor favors Berryman. We agree.

4. Prejudice

¶47. "To determine whether the delay resulted in actual prejudice, the Court considers three interests that the right to a speedy trial was meant to protect: '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.'" *Taylor*, 162 So. 3d at 787 (¶16) (quoting *Jenkins v. State*, 947 So. 2d 270, 277 (¶21) (Miss. 2006)). "Of these three interests, the last is the most important; and when violated, the most prejudicial to the defendant." *Collins*,

232 So. 3d at 746 (¶26) (quoting *Hersick*, 904 So. 2d at 123 (¶18)). "Generally, proof of prejudice entails the loss of evidence, death of witnesses, or staleness of an investigation." *McCormick v. State*, 183 So. 3d 898, 903 (¶21) (Miss. Ct. App. 2015) (quoting *Sharp v. State*, 786 So. 2d 372, 381 (¶19) (Miss. 2001)). The defendant "bears the burden of showing actual prejudice, since the defendant is clearly in the best position to show prejudice under this prong." *Reed*, 191 So. 3d at 141 (¶19) (brackets and quotation marks omitted).

¶48. On appeal, Berryman does not claim prejudice in the form of "oppressive pretrial incarceration" or "anxiety or concern." These interests are inapplicable in this case because Berryman had violated his parole prior to being charged in this case, and he was returned to MDOC's custody to serve his life sentence for capital murder for that reason. Put simply, Berryman would have been incarcerated at all relevant times regardless of any delays in the prosecution of this case.

¶49. Thus, the only issue under this factor is whether Berryman met his burden of proving that delays in the case prejudiced his defense. Berryman asserts that Edge, who passed away in February 2018, could have provided helpful testimony in support of his defense of necessity. As set out above, Berryman claimed that he took the rifle[7] from Thacker and maintained possession of it only to prevent Thacker from killing him, and the jury was instructed on Berryman's defense of necessity. Berryman argues that Edge would have supported this defense because, according to Berryman, Edge was sitting on his porch when Berryman walked back to the Thacker/Alexander trailer, and Edge could have testified that

[7] The indictment and jury instructions specifically identified the rifle as the relevant gun and did not mention the pistol.

Berryman was not carrying a rifle at that time.

¶50. Berryman claimed that his account of what Edge would have testified to could be corroborated, but he failed to produce any corroborating evidence. Berryman claimed that Edge told another neighbor, Brooks, what he would testify to. Berryman also testified that he kept in touch with Brooks through letters and by telephone while he was incarcerated. However, Berryman failed to call Brooks as a witness at the speedy-trial hearing. Berryman also claimed that Edge wrote a letter to the Parole Board in support of Berryman. However, Berryman did not have a copy of the letter. Moreover, prior to Edge's death, Berryman never informed law enforcement that Edge possessed exculpatory information.

¶51. In *Woodall*, *supra*, the Supreme Court held that a defendant failed to establish prejudice because he "offered no concrete proof, other than his broad assertions, as to what relevant knowledge [a deceased witness] had in [the] matter" or what the deceased witness "would have testified to if alive." *Woodall*, 801 So. 2d at 686-87 (¶¶26, 29). The Supreme Court reasoned that the defendant's claim of prejudice "remain[ed] speculative" because the defendant failed to preserve the deceased witness's testimony "through deposition, written or recorded statement, or otherwise." *Id.* at 687 (¶29) (quotation marks omitted). The Court stated that "[t]he assertions of [the defendant] and his attorney [did] not constitute substantial, credible evidence" to support his claim. *Id.* Likewise in this case, Berryman offered only unsubstantiated assertions regarding Edge's possible testimony. Berryman offered "no concrete proof" that Edge could have exculpated him.

¶52. Moreover, the exculpatory inference that Berryman would have us draw from the

testimony that Edge allegedly could have given was directly contradicted by Berryman's own signed statement. As set out above, Berryman himself stated, "I grabbed *my* .22 rifle and *my* .380 pistol and drove over to [Thacker's] trailer." (Emphasis added). Given that Berryman himself told Investigator Mitchell that he took two guns—*his* guns—to Thacker's trailer, we cannot say that Berryman was prejudiced by the absence of Edge's testimony that he saw Berryman without a rifle at another point in the night. In short, we agree with the trial judge's finding that Berryman was not actually prejudiced in his defense of the felon-in-possession charge. The absence of actual prejudice "weighs heavily against [the defendant] and in favor of the State." *DeLoach v. State*, 722 So. 2d 512, 518 (¶23) (Miss. 1998).

5. Summary of the *Barker* Factors

¶53. In weighing the *Barker* factors, we must consider the "totality of the circumstances," and "no one factor is dispositive." *Price v. State*, 898 So. 2d 641, 648 (¶11) (Miss. 2005). The factors are not a "mathematical formula." *Id.* "The weight given each [of the *Barker* factors] necessarily turns on the peculiar facts and circumstances of each case, the quality of evidence available on each factor and, in the absence of evidence, identification of the party with the risk of non-persuasion." *Jaco v. State*, 574 So. 2d 625, 630 (Miss. 1990).

¶54. Here, the overall length of the delay from arrest to trial is presumptively prejudicial. With respect to the second factor, the investigative delay of approximately seven months is considered neutral or weighs slightly against the State, the post-indictment delay of approximately fourteen months weighs heavily against the State, and the post-arraignment delay of approximately nineteen months occurred for various reasons that are considered

neutral. We do not believe that any material delay can be attributed to Berryman. Therefore, the reasons-for-the-delay factor weighs in favor of Berryman. In addition, Berryman clearly asserted his right to a speedy trial, so the third *Barker* factor also weighs in favor of Berryman. However, the fourth factor weighs in favor of the State because Berryman did not meet his burden of proving actual prejudice.

¶55. In prior cases in which the first three *Barker* factors favored the defendant, but the defendant did not prove actual prejudice, the Mississippi Supreme Court has found no violation of the right to a speedy trial. For example, in *Flora*, approximately twenty-seven months passed between the defendant's arrest and trial, and the Supreme Court held that "the reason for the delay factor weigh[ed] in favor of [the defendant]" and that the third factor also favored the defendant because it was "undisputed that [he] asserted his . . . right to a speedy trial on several occasions." *Flora*, 925 So. 2d at 815, 817-18 (¶¶62, 66-67). However, the Court found that the defendant proved "no actual prejudice" and then held, "Under the totality of the circumstances, and upon examination and analysis of the *Barker* factors, we conclude that [the defendant's] constitutional right to a speedy trial was not violated." *Id.* at 818-19 (¶69).

¶56. Similarly, in *Manix v. State*, 895 So. 2d 167 (Miss. 2005), there was an "extreme" delay of more than four years between indictment and trial, *id.* at 172, 175 (¶¶4, 15), and the second and third factors also weighed in favor of the defendant, *id.* at 176 (¶¶20-21). However, the Supreme Court held that the defendant "failed to prove actual prejudice" because he made only "[v]ague allegations of the existence of a poorly identified exculpatory

witness." *Id.* at 177 (¶¶22-23). The Court then stated that the defendant's "constitutional right to a speedy trial was not violated," reasoning that "any presumptive prejudice [he might] have suffered [was] overwhelmed by the absence of actual prejudice." *Id.* at (¶24); *see also Johnson*, 68 So. 3d at 1253 (¶63) & n.81 (Dickinson, P.J., dissenting) ("The last thirteen times in a row [the Mississippi Supreme] Court has reviewed cases in which three of the *Barker* factors weighed in favor of the defendant, it found no speedy-trial violation.") (collecting cases).[8]

¶57. Likewise in this case, although it took far too long to bring this case to trial, the trial judge did not clearly err by finding that the delay did not prejudice Berryman's defense of the felon-in-possession charge. In addition, consistent with Mississippi Supreme Court precedent, we cannot say that the trial judge—who considered the totality of the circumstances, made findings of fact, and weighed all four *Barker* factors—erred by finding no violation of Berryman's right to a speedy trial. *See Flora*, 925 So. 2d at 818-19 (¶69); *Manix*, 895 So. 2d at 177 (¶24).

B. Statutory Right

¶58. Berryman also alleges a denial of his statutory right to a speedy trial. Mississippi

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[8] Consistent with Mississippi Supreme Court precedent, this Court has also found no speedy-trial violation in cases in which the first three *Barker* factors favored the defendant, but the defendant failed to prove actual prejudice. *See, e.g.*, *May*, 285 So. 3d at 653 (¶50) (holding that a defendant's right to a speedy trial was not violated by a five-year delay between arrest and trial because "[t]he absence of any prejudice to [his] defense weigh[ed] heavily in favor of the State and outweigh[ed] the other *Barker* factors"); *Reed*, 191 So. 3d at 141-42 (¶21) (holding that a defendant's right to a speedy trial was not violated by a twenty-month delay because the absence of "actual prejudice" outweighed the other *Barker* factors); *McCain v. State*, 81 So. 3d 1130, 1136 (¶21) (Miss. Ct. App. 2011) (same), *aff'd*, 81 So. 3d 1055 (Miss. 2012).

Code Annotated section 99-17-1 (Rev. 2020) provides that "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." In this case, 594 days passed between Berryman's arraignment and trial. However, the trial judge found that Berryman's right to a speedy trial was not violated because fewer than 270 of those days were attributable to the State and because Berryman suffered no prejudice.

¶59. As our Supreme Court recently explained, "non-compliance [with the speedy-trial statute] does not itself evince a violation of the defendant's rights. Indeed, a defendant must show the State not only violated the statute, but the violation resulted in actual prejudice to his or her defense." *Williams v. State*, 305 So. 3d 1122, 1133-34 (¶39) (Miss. 2020) (citation omitted). Here, Berryman cannot show that the alleged violation of the speedy-trial statute caused him any prejudice because Edge passed away prior to Berryman's arraignment, i.e., before his statutory right to a speedy trial even attached.[9] Therefore, Edge's unavailability was not due to the alleged violation of the statute. Berryman does not identify any other form of prejudice. Accordingly, "his statutory speedy trial right was not violated." *Williams*, 305 So. 3d at 1134 (¶39). For that reason, it is unnecessary to determine whether there was good cause for the various continuances granted between the arraignment and the trial.

C. The Dissent

[9] *See Perry v. State*, 419 So. 2d 194, 198 (Miss. 1982) ("[O]ur speedy trial statute is plain and unambiguous, and it requires that the defendant be tried no later than 270 days after arraignment unless good cause be shown. Thus, under this statute, the time prior to arraignment is not computed to determine compliance with the statute.").

¶60. As noted above, the trial judge in this case dismissed Count I of the indictment for shooting into a dwelling based on a violation of Berryman's right to a speedy trial on that charge. The trial judge found that the delay in bringing Berryman to trial had prejudiced his defense on that charge only and, further, that a balancing of the *Barker* factors weighed in favor of the dismissal of that charge only. In dissent, Judge McCarty argues that a court can never dismiss fewer than all counts of an indictment as a remedy for a speedy-trial violation.[10] The dissent argues that the only possible remedy for a speedy-trial violation is "the dismissal of the *entire* indictment." *Post* at ¶91 (emphasis by the dissent). We disagree.

¶61. In *Barker*, the United States Supreme Court said that "dismissal of the indictment" is "the only possible remedy" for a speedy-trial violation, *Barker*, 407 U.S. at 522, but the Court never used the phrase "the *entire* indictment." More important, neither *Barker* nor any other case cited by the dissent even considered the argument that the dissent makes here. When the Court stated in *Barker* that "dismissal of the indictment" was "the only possible remedy" for a speedy-trial violation, it was not addressing the question whether specific counts could be dismissed. The United States Supreme Court has stated that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979); *see also Lange v. California*, 141 S. Ct. 2011, 2019 (2021) (explaining that a prior opinion decided only the specific issue it addressed, although the Court had "framed [its] holding in broader terms"). That admonition is on-point here. Language from the *Barker* opinion should not be wrenched

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[10] Berryman does not make this claim as part of his own speedy-trial argument.

from its context and treated as controlling on an issue that the *Barker* Court did not even consider, let alone decide.

¶62. Moreover, a review of the *Barker* opinion as a whole shows that the dismissal of specific charges is consistent with *Barker*'s analysis and may be appropriate in some cases. In *Barker*, the Court stated that "the right to speedy trial is a more vague concept than other procedural rights" and that "[i]t is . . . impossible to determine with precision when the right has been denied." *Barker*, 407 U.S. at 521. As discussed above, *Barker*'s four-factor "balancing test" "necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Id.* at 530.

¶63. In practice, *Barker*'s fourth factor—prejudice—often proves to be the most important in the analysis. While "an affirmative demonstration of prejudice" is not strictly "necessary to prove a denial of the constitutional right to a speedy trial," *Moore v. Arizona*, 414 U.S. 25, 26 (1973), the absence of prejudice may outweigh the other three factors. *See supra* ¶¶55-56; *see also Woodall*, 801 So. 2d at 685 (¶24) ("[W]e have remained reluctant to uphold dismissal of charges on speedy trial grounds where the defendant suffered no actual prejudice."). And although prejudice may consist of "oppressive pretrial incarceration" or "anxiety and concern," the "most important" or "most serious" consideration is whether the delay in bringing the defendant to trial actually impaired his ability to defend himself. *Barker*, 407 U.S. at 532; *Hersick*, 904 So. 2d at 123 (¶18). Prejudice of this type arises when evidence or witnesses are lost during the delay or when defense witnesses' memories fade due to the passage of time. *Barker*, 407 U.S. at 532.

¶64. Generally, a court's analysis of the first three *Barker* factors should be the same for all counts in an indictment, but the analysis of the fourth and most important factor may be different for different counts. In some cases, lost evidence or an unavailable witness may be prejudicial to the defense of one count but not others. Indeed, that is exactly what the trial judge found in this case. The judge found that the analysis of the first three *Barker* factors was "the same" for "all four counts" pending against Berryman—both counts of the indictment in this case and the two drug charges under a separate indictment. In addition, the judge "didn't find actual prejudice in three of the four" counts but did find that "there could be actual prejudice" with respect to Count I of the instant indictment (for shooting into a dwelling). Specifically, Edge's death was "enough for [the judge] to find actual prejudice" with respect to Count I only. Based on that finding, the judge dismissed Count I only. The trial judge's ruling dismissing Count I is not before us on appeal.[11] Therefore, we do not review the trial judge's finding that the delay in bringing Berryman to trial prejudiced Berryman's defense on Count I.

¶65. Accepting the trial judge's finding that Berryman's defense had been impaired as to Count I only—and that the *Barker* factors tipped in Berryman's favor on Count I only—the judge was entirely correct to dismiss only that count of the indictment. Under the "ad hoc" "balancing process" mandated by *Barker*, there is no violation of the right to a speedy trial unless the *Barker* factors "considered together" weigh in favor of the defendant. *Barker*, 407

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[11] The State could have appealed the dismissal of Count I but did not. *See* Miss. Code Ann. § 99-35-103(a) (Rev. 2020); *State v. Berryhill*, 703 So. 2d 250, 253 (¶10) (Miss. 1997) (holding that the State may appeal from an order quashing a portion of the indictment).

U.S. at 530, 533. If those factors weigh in favor of the State with respect to a particular charge, then the defendant's right to a speedy trial on that charge simply has not been violated. And if the case may proceed to trial on that charge without violating the defendant's right to a speedy trial, then there is no legal basis for the court to grant the "unsatisfactorily severe remedy" of dismissing the charge. *Id.* at 522.

¶66. Contrary to the dissent's contention, this does not "create an unworkable morass." *Post* at ¶93. The analysis of *Barker*'s first three factors will almost always be the same for all counts of an indictment. And in cases in which a delay has impaired the defense of some counts but not others, it is hardly "unworkable" for the trial judge to make such a finding. Indeed, the trial judge in this case had no difficulty making that finding. It clearly did not "strain[] [the judge's] resources to do it in this case," as the dissent asserts. *Post* at ¶95.

¶67. In addition, there is no need to fear that there will be "twenty or thirty" different "clock[s] running for purposes of speedy trial." *Post* at ¶96. For all counts in a single indictment, there will be "only one clock." *Id.*[12] The only potential distinction among counts will be with respect to the issue of prejudice, which the trial judge in this case addressed without any great difficulty or confusion.

II. Indictment

¶68. Berryman was indicted as a violent habitual offender under Mississippi Code Annotated section 99-19-83 (Rev. 2020). Berryman's indictment stated,

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[12] The constitutional speedy-trial clock begins running "with the defendant's arrest, indictment, or information," whichever occurs first. *Stark v. State*, 911 So. 2d 447, 450 (¶7) (Miss. 2005).

> **BRIAN SCOTT BERRYMAN** is hereby charged under Mississippi Code Annotated, Section 99-19-83, 1972 as amended, to be sentenced to the maximum term of imprisonment as prescribed for such felony and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation . . . .

The indictment then identified Berryman's prior convictions—capital murder, burglary of a dwelling, armed robbery, and robbery—all of which are crimes of violence. *See* Miss. Code Ann. § 97-3-2(1)(b), (j), (o) (Rev. 2020). The indictment concluded by stating that Berryman "was sentenced to and served separate terms of one (1) year or more in a state penal institution for each" prior conviction and that at least "one of the [prior] convictions was a crime of violence, as defined by Section 97-3-2." Consistent with the indictment, the trial court sentenced Berryman pursuant to section 99-19-83 to a term of life imprisonment without eligibility for parole or early release.

¶69. On appeal, Berryman does not dispute that his prior convictions satisfy the requirements of the violent habitual offender statute. Rather, Berryman argues that he should not have been sentenced under section 99-19-83 because his indictment did not put him on notice that the State would seek a life sentence under that statute. He argues that part of his indictment suggested that he would instead be sentenced under Mississippi Code Annotated section 99-19-81 (Rev. 2015), the nonviolent habitual offender statute.

¶70. Berryman's argument is without merit. As stated above, his indictment specifically charged him under section 99-19-83. The indictment did not even mention section 99-19-81. In addition, the indictment specifically alleged that Berryman "was sentenced to *and served* separate terms of one (1) year or more" for each prior conviction. (Emphasis added). The

requirement that the defendant must have actually *served* separate terms of one year or more is a requirement of section 99-19-83 only; the issue is irrelevant under section 99-19-81. *See, e.g., Akins v. State*, 493 So. 2d 1321, 1322 (Miss. 1986). Finally, the indictment specifically alleged that Berryman had been convicted of "a crime of violence, as defined by Section 97-3-2." A prior conviction for a crime of violence is also a requirement of section 99-19-83 only; again, the issue is irrelevant under section 99-19-81. In sum, the indictment *expressly* charged Berryman under section 99-19-83 and alleged all necessary prerequisites for sentencing under that statute. The indictment was more than sufficient to put Berryman on notice that he would be sentenced under section 99-19-83.

¶71. The only issue that Berryman raises with his indictment is that it erroneously included language from section 99-19-81, stating that he would "be sentenced to the maximum term of imprisonment as prescribed for such felony" rather than expressly referencing the life sentence provided for in section 99-19-83. However, this Court rejected a similar argument in *Grim v. State*, 102 So. 3d 1123 (Miss. Ct. App. 2010), *aff'd*, 102 So. 3d 1073 (Miss. 2012). In *Grim*, the defendant argued that his "indictment improperly cited both . . . section 99-19-81 . . . and section 99-19-83." *Id.* at 1129 (¶23). We held that the indictment was sufficient because "the two citations . . . put [the defendant] on notice that he could be sentenced under either statute." *Id.* at 1130 (¶24). The same is true in this case. Indeed, the indictment in this case did not even mention section 99-19-81. As in *Grim*, this indictment's clear and express reference to section 99-19-83 was sufficient to "put [Berryman] on notice that he could be sentenced under [that] statute." *Id.* Accordingly, the trial court properly sentenced Berryman

pursuant to section 99-19-83.

CONCLUSION

¶72. The delay in bringing Berryman to trial did not violate his constitutional or statutory right to a speedy trial. In addition, Berryman's indictment put him on notice that he would be sentenced to a term of life imprisonment as a violent habitual offender.

¶73. **AFFIRMED.**

BARNES, C.J., CARLTON, P.J., GREENLEE, LAWRENCE, SMITH AND EMFINGER, JJ., CONCUR. McDONALD, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY WESTBROOKS, J.; McCARTY, J., JOINS IN PART. McCARTY, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

McDONALD, J., CONCURRING IN PART AND DISSENTING IN PART:

¶74. I concur that Berryman's right to a speedy trial on Count II was not violated. I respectfully dissent regarding the majority's opinion that the indictment provided Berryman with sufficient notice that the State was pursuing sentencing under the violent habitual offender statute, Mississippi Code Annotated section 99-19-83 (Rev. 2020).

¶75. Berryman argues that the circuit court erred in sentencing him to life without parole under Mississippi Code Annotated section 99-19-83[13] because the indictment was defective.

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[13] "Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more, whether served concurrently or not, in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence, as defined by Section 97-3-2, *shall be sentenced to life imprisonment*, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole, probation or any other form of early release from actual physical custody within the Department of Corrections." Miss. Code Ann. § 99-19-83 (emphasis added).

Specifically, Berryman argues that based on the language of the indictment, he was not put on notice that the State sought a life sentence under section 99-19-83.

¶76. Rule 14.1(a) of the Mississippi Rules of Criminal Procedure provides that an indictment "shall be a plain, concise and definite written statement of the essential facts and elements constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation." MRCrP14.1(a). For an enhanced punishment for subsequent offenses, the State shall "specify such prior conviction(s) in the indictment, identifying each such prior conviction by the name of the crime, the name of the court in which each such conviction occurred and the cause number(s), the date(s) of conviction, and, if relevant, the length of time the accused was incarcerated for each such conviction . . . ." MRCrP 14.1(b)(1).

¶77. The Mississippi Supreme Court has held that "an indictment is generally sufficient if it tracks the language of the relevant criminal statute." *Jones v. State*, 215 So. 3d 508, 512 (¶13) (Miss. Ct. App. 2017) (quoting *Tran v. State*, 962 So. 2d 1237, 1241 (¶17) (Miss. 2007)). However, "using the exact language from the statute is not necessary if the words used have substantially the same meaning and the indictment is specific enough to give the defendant notice of the charge against [him]." *State v. Hawkins*, 145 So. 3d 636, 640 (¶8) (Miss. 2014) (citing *Madere v. State*, 794 So. 2d 200, 212 (¶33) (Miss. 2001)).

¶78. Berryman's indictment included the following language:

> BRIAN SCOTT BERRYMAN is hereby charged under Mississippi Code Annotated, Section 99-19-83, 1972 as amended, to be sentenced to the *maximum term of imprisonment as prescribed for such felony and such sentence shall not be reduced or suspended nor shall such person be eligible*

for parole or probation . . . .

The relevant felony for sentencing purposes in this case was the possession of a firearm by a felon. A conviction of this crime carries a maximum ten-year sentence. Miss. Code Ann. § 97-37-5(2) (Rev. 2014). The indictment cited section 99-19-83, which carries life imprisonment, by only referencing the section number. The indictment included no language from section 99-19-83. The language in the indictment comes from section 99-19-81,[14] stating that Berryman could only receive the maximum term of imprisonment for the felony, which in this case is ten years.

¶79. To support its argument that the indictment was not defective, the State and the majority cite *Grim v. State*, 102 So. 3d 1123 (Miss. Ct. App. 2010), *aff'd*, 102 So. 3d 1073 (Miss. 2012), where this Court found that the use of the two separate habitual offender provisions in the indictment put the defendant on notice that he could be sentenced under either provision. *Id.* at 1129-30 (¶24). In *Grim*, this Court cited *Henderson v. State*, 878 So. 2d 246, 248 (¶11) (Miss. Ct. App. 2004), in which both habitual offender statutes and language were included in the indictment. In *Henderson*, this Court stated that the "double reference was sufficient to give Henderson notice that he could be sentenced under either and gave him a fair opportunity to present a defense." *Id.* While *Grim* is not specific as to the

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[14] "Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, *shall be sentenced to the maximum term of imprisonment prescribed for such felony* and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation." Miss. Code Ann. § 99-19-81 (Rev. 2015) (emphasis added).

language in the indictment, its reliance on *Henderson* would suggest that its facts were similar to *Henderson.*

¶80. But this case is clearly distinguishable from *Grim* and *Henderson.* In those cases, both habitual offender statutes and language were included in the indictment. Here, even the majority acknowledges that the indictment did not cite both habitual offender statutes. Berryman's indictment cited Mississippi Code Annotated section 99-19-83 by number only, but then the indictment erroneously tracked the language from Mississippi Code Annotated section 99-19-81 concerning the potential punishment Berryman faced. Mississippi Code Annotated section 99-19-81 provided that "a person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution . . . shall be sentenced to the *maximum term of imprisonment prescribed for such felony* . . . ." (Emphasis added). Thus, instead of giving Berryman notice that if convicted, he would serve life imprisonment without eligibility for parole, the State only gave Berryman notice that he would serve the maximum sentence as to the charge of possession of a firearm by a felon, without eligibility for parole, which would be ten years.

¶81. The majority ignores the fact that Berryman's indictment improperly combines section 99-19-81 and section 99-19-83. Unlike *Grim*, which listed both habitual statutes and included the language of both statutes, Berryman's indictment misstates section 99-19-83 by using section 99-19-81's language, thus misleading Berryman as to his potential punishment.

The majority attempts to bolster its argument by pointing out that the indictment did cite Mississippi Code Annotated section 97-3-2 (Rev. 2014), which contains a list of violent crimes. But the indictment's citation of the violent-crimes statute does not remedy the problem of the indictment's misstatement of the language of section 99-19-83. We cannot condone an indictment that lists one statute by number while simultaneously tracking the language of another statute. To do so is not only confusing but, more significantly, denies a defendant his right to receive fair notice and assess his risk of proceeding to trial or pleading guilty.

¶82. Furthermore, this Court and the Mississippi Supreme Court have stated in several cases that "[i]t is not necessary for the State to specify in the indictment which section of the habitual criminal statute they were proceeding under"; in those cases, the Supreme Court was examining indictments that included both habitual offender statutes. *E.g., Johnson v. State*, 50 So. 3d 335, 338-39 (¶¶13,17) (Miss. Ct. App. 2010) (quoting *Ellis v. State*, 469 So. 2d 1256, 1258 (Miss. 1985)); *accord Osborne v. State*, 404 So. 2d 545, 548 (Miss. 1981).[15]

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[15] We used similar language in *Frazier v. State*, 907 So. 2d 985, 990 (¶12) (Miss. Ct. App. 2005), but that case is inapplicable to the case at hand. In *Frazier*, the defendant was sentenced under section 99-19-81 after his indictment was amended. *Id.* at (¶13). He received the maximum sentence for the felony for which he was charged, not life imprisonment. *Id.* On appeal, he sought to have his case reversed because the *order* amending the indictment contained inconsistencies. *Id.* at 990 (¶9). But the claimed inconsistencies did not affect Frazier's sentence, and he was properly sentenced. Because the motion to amend the indictment plainly announced that the State would proceed under section 99-19-81 and requested a five-year sentence, and the order allowing the amendment listed section 99-19-81, we found that the inconsistency in the order amending the indictment was not so misleading that Frazier experienced any prejudice. *Id.* at 991 (¶13). In Berryman's case, the indictment was initially flawed, improperly combining the citation of section 99-19-83 with the language of section 99-19-81, and never amended. Moreover, Berryman received the harsher life-imprisonment sentence, where Frazier did not.

¶83. In this case, the State erroneously combined the citation of section 99-19-83 with the language of section 99-19-81. If anything, the language in the indictment put Berryman on notice that if convicted he would only serve the ten-year maximum sentence prescribed by the felony statute. Additionally, while we recognize that the State listed Berryman's prior convictions pursuant to Rule 14.1(b) of the Mississippi Rules of Criminal Procedure, because the State listed section 99-19-83 but tracked the language of 99-19-81, the indictment was ambiguous as to which habitual offender statute was applicable. The indictment, at best, was confusing; at worst, it failed to give Berryman notice that he could serve life in prison. Under our rules, defendants should be given clear notice of the charges against them and the punishment sought.

Conclusion

¶84. In sum, I concur in part with the majority that Berryman's right to a speedy trial was not violated on Count II of the indictment. However, I dissent in part because Berryman's indictment was defective and failed to provide with him sufficient notice that he could be sentenced to life without eligibility for parole as a violent habitual offender under section 99-19-83. Therefore, I would reverse in part and render a sentence of ten years' incarceration based on section 99-19-81.

WESTBROOKS, J., JOINS THIS OPINION. McCARTY, J., JOINS THIS OPINION IN PART.

McCARTY, J., DISSENTING:

¶85. Because I believe precedent compels the dismissal of the entire indictment when a trial court finds that the right to a speedy trial was violated on a count within the indictment,

I respectfully dissent.

¶86. As the United States Supreme Court explained, there is only one possible remedy for a violation of the "amorphous" right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 522 (1972). The sole cure for a violation is the "severe remedy of dismissal of the indictment when the right has been deprived." *Id.* "This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried." *Id.* "Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but *it is the only possible remedy*." *Id.* (emphasis added).

¶87. Our Mississippi Supreme Court has agreed that "[t]he *sole* remedy for the denial of a defendant's right to a speedy trial is dismissal of the *charges* against him." *Taylor v. State*, 672 So. 2d 1246, 1262 (Miss. 1996) (emphases added); *see Smith v. State*, 550 So. 2d 406, 409 (Miss. 1989) ("Of course, the sole remedy for denial of a defendant's right to a speedy trial is dismissal of the charges against him.").

¶88. Similarly, the Fifth Circuit has ruled under the federal Speedy Trial Act that "[i]f a defendant is not brought to trial within this period, then *the indictment* must be dismissed." *United States v. Jones*, 56 F.3d 581, 583 (5th Cir. 1995) (emphasis added); *see also United States v. Neal*, 27 F.3d 1035, 1042 (5th Cir. 1994) ("If the Act is violated, the indictment must be dismissed."); *United States v. Rogers*, 781 F. Supp. 1181, 1185 (S.D. Miss. 1991) ("If, on balancing these factors, a violation is found, dismissal of the indictment is the only possible remedy.").

¶89. So it is well established that the "only possible remedy" for a violation of the right to

speedy trial is to dismiss the entire indictment. Yet in this case, the trial court segmented its analysis, looking at each charge separately, and examining the prejudice present to each charge. As to Count I, shooting into an occupied dwelling, the trial court found that the defendant would suffer prejudice because of the death of two witnesses who would bolster his defense. Accordingly, the trial court found this prejudice triggered dismissal of the charge for violation of the speedy-trial right.

¶90. However, the trial court then proceeded to analyze whether that same prejudice infected the other crimes with which the defendant was charged. The trial court reasoned that the "proposed testimony" of one of the deceased witnesses "has no bearing on whether Defendant, as a convicted felon, possessed the gun that was discovered in the house in which he was staying." Similarly, the trial court concluded that "[n]either deceased witness was presented as having any evidence bearing on the drug charges" from a separate indictment, so "the Court therefore [found] no prejudice as to these charges."

¶91. Yet in dismissing only *one* of the charges due to a speedy-trial violation, the trial court created a *new* remedy. While the United States Supreme Court concluded in *Barker* that "the only possible remedy" is the dismissal of the *entire* indictment, and our Supreme Court has held *all* charges must be dismissed, the trial court in this case dismissed only *some* of the charges. No matter how well-meaning, this ruling plainly does not comport with clearly established constitutional law.

¶92. As a result, since "the only possible remedy" is the "severe remedy of dismissal of the indictment when the right has been deprived," we are bound by federal and State precedent

to reverse and render.[16]

¶93. To do otherwise would be to suddenly create an entirely new analysis for purposes of speedy trial. There is a reason the entire indictment is dismissed and not just individual charges. It is complicated enough for courts to calculate the fluid *Barker* factors for an indictment as a whole. It would create an unworkable morass if trial and appellate courts had to analyze *each* individual count in an indictment to ascertain if there was a speedy trial violation.

¶94. As one court has interpreted *Barker*, it is actually this "severe remedy" of total dismissal that distinguishes a speedy-trial violation. "There is no intermediate remedy for a violation of the speedy trial right such as the exclusionary rule or a new trial" since the only remedy is dismissal. *State v. Reynolds*, 95 A.3d 973, 977 (¶7) (Vt. 2014). Nonetheless, the trial court here crafted an "intermediate remedy" of carving off one charge from multiple. Yet the constitutional right to a speedy trial cannot be divvied up.

¶95. It strains resources to do it in this case, where the defendant was charged with two counts in the indictment; it would be nearly impossible when a defendant was charged with

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[16] In light of the extreme language deployed by the United States Supreme Court in *Barker*—in which it lamented the "serious consequence" of a dismissal due to a violation of the right to a speedy trial—I see this as the only possibly interpretation of speedy-trial precedent. The majority is wholly correct that neither *Barker* nor any of the other cases cited in this separate opinion address a situation where a trial court found one count in an indictment should be dismissed under a speedy-trial violation while other counts could proceed to trial. Indeed, this is in part because there does not seem to be any other case where such an approach was taken.

Barker held that the "only possibly remedy" was dismissal, not "one of the possible remedies." *Barker*, 407 U.S. at 522. Applying that holding to this case, there is only one remedy, and that is full dismissal of all charges.

the commission of ten or twenty or even thirty crimes. *See Terrell v. State*, 160 So. 3d 213, 214 (¶1) (Miss. 2015) (where a defendant was indicted for a whopping "twenty counts of mail fraud, conspiracy to commit mail fraud, fraudulent use of identity, conspiracy to commit fraudulent use of identity, timber theft, conspiracy to commit timber theft, false pretense, and conspiracy to commit false pretense"); *Sowers v. State*, 101 So. 3d 1156, 1157 (¶6) (Miss. 2012) (where defendant was indicted on 31 counts of two separate crimes).

¶96. There should only be one clock running for purposes of speedy trial, not twenty or thirty. Indeed, even when there are multiple defendants, there is only one clock. *See United States v. Cope*, 312 F.3d 757, 776-77 (6th Cir. 2002) (holding that under the federal Speedy Trial Act, when "multiple defendants are charged together and no severance has been granted, one speedy trial clock governs"); *accord Flores v. State*, 574 So. 2d 1314, 1321 (Miss. 1990) ("[S]ince the right to a speedy trial is a right personal to the accused, the right should not be waived because of delays occasioned by a co-defendant for which the accused was not in any way responsible.").

¶97. Courts have grappled with the "multiple clock" issue before, but normally when there are multiple indictments or new co-defendants. In Mississippi, "[t]he prosecution may not circumvent an accused's demand for a speedy trial by seeking a new indictment for the *same offense* and then proceeding upon the new indictment." *Taylor v. State*, 672 So. 2d 1246, 1257 (Miss. 1996) (emphasis added).[17]

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[17] However, if the original indictment is dismissed, the speedy-trial clock is restarted with the re-indictment. *See Murray v. State*, 967 So. 2d 1222, 1229 (Miss. 2007) (Where defendant's first indictment was dismissed by nolle prosequi, the date of the original indictment did not count towards the speedy trial analysis when he was re-indicted later.);

¶98. Likewise, in the Fifth Circuit, "[t]he filing of a superseding indictment does not affect the speedy trial clock for offenses charged in the original indictment or any offense required to be joined under double jeopardy principles." *United States v. Bermea*, 30 F.3d 1539, 1567 (5th Cir. 1994). Under this interpretation of the law, "[t]he clock continues to run from the original indictment or arraignment, whichever was later, and all speedy trial exclusions apply as if no superseding indictment had been returned." *Id.* This approach "prevents the government from circumventing the speedy trial guarantee through the simple expedient of obtaining superseding indictments with minor corrections." *Id.*; *but see United States v. Harris*, 566 F.3d 422, 429 (5th Cir. 2009) (When a subsequent indictment widens the scope of the criminal investigation, such as by adding new conspirators, "the starting point for the speedy trial clock is . . . reset to the date of the arraignment on the superceding indictment.").

¶99. Similarly, in Ohio, a subsequent indictment "made against an accused would be subject to the same speedy-trial constraints as the original charges, if additional charges arose from the same facts as the first indictment." *State v. Baker*, 676 N.E.2d 883, 885 (Ohio 1997). However, "[a]dditional crimes based on different facts should not be considered as arising from the same sequence of events for the purposes of speedy-trial computation." *Id.* at 885-86; *see also State v. Parker*, 863 N.E.2d 1032, 1036 (¶20) (Ohio 2007) ("[S]peedy-trial time is not tolled for the filing of later charges that arose from the facts of the criminal incident that led to the first charge.").

¶100. So under these state and federal approaches to new indictments, even if the defendant

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Forrest v. State, 782 So. 2d 1260, 1268 (Miss. Ct. App. 2001) ("[T]he 270 day right should begin at the date of the new indictment.").

in this case had been separately indicted for the crimes in this case, all the charges against him that "arose from the same facts" are still subject to the *same* speedy-trial clock. Under this analogous precedent, whether in one indictment or many, if the charges arise from the same facts, they are subject to one clock. I find a "one clock" approach monumentally clearer than the one implicitly adopted by the majority today.

¶101. I further write separately to emphasize that Berryman spent an estimated 1,234 days under the control of the State before his trial. This, despite the assurance that "[t]he history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967). There the Supreme Court traced the American right to a speedy trial back to English guarantees of due process and liberty announced in 1215 and 1166. *Id.* at 223. The Court noted that the Virginia Declaration of Rights enshrined it at the very dawn of our country in 1776, establishing that "a man ha[s] a right to . . . a speedy trial." *Id.* at 225. Our state followed suit. *See* Miss. Const. art. 3, § 26 ("[T]he accused shall have a right to . . . a speedy and public trial by an impartial jury[.]").

¶102. The right to a speedy trial should be treated no less and no more than our sacred rights to speak our minds or to bear arms in defense of our homes, or our right to even *have* a trial should we be arrested. We should not allow a constitutional right to be fumbled away by bureaucracy and confusion, as it was in this case. Nor should its deprivation be used to oppress our citizens.[18]

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[18] "One of the concerns of criminal defendants in the Mississippi of times past was not the deprivation of a speedy trial," but in trial being held so quickly they could not

¶103. Once upon a time the Mississippi Supreme Court held, "The right to a speedy trial means what it says." *Flores*, 574 So. 2d at 1323. Because the right must mean what it says as to *all* charges, and not just for some, the "only possible remedy" is to dismiss the entire indictment and any charges stemming from the same factual nexus. Therefore, I respectfully dissent from the conclusion that Berryman's speedy-trial right was not violated.

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adequately prepare. *Guice v. State*, 952 So. 2d 129, 145 (Miss. 2007) (Diaz, P.J., dissenting) (collecting cases showing how the shift over time from ultra-speedy time to trial to ultra-delays in trial); *see Robinson v. State*, 223 Miss. 70, 82, 77 So. 2d 265, 269 (1955) (affirming a conviction of death for conviction of rape when sentencing was only *six days* from the attack).

APPENDIX K INDICTMENT NO. CR17-183

STATE OF MISSISSIPPI
COUNTY OF TISHOMINGO
I, JOSH MCNATT, Clerk of the Circuit Court of the said County and State do hereby certify that the foregoing constitutes a true and correct copy of said instrument of writing as appears of record in Criminal Book, on page CR17-183 of records now on file in said clerk's office.
Given under my hand and official seal, this 26th day of July 20 21
JOSH MCNATT
By: MC D.C.

INDICTMENT

THE STATE OF MISSISSIPPI

TISHOMINGO COUNTY

CIRCUIT COURT

SEPTEMBER 2017

CAUSE NO. CR17-183

The Grand Jurors for the State of Mississippi, taken from the body of good and lawful men and women of TISHOMINGO COUNTY, in the State of Mississippi, elected, impaneled, sworn and charged to inquire in and for said County and State aforesaid, in the name and by the authority of the State of Mississippi, upon their oaths present: That

BRIAN SCOTT BERRYMAN

COUNT I: in said County and State on or about the 6TH DAY of FEBRUARY, A.D., 2017, did willfully, unlawfully and feloniously shoot a firearm into a dwelling house usually occupied by persons at 11 CR 344, IUKA, MS, in violation of Mississippi Code Annotated, Section 97-37-29;

COUNT II: in said County and State on or about the 6TH DAY of FEBRUARY, A.D., 2017, did willfully, unlawfully and feloniously possess a weapon, a Marlin .22 Rifle, the said **BRIAN SCOTT BERRYMAN**, being a prior convicted felon, having previously been convicted of one or more felonies under the laws of this State or any other State, having previously been convicted of Capitol Murder, Burglary of a Dwelling and Armed Robbery in the Circuit

Court of Tishomingo County, Mississippi in Cause No. 3409 on April 16, 1990, in violation of Mississippi Code Annotated, Section 97-37-5;

and upon conviction the said **BRIAN SCOTT BERRYMAN** is hereby charged under Mississippi Code Annotated, Section 99-19-83, 1972 as amended, to be sentenced to the maximum term of imprisonment as prescribed for such felony and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation, in that:

(1) **BRIAN SCOTT BERRYMAN** was previously convicted in Cause No.3409 of the Circuit Court of Tishomingo County, Mississippi, on April 16, 1990; for the felony offense of Capital Murder, Burglary of a Dwelling and Armed Robbery, and was sentenced to a term of one (1) year or more in a state penal institution; and

(2) **BRIAN SCOTT BERRYMAN** was previously convicted in Cause No. 18,822 of the Circuit Court of Lee County, Mississippi on March 2, 1983; for the felony offense of Robbery, and was sentenced to a term of one (1) year or more in a state penal institution; and

(3) Each of the above convictions were upon charges separately brought and arose out of separate incidents at different times and **BRIAN SCOTT BERRYMAN** was sentenced to and served separate terms of one (1) year or more in a state penal institution for each

conviction, and one of the above convictions was a crime of violence, as defined by Section 97-3-2;

contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

Filed and Recorded 22 day of September, 2017
Anna H. Dill, Clerk
_____, D.C.

Assistant District Attorney

A TRUE BILL

Foreman of the Grand Jury

STATE OF MISSISSIPPI
COUNTY OF TISHOMINGO
I, JOSH MCNATT, Clerk of the Circuit Court of the said County and State do hereby certify that the foregoing constitutes a true and correct copy of said instrument of writing as appears of record in Criminal Book, on page 17-183 of records now on file in said clerk's office.
Given under my hand and official seal, this 26th day of July, 2021
Josh McNatt
JOSH MCNATT
By MC D.C.

CIRCUIT COURT SEAL TISHOMINGO COUNTY, MS

Sup. Vol. #1 Pg. 9

APPENDIX L LETTER FROM UNITED STATES SUPREME COURT WITH EXTENTION FOR PETITION

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

June 14, 2022

Brian S. Berryman
#44499
S. Mississippi Correctional Institution
P.O. Box 1419
Leakesville, MS 39451

RE: Berryman v. Mississippi
MSSC No. 2020-CT-00710-SCT

Dear Mr. Berryman:

The above-entitled petition for writ of certiorari was postmarked June 2, 2022 and received June 13, 2022. The papers are returned for the following reason(s):

The motion to proceed in forma pauperis does not comply with Rule 39. You may use the enclosed form.

No notarized affidavit or declaration of indigency is attached. Rule 39. You may use the enclosed form.

The petition fails to comply with the content requirements of Rule 14. A guide for in forma pauperis petitioners and a copy of the Rules of this Court are enclosed. The guide includes a form petition that may be used.

Please correct and resubmit as soon as possible. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

A copy of the corrected petition must be served on opposing counsel.

Sincerely,
Scott S. Harris, Clerk
By:

Susan Frimpong
(202) 479-3039

Enclosures

APPENDIX M BERRYMAN V. STATE, 337 So. 3d 1116 (2021)

337 So.3d 1116
Court of Appeals of Mississippi.

Brian Scott BERRYMAN a/
k/a Brian Berryman, Appellant
v.
STATE of Mississippi, Appellee

NO. 2020-KA-00710-COA
|
11/09/2021
|
Rehearing Denied February 15, 2022

Synopsis

Background: Defendant was convicted in the Circuit Court, Tishomingo County, Kelly L. Mims, J., of unlawful possession of firearm by felon, and sentenced as violent habitual offender to term of life imprisonment without eligibility for parole. Defendant appealed.

Holdings: The Court of Appeals, Wilson, P.J., held that:

[1] defendant did not suffer actual prejudice from delay of approximately 40 months between his arrest and trial;

[2] delay did not violate defendant's right to speedy trial;

[3] delay did not violate defendant's statutory right to speedy trial;

[4] trial court did not err in dismissing only one count of indictment on finding of speedy trial right as to that count; and

[5] indictment was sufficient to put defendant on notice that he could be sentenced to life under violent habitual offender statute.

Affirmed.

McDonald, J., filed an opinion concurring in part and dissenting in part in which Westbrooks, J., joined and McCarty, J., joined in part.

McCarty, J., dissented with separate written opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (35)

[1] **Criminal Law** ⚿ In general; balancing test

When considering an alleged violation of a defendant's state or federal constitutional right to a speedy trial, the Mississippi Supreme Court applies the four-part *Barker* test, which requires a balancing of four factors: (1) length of delay, (2) reasons for the delay, (3) defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[2] **Criminal Law** ⚿ In general; balancing test

When evaluating the factors relevant to a speedy trial analysis, no mathematical formula exists according to which the *Barker* weighing and balancing process must be performed. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[3] **Criminal Law** ⚿ Questions of Law or of Fact

A trial judge's ruling on a speedy-trial claim encompasses questions of fact, including whether there was good cause for a delay, and whether the defendant has been prejudiced by any delay. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[4] **Criminal Law** ⚿ Questions of Fact and Findings

Appellate court must affirm trial judge's factual findings if they are supported by substantial, credible evidence.

[5] **Criminal Law** ⚿ Questions of Fact and Findings

Appellate court will reverse trial judge's factual findings only if there is no probative evidence to support them and they are clearly erroneous.

[6] **Criminal Law** Accrual of right to time restraints

The constitutional right to a speedy trial attaches when a person has been accused. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[7] **Criminal Law** Accrual of right to time restraints

The speedy-trial clock begins running with the defendant's arrest, indictment, or information, whichever occurs first. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

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

The length of delay is to some extent a triggering mechanism for a speedy trial claim; until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other *Barker* factors that go into the balance. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[9] **Criminal Law** Length of Delay

Criminal Law Presumptions and burden of proof

Any delay exceeding eight months is presumptively prejudicial for purposes of speedy trial analysis, and requires analysis of the remaining *Barker* factors. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[10] **Criminal Law** Subsequent to arrest

Criminal Law Presumptions and burden of proof

Delay of more than 40 months between defendant's arrest and trial was presumptively prejudicial for purposes of defendant's speedy trial claim, requiring analysis of remaining *Barker* factors. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[11] **Criminal Law** In general; balancing test

Criminal Law Presumptions and burden of proof

When the length of the delay is presumptively prejudicial under the speedy trial analysis, the burden shifts to the prosecution to produce evidence justifying the delay; the appellate court must then determine whether the delay is attributable to the State or the defendant. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

1 Cases that cite this headnote

[12] **Criminal Law** Necessities of trial procedure; docket congestion

Criminal Law Delay Attributable to Prosecution

Criminal Law Deliberate governmental conduct

Deliberate attempts to delay the trial in order to hamper the defense are weighed heavily against the state, for purposes of determining whether a defendant's constitutional right to a speedy trial has been violated; on the other hand, 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. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

1 Cases that cite this headnote

[13] **Criminal Law** Presumptions and burden of proof

When the length of the delay is presumptively prejudicial under the speedy trial analysis, the state must prove either that the defendant prompted the delay or that the state had good cause. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[14] **Criminal Law** ⇐ Delay Attributable to Prosecution

Criminal Law ⇐ Subsequent to arrest

Delay of approximately seven months between defendant's arrest and indictment was neutral or weighed only slightly against state, for purposes of defendant's speedy trial claim; delay was for investigative purposes, as state was still attempting to locate victims, investigation was not complete when next available grand jury was empaneled following defendant's arrest, and state presented case to following grand jury. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

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

Criminal Law ⇐ In general; confinement

Delay of approximately 14 months between defendant's indictment and arraignment weighed more heavily against state, for purposes of defendant's speedy trial claim; defendant was in state's custody entire time, and, despite not having been served with indictment or arraigned, defendant filed two pro se demands for trial and motions to dismiss during that time, both of which clearly showed where he was being held. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

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

Criminal Law ⇐ Delay Attributable to Prosecution

Delay of approximately two months between defendant's arraignment and first trial setting did not weigh against defendant for purposes of defendant's speedy trial claim; although delay was attributable to continuance requested by defense counsel, who was appointed at arraignment, defendant had already been in state custody for almost two years without being provided appointed counsel or receiving any discovery, and it was known at time of counsel's appointment that he could not represent defendant because he had been elected to circuit court and would take office prior to next available trial setting. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[17] **Criminal Law** ⇐ Necessities of trial procedure; docket congestion

Eight-month trial delay related to withdrawal of defense counsel due to conflict and conflict public defender's subsequent request for continuance was neutral, for purposes of defendant's speedy trial claim; defendant was without counsel who could actually represent him for more than two years after his arrest, and defendant made multiple requests for appointed counsel prior to delay. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[18] **Criminal Law** ⇐ Necessities of trial procedure; docket congestion

Trial delay related to trial judge's inability to preside due to personal illness was neutral, for purposes of defendant's speedy trial claim. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[19] **Criminal Law** ⇐ Necessities of trial procedure; docket congestion

Trial delay, if any, due to judge's recusal from case was neutral, for purposes of defendant's speedy trial claim. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[20] **Criminal Law** ⇐ Necessities of trial procedure; docket congestion

A judge's unavailability due to illness or judicial recusal are neutral reasons for delay that do not count against defendant or the state on a speedy trial claim. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[21] **Criminal Law** ⇐ Necessities of trial procedure; docket congestion

Trial delay attributable to fact that state department of corrections was not transporting prisoners due to COVID-19 pandemic was neutral, for purposes of defendant's speedy trial

claim. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[22] **Criminal Law** ⊶ Prejudice or absence of prejudice

To determine whether a trial delay resulted in actual prejudice a defendant, a court considers three interests that the right to a speedy trial was meant to protect: (1) prevention of oppressive pretrial incarceration, (2) minimization of anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[23] **Criminal Law** ⊶ Prejudice or absence of prejudice

Generally, proof of prejudice resulting from trial delay, as necessary to establish a speedy trial violation, entails the loss of evidence, death of witnesses, or staleness of an investigation. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[24] **Criminal Law** ⊶ Presumptions and burden of proof

On a speedy trial claim, the defendant bears the burden of showing actual prejudice. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[25] **Criminal Law** ⊶ Prejudice or absence of prejudice

Defendant did not suffer actual prejudice from delay of approximately 40 months between his arrest and trial, as factor in speedy trial analysis; although alleged witness died prior to trial, defendant presented no evidence corroborating what he claimed witness would testify to, defendant never informed law enforcement that witness possessed exculpatory information, and exculpatory inference that defendant claimed would have arising from witness's testimony was directly contradicted by defendant's own signed statement. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[26] **Criminal Law** ⊶ In general; balancing test

Criminal Law ⊶ Circumstances as determinative

In weighing the *Barker* speedy trial factors, court must consider the totality of the circumstances, and no one factor is dispositive. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[27] **Criminal Law** ⊶ In general; balancing test

The weight given each of the *Barker* speedy trial factors necessarily turns on the peculiar facts and circumstances of each case, the quality of evidence available on each factor and, in the absence of evidence, identification of the party with the risk of non-persuasion. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[28] **Criminal Law** ⊶ Particular or conjunctive circumstances, fulfillment or denial of right

Criminal Law ⊶ Subsequent to arrest

Delay of approximately 40 months between defendant's arrest and trial did not violate defendant's right to speedy trial; although reasons for delay weighed in defendant's favor, and although defendant clearly asserted his right to speedy trial, defendant failed to demonstrated actual prejudice resulting from delay. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

1 Cases that cite this headnote

[29] **Criminal Law** ⊶ Length of Delay

Criminal Law ⊶ Prejudice or absence of prejudice

Defendant did not suffer actual prejudice from delay of 594 days between his arraignment and trial, and thus, delay did not violate defendant's statutory right to speedy trial; although alleged witness died during delay between defendant's arrest and trial, witness passed away prior to defendant's arraignment, i.e., before his statutory right to speedy trial attached. Miss. Code Ann. § 99-17-1.

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

Noncompliance with speedy-trial statute does not itself evince violation of defendant's rights; defendant must show that state not only violated statute, but violation resulted in actual prejudice to his or her defense. Miss. Code Ann. § 99-17-1.

[31] **Criminal Law** ⇐ Nature and scope of remedy

Criminal Law ⇐ Prejudice or absence of prejudice

Trial court's finding that defendant's constitutional right to speedy trial was violated as to one count in indictment did not require dismissal of entire indictment; although court found that death of alleged witness during trial delay caused actual prejudice to defendant, court found that such prejudice occurred only as to one count, and analysis as to other speedy trial factors was same as to all counts. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

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

Although affirmative demonstration of prejudice is not strictly necessary to prove denial of constitutional right to speedy trial, absence of prejudice may outweigh other three *Barker* factors. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

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

In determining whether a trial delay caused actual prejudice to a defendant, for purposes of a speedy trial claims, the most important or most serious consideration is whether the delay in bringing defendant to trial actually impaired his ability to defend himself; prejudice of this type arises when evidence or witnesses are lost during delay or when defense witnesses' memories fade due to passage of time. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[34] **Criminal Law** ⇐ In general; balancing test

Criminal Law ⇐ Nature and scope of remedy

Under ad hoc balancing process mandated by *Barker*, there is no violation of right to speedy trial unless *Barker* factors considered together weigh in favor of defendant; if those factors weigh in favor of state with respect to particular charge, then defendant's right to speedy trial on that charge has not been violated, and if case may proceed to trial on that charge without violating defendant's right to speedy trial, then there is no legal basis for court to grant unsatisfactorily severe remedy of dismissing charge. U.S. Const. Amend. 6; Miss. Const. art. 3, § 26.

[35] **Sentencing and Punishment** ⇐ Requisites and sufficiency of accusation

Indictment was sufficient to put defendant on notice that he could be sentenced to life under violent habitual offender statute; although indictment did not expressly state that state would seek life sentence, it specifically charged him under violent habitual offender statute, it alleged that defendant was sentenced to and served separate terms of one year or more on prior convictions, and it specifically alleged that defendant had been convicted of crime of violence. Miss. Code Ann. § 99-19-83.

TISHOMINGO COUNTY CIRCUIT COURT, HON. KELLY LEE MIMS, JUDGE

Attorneys and Law Firms

ATTORNEY FOR APPELLANT: OFFICE OF STATE PUBLIC DEFENDER BY: MOLLIE MARIE McMILLIN

ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL BY: ALLISON ELIZABETH HORNE

EN BANC.

Opinion

WILSON, P.J., FOR THE COURT:

¶1. Brian Berryman was arrested for unlawful possession of a firearm by a felon and other offenses. Prior to his arrest, Berryman had been on parole from a life sentence for capital murder and had absconded from supervision. Based on his prior parole violations, Berryman's parole was revoked, and he was returned to the custody of the Mississippi Department of Corrections (MDOC) while he awaited trial in the present case. Berryman eventually was tried and convicted of unlawful possession of a firearm by a felon. The trial judge sentenced Berryman as a violent habitual offender to a term of life imprisonment without eligibility for parole.

¶2. On appeal, Berryman argues that his constitutional right to a speedy trial was violated by the forty-month delay between his arrest and trial; that his statutory right to a speedy trial was violated by the nineteen-month delay between his arraignment and trial; and that he should not have been sentenced as a violent habitual offender because his indictment did not put him on notice that the State was seeking a life sentence. For the reasons discussed below, we find no reversible error and affirm.

FACTS AND PROCEDURAL HISTORY

Berryman's Arrest

¶3. In the early morning hours of February 6, 2017, David Thacker called 911 and reported that his neighbor, Berryman, had come inside his trailer and fired a gun into his bedroom. Deputy Scott Dalton from the Tishomingo County Sheriff's Office responded to the trailer on County Road 344 in the Goat Island area in the northern part of Tishomingo County. Dalton took statements from Thacker and Thacker's girlfriend, Tina Alexander. Thacker and Alexander both identified Berryman as the shooter. Dalton then entered the trailer and recovered eight spent shell casings from a .22 caliber gun, one live round for a .22-caliber gun, and a pink dog leash that did not belong to Thacker or Alexander. Dalton also observed bullet holes in the bedroom door and in the wall inside the bedroom.

¶4. Dalton and two other deputies then proceeded to Berryman's house, which was two houses away. Two large dogs were chained up outside the home, and the deputies ordered Berryman to come out and put up the dogs. Berryman put the dogs in a pen and was then arrested. Berryman's face was bruised and bloodied, and he claimed that Thacker had "beat him up." Berryman then told the deputies that he did not have any guns in his house but that they "were free to check." The deputies entered the house and found a .380-caliber pistol behind a speaker in the living room and a .22-caliber rifle in the laundry room behind the washer and dryer. The deputies also found a box of .22-caliber ammunition in the bedroom and a box containing both .22-caliber and .380-caliber ammunition in the laundry room. The deputies also found hydrocodone and oxycodone inside the house.

¶5. Berryman was taken to the Tishomingo County Sheriff's Office. He was advised of and waived his *Miranda* rights and agreed to talk to Investigator Greg Mitchell. Berryman subsequently signed a written statement setting out his version of events. In his written statement, Berryman claimed,

> I have known my neighbor "Tennessee" for less than a year. That was the nickname I knew him by. I was told today by the investigator that his name was David Thacker. I told "Tennessee" that my name was "Rick." I had let "Tennessee" borrow tools from me and DVDs. When he would borrow DVDs, they would be scratched up or something would be wrong with them. "Tennessee" worried me to death about one movie all the time and finally this past weekend, he knew I had some moonshine and asked me to bring it to him where he could get a few shots of it. I went over to his trailer and let him and his girlfriend, Tina, have a couple shots of the "shine." While I was sitting on the couch, "Tennessee" began asking me again about borrowing that DVD. I told him again he couldn't borrow it and the next thing I knew, "Tennessee" had hit me across the face and knocked my glasses off. He hit me about three

> times in the face and was telling me, like he has always, that I didn't know who I was messing with. I left and I was really pissed about him hitting me, so a little bit later, I grabbed my .22 rifle and my .380 pistol and drove over to "Tennessee" trailer. I went up the back porch and opened the door. The bedroom was to the right and I yelled "Hey Tennessee!" At this time, he jumped up from the bed and grabbed the barrel of my rifle. [Tina] ran toward the front door and I then fired off what I thought was three or four rounds to make him let go of the barrel. When he let go, "Tennessee" ran past me on the wooden porch and fell through it. He pulled himself up and ran down the stairs of the porch heading back down the road toward my house. At some point, my dog lead fell out of my jacket and I didn't know that it had until I was shown a picture of it laying in the floor of "Tennessee" trailer by the investigator. I walked back to my vehicle and drove back to my house. I knew the law would be coming, so I turned on the lights to my house and started getting drunk. My only intention that night was to "scare" him and I think I done that. I wasn't going to kill them because if I was, I would had just shot them both while they were in bed, but I didn't.

¶6. Berryman had been paroled from his life sentence for capital murder in 2009, but he had absconded from supervision in 2013. Thus, by the time of Berryman's arrest in this case, there was already an outstanding warrant for his arrest for parole violations. After Berryman's arrest, he was remanded to MDOC's custody, and his parole was revoked.

Pretrial Proceedings

¶7. In September 2017, a Tishomingo County grand jury indicted Berryman for shooting a firearm into a dwelling and unlawfully possessing a firearm as a felon.[1] Berryman was indicted as a violent habitual offender based on his prior convictions for robbery, armed robbery, burglary of a dwelling, and capital murder.

1 Berryman was also separately indicted for two counts of possession of a controlled substance (hydrocodone and oxycodone). Those charges are not at issue in this appeal.

¶8. In June 2018, Berryman filed a pro se demand for trial and motion to dismiss in which he alleged a denial of his right to a speedy trial. Berryman also requested appointed counsel. In October 2018, Berryman filed another pro se demand for trial and motion to dismiss.

¶9. On November 7, 2018, Berryman was finally arraigned. The court appointed John White to represent Berryman. However, White had been elected to the circuit court (without opposition) on November 6, 2018. Therefore, White was unable to represent Berryman after his arraignment. The arraignment order, which both White and Berryman signed, stated that the case was "continued on motion of the Defendant and set for trial during the next regularly scheduled term." On November 21, 2018, Berryman filed another pro se demand for trial, motion to dismiss, and motion for appointed counsel.

¶10. On January 7, 2019, the court entered an order appointing Richard Bowen to represent all indigent defendants in Tishomingo County. However, the order was not filed in this case, and Berryman was never told that Bowen was representing him. Bowen was listed as Berryman's attorney on the criminal dockets for the May 2019, September 2019, January 2020, and April 2020 court terms. However, sometime in the first half 2019, Bowen, a former assistant district attorney, realized that he had a conflict because he had previously prosecuted Berryman for capital murder. Bowen then informed Daniel Sparks, who was the conflict public defender, that he would need to represent Berryman.

¶11. In April 2019, Berryman filed another pro se demand for trial and motion to dismiss.

¶12. In June 2019, the court entered an order continuing the case. The order stated that the continuance was granted "on Motion of the Defendant" and was signed by Sparks as counsel for Berryman. However, the record does not contain a prior motion for a continuance, entry of appearance

by Sparks, or order appointing Sparks. At a subsequent hearing, Berryman testified that he met Sparks for the first and only time in September 2019. He said that Sparks "introduced himself" and that they "had about a fifteen minute conversation."

¶13. In October 2019, Berryman filed a pro se motion to dismiss for want of prosecution, again alleging a denial of his right to a speedy trial. He also filed another pro se motion for appointed counsel.

¶14. In November and December 2019, Berryman attempted to appeal the June 2019 order continuing his case. Berryman alleged that he had only recently become aware of the order. He also alleged that Sparks lacked authority to request a continuance because Sparks had never been appointed to represent him. Berryman also continued to maintain that he had been denied a speedy trial. However, the Supreme Court dismissed Berryman's appeals for lack of an appealable final judgment. *Berryman v. State*, No. 2020-TS-00198 (Miss. July 9, 2020); *Berryman v. State*, No. 2020-TS-00218 (Miss. July 9, 2020).

¶15. In January 2020, Berryman filed a motion for the recusal of Circuit Judge Paul Funderburk. Berryman argued that Judge Funderburk should recuse because he had been a prosecutor in a case in which Berryman was convicted of robbery in 1983. In March 2020, Judge Funderburk recused himself "[t]o avoid even the appearance of impropriety."

¶16. In March 2020, Circuit Judge Kelly Mims (the trial judge) ruled on Berryman's multiple motions to appoint counsel. The trial judge stated that although Berryman was correct that no order appointing counsel had been entered, Berryman had been and continued to be represented by counsel. The judge noted that White had been appointed to represent Berryman at his arraignment, although White could not continue the representation due to his election to the circuit court. Therefore, Berryman's case was eventually assigned to Sparks, although no order appointing Sparks had been entered. Therefore, on March 16, 2020, the judge entered an order appointing Sparks "nunc pro tunc."

¶17. In April 2020, Bowen filed a motion for discovery on behalf of Berryman. As noted above, however, prior court orders and statements in the record indicate that Bowen had realized a conflict and ceased representing Berryman months earlier. There is no explanation in the record for why Bowen filed this motion.

¶18. In April 2020, Berryman filed a petition for writ of mandamus in which he asked the Supreme Court to order the trial court to rule on his October 2019 motion to dismiss for want of prosecution. In response, the trial judge informed the Supreme Court that Berryman had never attempted to notice his pro se motion for a hearing. In addition, the trial judge ordered the State to respond to Berryman's motion and set the motion for a hearing on June 22, 2020. Based on the trial judge's response and order, the Supreme Court dismissed Berryman's mandamus petition. *Berryman v. State*, No. 2020-TS-00198 (May 5, 2020); *Berryman v. State*, No. 2020-TS-00218 (May 5, 2020).

¶19. On June 11, 2020, the trial judge appointed Will Bristow to represent Berryman. Bristow was appointed because Sparks had been elected to the Mississippi Senate in 2019, and the 2020 Regular Session of the Legislature continued until October 2020. It does not appear that Sparks ever played any substantive role in this case.

¶20. On June 22, 2020, Bristow filed a motion to suppress Berryman's post-arrest statements to law enforcement and a motion to suppress the guns found during the search of Berryman's home. The motions alleged that Berryman was intoxicated at the time he made his statements and consented to the search.

Speedy-Trial Hearing

¶21. On June 22, 2020, the trial judge held a hearing on Berryman's speedy-trial motion and motions to suppress. During the hearing, Berryman testified that potential defense witness Marshall Edge had died on February 22, 2018. Berryman testified that Edge lived in a house between the house where Berryman was staying and the Thacker/Alexander trailer. According to Berryman, Edge was sitting on his porch during part of the night in question and could have testified that Berryman did not have a gun with him when he walked back to the Thacker/Alexander trailer. Berryman had attached Edge's obituary in support of his prior pro se motions.

¶22. Berryman also testified that another neighbor, Nancy Brooks, had told him that Edge wanted to testify in his behalf. Berryman said that Brooks knew Edge and was with him when he died. Berryman also testified that he had communicated with Brooks by letter and telephone while he

was incarcerated. However, Berryman did not call Brooks as a witness at the hearing. Berryman also claimed that Edge had written a letter to the Parole Board in support of Berryman. However, Berryman could not produce a copy of the letter. [2]

2 Berryman also testified that another potential defense witness, Clinton Buddy Holley, died about six months after Edge. Berryman claimed that Holley could have testified that Thacker had attempted to sell him a .22-caliber rifle. However, Berryman offered no other evidence of Holley's existence or his death. The trial judge found that Berryman's claim regarding Holley was too "speculative" and not credible, and Berryman does not mention Holley in his brief on appeal.

¶23. Following the hearing, the trial judge found that Edge's death had prejudiced Berryman's defense on Count I of the indictment (shooting into a dwelling) but that Berryman had not suffered any prejudice with respect to the Count II (unlawful possession of a firearm by a felon) or the two separate drug charges. *See supra* note 1. In addition, after considering the totality of the circumstances and the *Barker* factors, [3] the trial judge found that Berryman's right to a speedy trial had been violated with respect to Count I but not with respect to Count II or the drug charges. Accordingly, the trial judge dismissed Count I of the indictment only and denied Berryman's motion to dismiss Count II and the drug charges. The trial judge subsequently entered a written order summarizing his findings and rulings. The trial judge also denied both of Berryman's motions to suppress. [4]

3 *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

4 On appeal, Berryman does not challenge the denial of his motions to suppress.

Trial

¶24. Berryman's trial began the next day. Deputy Dalton, Investigator Mitchell, and the two other deputies involved in Berryman's arrest testified. The State also introduced Berryman's written statement. Neither Thacker nor Alexander testified. [5]

5 Mitchell testified that he tried to talk to Thacker and Alexander a few days after the shooting but could not find them. He further testified that he had "tried to locate [Thacker and Alexander] through various means through law enforcement and could not locate them." Mitchell also acknowledged that Thacker and Alexander had provided "misleading information as far as Social Security numbers and whatnot."

¶25. Berryman was the only defense witness. His testimony at trial varied significantly from his written statement. We summarize his testimony as follows: Berryman's brother, who lived in Chicago, owned the house on County Road 344 where Berryman was arrested. Berryman stayed there off and on while he did work on the house for his brother. Thacker and Alexander lived in a trailer nearby, and Berryman had known them for about a year. Around 8 p.m. on February 6, 2017, Thacker invited Berryman over to his trailer. Berryman brought some moonshine, and he, Thacker, and Alexander drank for about two hours.

¶26. Around 10 p.m., Thacker asked Berryman to borrow $25 to buy some crystal meth, but Berryman refused. A short time later, Thacker left the room, and Alexander urged Berryman to loan Thacker the money. Alexander told Berryman that she wanted to get high, that she would make sure he got his money back, and that she would have sex with him while Thacker was gone. Berryman then loaned Thacker the money. Thacker asked Berryman if he wanted to go with him to buy the drugs, but Berryman asked Thacker just to drop him off at his house. After Thacker drove Berryman home, Berryman walked back to the Thacker/Alexander trailer, and Alexander began performing oral sex on him.

¶27. Thacker walked in on Berryman and Alexander. Thacker "was very upset" and carrying a rifle. Berryman tried to close the bedroom door on Thacker, but Thacker fired several shots into the bedroom. Berryman tried to take the rifle from Thacker, but "it fired a couple of more times" while they struggled over it. While the two men fought, Alexander ran out of the trailer. Berryman finally took the gun from Thacker. Thacker threatened to kill Berryman but then ran away, leaving Berryman alone in the trailer.

¶28. Berryman returned to his brother's house with the rifle. He hid the rifle in the laundry room behind the washer and dryer. Berryman knew that as a convicted felon he was not allowed to possess a gun, [6] but Thacker "was trying to kill [him] with [the rifle]," and he "wasn't fixing to leave [Thacker] nothing to kill [him] with." Berryman drank some whiskey and did a line of crystal meth while he "kept a

watch out" for Thacker. Around 11 p.m., Thacker entered the house unannounced. The two men argued and began fighting again, and Thacker pulled out a pistol, which he fired into the floor during the altercation. Then one of Berryman's dogs, a German Shepherd-and-Chow mix named Eli, "bit [Thacker] on the back side of his leg and snatched him to the ground." Berryman called Eli off of Thacker, and Thacker left the house, cursing and threatening to kill Berryman as he went. Berryman thought that Thacker must have dropped his pistol during their fight and that it was the same pistol that deputies later found behind a speaker in the living room.

6 Berryman stipulated that he had a prior felony conviction, and the stipulation was read to the jury.

¶29. Berryman then drank some more whiskey and did some more crystal meth, and the deputies arrived and arrested him a few hours later. Berryman denied that he consented to a search of his brother's house, he denied that he made any oral statement to Mitchell, and he denied that he signed or ever saw the written statement that was admitted into evidence at trial. He claimed that the signature on the statement was forged.

¶30. On cross-examination, Berryman was unable to explain the boxes of .22-caliber and .380-caliber ammunition found in the house. He testified that he did not take any boxes of ammunition with him when he left Thacker's trailer.

¶31. The jury found Berryman guilty of unlawfully possessing a firearm as a felon, and the court sentenced him as a violent habitual offender to life imprisonment without eligibility for parole. Berryman filed a motion for judgment notwithstanding the verdict or a new trial, which was denied, and a notice of appeal. On appeal, he argues that the felon-in-possession charge should have been dismissed because he was denied a speedy trial and that he should not have been sentenced as a violent habitual offender because his indictment did not put him on notice that the State would seek a sentence of life without parole.

ANALYSIS

I. Speedy Trial

A. Constitutional Right

[1] [2] ¶32. The Mississippi Constitution and the United States Constitution both protect the defendant's right to "a speedy ... trial." Miss. Const. art. 3, § 26; U.S. Const. amend. VI. "When considering an alleged violation of a defendant's [state or federal constitutional] right to a speedy trial, [the Mississippi Supreme] Court applies the four-part test developed by the United States Supreme Court in *Barker*," *supra* note 3. *Newell v. State*, 175 So. 3d 1260, 1269 (¶19) (Miss. 2015). "The *Barker* test 'requires a balancing of four factors: (1) length of delay; (2) reasons for the delay; (3) defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant.' " *Reed v. State*, 191 So. 3d 134, 139 (¶8) (Miss. Ct. App. 2016) (quoting *Taylor v. State*, 162 So. 3d 780, 783 (¶6) (Miss. 2015)). *Barker* "held that courts must 'engage in a difficult and sensitive balancing process' of the four factors because none of the factors is 'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.' " *Id.* (quoting *Barker*, 407 U.S. at 533, 92 S.Ct. 2182). "No mathematical formula exists according to which the *Barker* weighing and balancing process must be performed." *Flora v. State*, 925 So. 2d 797, 815 (¶61) (Miss. 2006).

[3] [4] [5] ¶33. A trial judge's ruling on a speedy-trial claim encompasses questions of fact, including whether there was "good cause" for a delay and whether the defendant has been prejudiced by any delay. *State v. Woodall*, 801 So. 2d 678, 680-81, 687 (¶¶7, 29, 31) (Miss. 2001). We must affirm the trial judge's factual findings if they are "supported by substantial, credible evidence." *Id.* (quotation marks omitted). We will reverse the trial judge's factual findings only if there is "no probative evidence" to support them and they are "clearly erroneous." *Id.*

1. Length of the Delay

[6] [7] [8] [9] ¶34. "[T]he constitutional right to a speedy trial attaches when a person has been accused." *Stark v. State*, 911 So. 2d 447, 450 (¶7) (Miss. 2005) (quoting *Hersick v. State*, 904 So. 2d 116, 121 (¶5) (Miss. 2004)). Therefore, the speedy-trial clock begins running "with the defendant's arrest, indictment, or information," whichever occurs first. *Id.* "The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530, 92 S.Ct. 2182. It is now well settled that "any delay exceeding eight months is presumptively prejudicial" and requires analysis of the

remaining *Barker* factors. *Stark*, 911 So. 2d at 450 (¶7) (citing *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989)).

[10] ¶35. In this case, Berryman was arrested on February 6, 2017, but was not tried until June 23, 2020, a delay of more than forty months. Thus, the length of the delay is presumptively prejudicial. However, our Supreme Court has made "clear" that this "does not mean that *actual* prejudice to the defendant exists. Rather, actual prejudice is determined at a different point in the *Barker* analysis." *Graham v. State*, 185 So. 3d 992, 1005 (¶41) (Miss. 2016) (quoting *Johnson v. State*, 68 So. 3d 1239, 1242 (¶7) (Miss. 2011)). A delay in excess of eight months simply means that we must analyze the remaining *Barker* factors. *Id.* at (¶40).

2. Reasons for the Delay

[11] **[12]** **[13]** ¶36. "When the length of the delay is presumptively prejudicial, the burden shifts to the prosecution to produce evidence justifying the delay." *Bateman v. State*, 125 So. 3d 616, 629 (¶45) (Miss. 2013). "This Court must then determine whether the delay is attributable to the State or the defendant." *Collins v. State*, 232 So. 3d 739, 745 (¶20) (Miss. Ct. App. 2017), *cert. denied*, 229 So. 3d 123 (Miss. 2017). Different reasons for delay are assigned different weights. *Barker*, 407 U.S. at 532, 92 S.Ct. 2182. " 'Deliberate attempts to delay the trial in order to hamper the defense are weighed heavily against the State. On the other hand, '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.' " *Collins*, 232 So. 3d at 745 (¶20) (quoting *Hardy v. State*, 137 So. 3d 289, 299 (¶30) (Miss. 2014)). Basically, "the State must prove either that the defendant prompted the delay or that the State had good cause." *De La Beckwith v. State*, 707 So. 2d 547, 606 (Miss. 1997). "We will uphold a trial court's factual determination regarding whether delay arose from good cause if it is based on substantial, credible evidence." *Reed*, 191 So. 3d at 139 (¶9) (citing *DeLoach v. State*, 722 So. 2d 512, 516 (¶12) (Miss. 1998)).

i. Arrest to Indictment

[14] ¶37. In this case, approximately seven months elapsed between Berryman's arrest in February 2017 and his indictment in September 2017. The State argues that this delay should not be counted against the State because it was still attempting to locate the victims, and its investigation of the crime was not yet complete on May 22, 2017, when the next available grand jury was empaneled following Berryman's arrest. The State presented the case to the next grand jury in September 2017. Citing *Woodall*, *supra*, the trial judge found this to be a reasonable investigative delay and, thus, a "neutral delay" that should not be weighed against the State or Berryman. There is substantial evidence to support the trial judge's finding. In *Woodall*, our Supreme Court stated that "investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused." *Woodall*, 801 So. 2d at 682 (¶15) (quoting *United States v. Lovasco*, 431 U.S. 783, 795, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)). The trial judge did not err by finding that the investigative delay in this case is neutral or weighs "only slightly against the State." *Id.* at 684 (¶19).

ii. Indictment to Arraignment

[15] ¶38. About fourteen more months passed between Berryman's indictment and his arraignment in November 2018. The State says that this delay occurred because the capias and indictment had not been served on Berryman. Although the State's explanation is not entirely clear, the State seems to say, as the trial judge put it, that "the State was unaware of where [Berryman] was." The trial judge rightly found this explanation to be inadequate because Berryman was "in the custody of the State" the entire time, and "it's incumbent on the State to know where [persons in its custody] are." *Cf. Cressionnie v. State*, 797 So. 2d 289, 292 (¶8) (Miss. Ct. App. 2001) (stating that for speedy-trial purposes "the State of Mississippi is a monolithic entity" and that the "prosecution cannot excuse the failure of the State to act by ascribing that inactivity to the Governor"). Moreover, despite not having been served with an indictment or arraigned, Berryman filed two pro se demands for trial and motions to dismiss during this time, both of which clearly showed that he was being held at the South Mississippi Correctional Institute in Leakesville. A simple search of MDOC's public website or a phone call should have revealed the same. The trial judge found that this delay had to be weighed against the State, but citing *Adams v. State*, 583 So. 2d 165, 168 (Miss. 1991), he found that it should not "weigh ... heavily" against the State "because it was negligent and not intentional." While we agree with the trial judge that there is no evidence of bad faith or malicious intent on the part of the State, we conclude that such a lengthy delay in arraigning an unrepresented defendant

who is already in state custody must weigh more heavily against the State.

iii. Arraignment to First Trial Setting

[16] ¶39. About two months passed between Berryman's arraignment and the first available trial setting in January 2019. The trial judge found that this delay was attributable to and weighed against Berryman because Berryman and his new counsel, John White, who was appointed at the arraignment, both signed a standard form arraignment order continuing the case to the next trial setting "on motion of the Defendant." The trial judge reasoned that a new attorney needed time to request discovery, meet with the defendant, and investigate the charges.

¶40. Ordinarily we would agree that a continuance requested by defense counsel for such reasons would weigh against the defendant. *May v. State*, 285 So. 3d 639, 649 (¶30) (Miss. Ct. App. 2019) (holding that a defendant "is bound by his lawyer's decisions as to the timing of trial and the need for a continuance" despite the defendant's prior "pro se demand for a speedy trial"), *cert. denied*, 284 So. 3d 751 (Miss. 2019). But in the circumstances of this case, we cannot weigh this delay against Berryman, who by this time had already been in state custody for almost two years. The fact that Berryman still had not been appointed counsel or received any discovery at this late date is the fault of the State, not Berryman. Furthermore, it was known at the time of White's appointment that he could not represent Berryman because he had already been elected to the circuit court and would take office prior to the next available trial setting.

iv. January 2019 to September 2019

[17] ¶41. The next period of delay is attributable to Bowen's withdrawal due to a conflict and a request for a continuance made by Sparks, albeit without Berryman's consent or approval. The trial judge found that the delay caused by Bowen's withdrawal was neutral and that the delay caused by Sparks's request for a continuance counted against Berryman. Ordinarily we would agree with this analysis. *See, e.g.*, *Wiley v. State*, 582 So. 2d 1008, 1012 (Miss. 1991) (stating that delays caused by the withdrawal of defense counsel "cannot be weighed against the State"); *May*, 285 So. 3d at 649 (¶30). But in the particular circumstances of this case, we cannot attribute any part of this delay to Berryman. Sparks requested a continuance only because the case had only recently been assigned to him. The fact that Berryman was without counsel who could actually represent him for more than two years after his arrest was not Berryman's fault. Indeed, Berryman had made multiple requests for appointed counsel prior to this time. Accordingly, we conclude that this eight-month delay related to Bowen's withdrawal is simply neutral.

v. September 2019 to January 2020

[18] ¶42. Berryman's case was assigned to Circuit Judge James L. Roberts Jr., since-retired, during the September 2019 term of court. However, Judge Roberts was ill and unable to preside during that term. The trial judge found that delay due to Judge Roberts's unavailability could not be counted against the State. We agree that this delay is neutral. *See State v. Magnusen*, 646 So. 2d 1275, 1281 (Miss. 1994).

vi. January 2020 to April 2020

[19] [20] ¶43. Judge Roberts was still unavailable in January 2020. As a result, on January 13, 2020, Judge Funderburk entered an order cancelling the January 2020 term of court for Tishomingo County. On January 21, 2020, Berryman filed a pro se motion to recuse Judge Funderburk on the ground that he had prosecuted Berryman in an unrelated case in 1983. Several weeks later, Judge Funderburk recused himself "[t]o avoid even the appearance of impropriety." It does not appear that Judge Funderburk's recusal caused any delay in the case. In any event, a judge's unavailability due to illness and a judicial recusal are both neutral reasons for delay that do not count against either party. *Magnusen*, 646 So. 2d at 1281; *Scott v. State*, 231 So. 3d 1024, 1041 (¶72) (Miss. Ct. App. 2016), *aff'd by an equally divided court*, 231 So. 3d 995 (Miss. 2017).

vii. April 2020 to June 2020

[21] ¶44. No trials could be held during the next scheduled term of court in April 2020 because MDOC was not transporting prisoners due to the COVID-19 pandemic. *See also* Emergency Administrative Order–2, *In re Emergency Order Related to Coronavirus (COVID-19)*, No. 2020-AD-00001-SCT (Miss. Mar. 15, 2020) (authorizing judges "to postpone any jury trials ... scheduled through May 15, 2020"). The resulting delay is not weighed against either

party. Berryman's case finally proceeded to trial on June 23, 2020.

viii. Summary of Reasons for Delay

¶45. In summary, the approximately seven-month delay between arrest and indictment is neutral or weighs slightly against the State; the approximately fourteen-month delay between indictment and arraignment weighs against the State; and the post-arraignment delay of approximately nineteen months—due to changes in counsel, the illness of a judge, and COVID-19—is neutral and is not weighed against either party.

3. Assertion of the Right to a Speedy Trial

¶46. Berryman clearly and repeatedly asserted his right to a speedy trial, beginning before he was even arraigned. The trial judge found, and the State concedes, that this factor favors Berryman. We agree.

4. Prejudice

[22] [23] [24] ¶47. "To determine whether the delay resulted in actual prejudice, the Court considers three interests that the right to a speedy trial was meant to protect: '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.' " *Taylor*, 162 So. 3d at 787 (¶16) (quoting *Jenkins v. State*, 947 So. 2d 270, 277 (¶21) (Miss. 2006)). "Of these three interests, the last is the most important; and when violated, the most prejudicial to the defendant." *Collins*, 232 So. 3d at 746 (¶26) (quoting *Hersick*, 904 So. 2d at 123 (¶18)). "Generally, proof of prejudice entails the loss of evidence, death of witnesses, or staleness of an investigation." *McCormick v. State*, 183 So. 3d 898, 903 (¶21) (Miss. Ct. App. 2015) (quoting *Sharp v. State*, 786 So. 2d 372, 381 (¶19) (Miss. 2001)). The defendant "bears the burden of showing actual prejudice, since the defendant is clearly in the best position to show prejudice under this prong." *Reed*, 191 So. 3d at 141 (¶19) (brackets and quotation marks omitted).

¶48. On appeal, Berryman does not claim prejudice in the form of "oppressive pretrial incarceration" or "anxiety or concern." These interests are inapplicable in this case because Berryman had violated his parole prior to being charged in this case, and he was returned to MDOC's custody to serve his life sentence for capital murder for that reason. Put simply, Berryman would have been incarcerated at all relevant times regardless of any delays in the prosecution of this case.

[25] ¶49. Thus, the only issue under this factor is whether Berryman met his burden of proving that delays in the case prejudiced his defense. Berryman asserts that Edge, who passed away in February 2018, could have provided helpful testimony in support of his defense of necessity. As set out above, Berryman claimed that he took the rifle[7] from Thacker and maintained possession of it only to prevent Thacker from killing him, and the jury was instructed on Berryman's defense of necessity. Berryman argues that Edge would have supported this defense because, according to Berryman, Edge was sitting on his porch when Berryman walked back to the Thacker/Alexander trailer, and Edge could have testified that Berryman was not carrying a rifle at that time.

7 The indictment and jury instructions specifically identified the rifle as the relevant gun and did not mention the pistol.

¶50. Berryman claimed that his account of what Edge would have testified to could be corroborated, but he failed to produce any corroborating evidence. Berryman claimed that Edge told another neighbor, Brooks, what he would testify to. Berryman also testified that he kept in touch with Brooks through letters and by telephone while he was incarcerated. However, Berryman failed to call Brooks as a witness at the speedy-trial hearing. Berryman also claimed that Edge wrote a letter to the Parole Board in support of Berryman. However, Berryman did not have a copy of the letter. Moreover, prior to Edge's death, Berryman never informed law enforcement that Edge possessed exculpatory information.

¶51. In *Woodall, supra*, the Supreme Court held that a defendant failed to establish prejudice because he "offered no concrete proof, other than his broad assertions, as to what relevant knowledge [a deceased witness] had in [the] matter" or what the deceased witness "would have testified to if alive." *Woodall*, 801 So. 2d at 686-87 (¶¶26, 29). The Supreme Court reasoned that the defendant's claim of prejudice "remain[ed] speculative" because the defendant failed to preserve the deceased witness's testimony "through deposition, written or recorded statement, or otherwise." *Id.* at 687 (¶29) (quotation marks omitted). The Court stated that "[t]he assertions of [the defendant] and his attorney

[did] not constitute substantial, credible evidence" to support his claim. *Id.* Likewise in this case, Berryman offered only unsubstantiated assertions regarding Edge's possible testimony. Berryman offered "no concrete proof" that Edge could have exculpated him.

¶52. Moreover, the exculpatory inference that Berryman would have us draw from the testimony that Edge allegedly could have given was directly contradicted by Berryman's own signed statement. As set out above, Berryman himself stated, "I grabbed *my* .22 rifle and *my* .380 pistol and drove over to [Thacker's] trailer." (Emphasis added). Given that Berryman himself told Investigator Mitchell that he took two guns—*his* guns—to Thacker's trailer, we cannot say that Berryman was prejudiced by the absence of Edge's testimony that he saw Berryman without a rifle at another point in the night. In short, we agree with the trial judge's finding that Berryman was not actually prejudiced in his defense of the felon-in-possession charge. The absence of actual prejudice "weighs heavily against [the defendant] and in favor of the State." *DeLoach v. State*, 722 So. 2d 512, 518 (¶23) (Miss. 1998).

5. Summary of the *Barker* Factors

[26] **[27]** ¶53. In weighing the *Barker* factors, we must consider the "totality of the circumstances," and "no one factor is dispositive." *Price v. State*, 898 So. 2d 641, 648 (¶11) (Miss. 2005). The factors are not a "mathematical formula." *Id.* "The weight given each [of the *Barker* factors] necessarily turns on the peculiar facts and circumstances of each case, the quality of evidence available on each factor and, in the absence of evidence, identification of the party with the risk of non-persuasion." *Jaco v. State*, 574 So. 2d 625, 630 (Miss. 1990).

[28] ¶54. Here, the overall length of the delay from arrest to trial is presumptively prejudicial. With respect to the second factor, the investigative delay of approximately seven months is considered neutral or weighs slightly against the State, the post-indictment delay of approximately fourteen months weighs heavily against the State, and the post-arraignment delay of approximately nineteen months occurred for various reasons that are considered neutral. We do not believe that any material delay can be attributed to Berryman. Therefore, the reasons-for-the-delay factor weighs in favor of Berryman. In addition, Berryman clearly asserted his right to a speedy trial, so the third *Barker* factor also weighs in favor of Berryman. However, the fourth factor weighs in favor of the State because Berryman did not meet his burden of proving actual prejudice.

¶55. In prior cases in which the first three *Barker* factors favored the defendant, but the defendant did not prove actual prejudice, the Mississippi Supreme Court has found no violation of the right to a speedy trial. For example, in *Flora*, approximately twenty-seven months passed between the defendant's arrest and trial, and the Supreme Court held that "the reason for the delay factor weigh[ed] in favor of [the defendant]" and that the third factor also favored the defendant because it was "undisputed that [he] asserted his ... right to a speedy trial on several occasions." *Flora*, 925 So. 2d at 815, 817-18 (¶¶62, 66-67). However, the Court found that the defendant proved "no actual prejudice" and then held, "Under the totality of the circumstances, and upon examination and analysis of the *Barker* factors, we conclude that [the defendant's] constitutional right to a speedy trial was not violated." *Id.* at 818-19 (¶69).

¶56. Similarly, in *Manix v. State*, 895 So. 2d 167 (Miss. 2005), there was an "extreme" delay of more than four years between indictment and trial, *id.* at 172, 175 (¶¶4, 15), and the second and third factors also weighed in favor of the defendant, *id.* at 176 (¶¶20-21). However, the Supreme Court held that the defendant "failed to prove actual prejudice" because he made only "[v]ague allegations of the existence of a poorly identified exculpatory witness." *Id.* at 177 (¶¶22-23). The Court then stated that the defendant's "constitutional right to a speedy trial was not violated," reasoning that "any presumptive prejudice [he might] have suffered [was] overwhelmed by the absence of actual prejudice." *Id.* at (¶24); *see also Johnson*, 68 So. 3d at 1253 (¶63) & n.81 (Dickinson, P.J., dissenting) ("The last thirteen times in a row [the Mississippi Supreme] Court has reviewed cases in which three of the *Barker* factors weighed in favor of the defendant, it found no speedy-trial violation.") (collecting cases). [8]

8 Consistent with Mississippi Supreme Court precedent, this Court has also found no speedy-trial violation in cases in which the first three *Barker* factors favored the defendant, but the defendant failed to prove actual prejudice. *See, e.g.*, *May*, 285 So. 3d at 653 (¶50) (holding that a defendant's right to a speedy trial was not violated by a five-year delay between arrest and trial because "[t]he absence of any prejudice to [his] defense weigh[ed] heavily in favor of the State and outweigh[ed]

the other *Barker* factors"); *Reed*, 191 So. 3d at 141-42 (¶21) (holding that a defendant's right to a speedy trial was not violated by a twenty-month delay because the absence of "actual prejudice" outweighed the other *Barker* factors); *McCain v. State*, 81 So. 3d 1130, 1136 (¶21) (Miss. Ct. App. 2011) (same), *aff'd*, 81 So. 3d 1055 (Miss. 2012).

¶57. Likewise in this case, although it took far too long to bring this case to trial, the trial judge did not clearly err by finding that the delay did not prejudice Berryman's defense of the felon-in-possession charge. In addition, consistent with Mississippi Supreme Court precedent, we cannot say that the trial judge—who considered the totality of the circumstances, made findings of fact, and weighed all four *Barker* factors—erred by finding no violation of Berryman's right to a speedy trial. *See Flora*, 925 So. 2d at 818-19 (¶69); *Manix*, 895 So. 2d at 177 (¶24).

B. Statutory Right

[29] ¶58. Berryman also alleges a denial of his statutory right to a speedy trial. Mississippi Code Annotated section 99-17-1 (Rev. 2020) provides that "[u]nless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." In this case, 594 days passed between Berryman's arraignment and trial. However, the trial judge found that Berryman's right to a speedy trial was not violated because fewer than 270 of those days were attributable to the State and because Berryman suffered no prejudice.

[30] ¶59. As our Supreme Court recently explained, "non-compliance [with the speedy-trial statute] does not itself evince a violation of the defendant's rights. Indeed, a defendant must show the State not only violated the statute, but the violation resulted in actual prejudice to his or her defense." *Williams v. State*, 305 So. 3d 1122, 1133-34 (¶39) (Miss. 2020) (citation omitted). Here, Berryman cannot show that the alleged violation of the speedy-trial statute caused him any prejudice because Edge passed away prior to Berryman's arraignment, i.e., before his statutory right to a speedy trial even attached.[9] Therefore, Edge's unavailability was not due to the alleged violation of the statute. Berryman does not identify any other form of prejudice. Accordingly, "his statutory speedy trial right was not violated." *Williams*, 305 So. 3d at 1134 (¶39). For that reason, it is unnecessary to determine whether there was good cause for the various continuances granted between the arraignment and the trial.

9 *See Perry v. State*, 419 So. 2d 194, 198 (Miss. 1982) ("[O]ur speedy trial statute is plain and unambiguous, and it requires that the defendant be tried no later than 270 days after arraignment unless good cause be shown. Thus, under this statute, the time prior to arraignment is not computed to determine compliance with the statute.").

C. The Dissent

[31] ¶60. As noted above, the trial judge in this case dismissed Count I of the indictment for shooting into a dwelling based on a violation of Berryman's right to a speedy trial on that charge. The trial judge found that the delay in bringing Berryman to trial had prejudiced his defense on that charge only and, further, that a balancing of the *Barker* factors weighed in favor of the dismissal of that charge only. In dissent, Judge McCarty argues that a court can never dismiss fewer than all counts of an indictment as a remedy for a speedy-trial violation.[10] The dissent argues that the only possible remedy for a speedy-trial violation is "the dismissal of the *entire* indictment." *Post* at ¶91 (emphasis by the dissent). We disagree.

10 Berryman does not make this claim as part of his own speedy-trial argument.

¶61. In *Barker*, the United States Supreme Court said that "dismissal of the indictment" is "the only possible remedy" for a speedy-trial violation, *Barker*, 407 U.S. at 522, 92 S.Ct. 2182, but the Court never used the phrase "the *entire* indictment." More important, neither *Barker* nor any other case cited by the dissent even considered the argument that the dissent makes here. When the Court stated in *Barker* that "dismissal of the indictment" was "the only possible remedy" for a speedy-trial violation, it was not addressing the question whether specific counts could be dismissed. The United States Supreme Court has stated that "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979); *see also Lange v. California*, —— U.S. ——, 141 S. Ct. 2011, 2019, 210 L.Ed.2d 486 (2021) (explaining that a prior opinion decided only the specific issue it addressed, although the Court had "framed [its] holding in broader terms"). That admonition is

on-point here. Language from the *Barker* opinion should not be wrenched from its context and treated as controlling on an issue that the *Barker* Court did not even consider, let alone decide.

¶62. Moreover, a review of the *Barker* opinion as a whole shows that the dismissal of specific charges is consistent with *Barker*'s analysis and may be appropriate in some cases. In *Barker*, the Court stated that "the right to speedy trial is a more vague concept than other procedural rights" and that "[i]t is ... impossible to determine with precision when the right has been denied." *Barker*, 407 U.S. at 521, 92 S.Ct. 2182. As discussed above, *Barker*'s four-factor "balancing test" "necessarily compels courts to approach speedy trial cases on an ad hoc basis." *Id.* at 530, 92 S.Ct. 2182.

[32] **[33]** ¶63. In practice, *Barker*'s fourth factor—prejudice—often proves to be the most important in the analysis. While "an affirmative demonstration of prejudice" is not strictly "necessary to prove a denial of the constitutional right to a speedy trial," *Moore v. Arizona*, 414 U.S. 25, 26, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973), the absence of prejudice may outweigh the other three factors. *See supra* ¶¶55-56; *see also Woodall*, 801 So. 2d at 685 (¶24) ("[W]e have remained reluctant to uphold dismissal of charges on speedy trial grounds where the defendant suffered no actual prejudice."). And although prejudice may consist of "oppressive pretrial incarceration" or "anxiety and concern," the "most important" or "most serious" consideration is whether the delay in bringing the defendant to trial actually impaired his ability to defend himself. *Barker*, 407 U.S. at 532, 92 S.Ct. 2182; *Hersick*, 904 So. 2d at 123 (¶18). Prejudice of this type arises when evidence or witnesses are lost during the delay or when defense witnesses' memories fade due to the passage of time. *Barker*, 407 U.S. at 532, 92 S.Ct. 2182.

¶64. Generally, a court's analysis of the first three *Barker* factors should be the same for all counts in an indictment, but the analysis of the fourth and most important factor may be different for different counts. In some cases, lost evidence or an unavailable witness may be prejudicial to the defense of one count but not others. Indeed, that is exactly what the trial judge found in this case. The judge found that the analysis of the first three *Barker* factors was "the same" for "all four counts" pending against Berryman—both counts of the indictment in this case and the two drug charges under a separate indictment. In addition, the judge "didn't find actual prejudice in three of the four" counts but did find that "there could be actual prejudice" with respect to Count I of the instant indictment (for shooting into a dwelling). Specifically, Edge's death was "enough for [the judge] to find actual prejudice" with respect to Count I only. Based on that finding, the judge dismissed Count I only. The trial judge's ruling dismissing Count I is not before us on appeal. [11] Therefore, we do not review the trial judge's finding that the delay in bringing Berryman to trial prejudiced Berryman's defense on Count I.

11 The State could have appealed the dismissal of Count I but did not. *See* Miss. Code Ann. § 99-35-103(a) (Rev. 2020); *State v. Berryhill*, 703 So. 2d 250, 253 (¶10) (Miss. 1997) (holding that the State may appeal from an order quashing a portion of the indictment).

[34] ¶65. Accepting the trial judge's finding that Berryman's defense had been impaired as to Count I only—and that the *Barker* factors tipped in Berryman's favor on Count I only—the judge was entirely correct to dismiss only that count of the indictment. Under the "ad hoc" "balancing process" mandated by *Barker*, there is no violation of the right to a speedy trial unless the *Barker* factors "considered together" weigh in favor of the defendant. *Barker*, 407 U.S. at 530, 533, 92 S.Ct. 2182. If those factors weigh in favor of the State with respect to a particular charge, then the defendant's right to a speedy trial on that charge simply has not been violated. And if the case may proceed to trial on that charge without violating the defendant's right to a speedy trial, then there is no legal basis for the court to grant the "unsatisfactorily severe remedy" of dismissing the charge. *Id.* at 522, 92 S.Ct. 2182.

¶66. Contrary to the dissent's contention, this does not "create an unworkable morass." *Post* at ¶93. The analysis of *Barker*'s first three factors will almost always be the same for all counts of an indictment. And in cases in which a delay has impaired the defense of some counts but not others, it is hardly "unworkable" for the trial judge to make such a finding. Indeed, the trial judge in this case had no difficulty making that finding. It clearly did not "strain[ ] [the judge's] resources to do it in this case," as the dissent asserts. *Post* at ¶95.

¶67. In addition, there is no need to fear that there will be "twenty or thirty" different "clock[s] running for purposes of speedy trial." *Post* at ¶96. For all counts in a single indictment, there will be "only one clock." *Id.* [12] The only potential distinction among counts will be with respect to the issue of prejudice, which the trial judge in this case addressed without any great difficulty or confusion.

12 The constitutional speedy-trial clock begins running "with the defendant's arrest, indictment, or information," whichever occurs first. *Stark v. State*, 911 So. 2d 447, 450 (¶7) (Miss. 2005).

II. Indictment

[35] ¶68. Berryman was indicted as a violent habitual offender under Mississippi Code Annotated section 99-19-83 (Rev. 2020). Berryman's indictment stated,

> **BRIAN SCOTT BERRYMAN** is hereby charged under Mississippi Code Annotated, Section 99-19-83, 1972 as amended, to be sentenced to the maximum term of imprisonment as prescribed for such felony and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation ....

The indictment then identified Berryman's prior convictions —capital murder, burglary of a dwelling, armed robbery, and robbery—all of which are crimes of violence. *See* Miss. Code Ann. § 97-3-2(1)(b), (j), (o) (Rev. 2020). The indictment concluded by stating that Berryman "was sentenced to and served separate terms of one (1) year or more in a state penal institution for each" prior conviction and that at least "one of the [prior] convictions was a crime of violence, as defined by Section 97-3-2." Consistent with the indictment, the trial court sentenced Berryman pursuant to section 99-19-83 to a term of life imprisonment without eligibility for parole or early release.

¶69. On appeal, Berryman does not dispute that his prior convictions satisfy the requirements of the violent habitual offender statute. Rather, Berryman argues that he should not have been sentenced under section 99-19-83 because his indictment did not put him on notice that the State would seek a life sentence under that statute. He argues that part of his indictment suggested that he would instead be sentenced under Mississippi Code Annotated section 99-19-81 (Rev. 2015), the nonviolent habitual offender statute.

¶70. Berryman's argument is without merit. As stated above, his indictment specifically charged him under section 99-19-83. The indictment did not even mention section 99-19-81. In addition, the indictment specifically alleged that Berryman "was sentenced to *and served* separate terms of one (1) year or more" for each prior conviction. (Emphasis added). The requirement that the defendant must have actually *served* separate terms of one year or more is a requirement of section 99-19-83 only; the issue is irrelevant under section 99-19-81. *See, e.g.*, *Akins v. State*, 493 So. 2d 1321, 1322 (Miss. 1986). Finally, the indictment specifically alleged that Berryman had been convicted of "a crime of violence, as defined by Section 97-3-2." A prior conviction for a crime of violence is also a requirement of section 99-19-83 only; again, the issue is irrelevant under section 99-19-81. In sum, the indictment *expressly* charged Berryman under section 99-19-83 and alleged all necessary prerequisites for sentencing under that statute. The indictment was more than sufficient to put Berryman on notice that he would be sentenced under section 99-19-83.

¶71. The only issue that Berryman raises with his indictment is that it erroneously included language from section 99-19-81, stating that he would "be sentenced to the maximum term of imprisonment as prescribed for such felony" rather than expressly referencing the life sentence provided for in section 99-19-83. However, this Court rejected a similar argument in *Grim v. State*, 102 So. 3d 1123 (Miss. Ct. App. 2010), *aff'd*, 102 So. 3d 1073 (Miss. 2012). In *Grim*, the defendant argued that his "indictment improperly cited both ... section 99-19-81 ... and section 99-19-83." *Id.* at 1129 (¶23). We held that the indictment was sufficient because "the two citations ... put [the defendant] on notice that he could be sentenced under either statute." *Id.* at 1130 (¶24). The same is true in this case. Indeed, the indictment in this case did not even mention section 99-19-81. As in *Grim*, this indictment's clear and express reference to section 99-19-83 was sufficient to "put [Berryman] on notice that he could be sentenced under [that] statute." *Id.* Accordingly, the trial court properly sentenced Berryman pursuant to section 99-19-83.

CONCLUSION

¶72. The delay in bringing Berryman to trial did not violate his constitutional or statutory right to a speedy trial. In addition, Berryman's indictment put him on notice that he would be sentenced to a term of life imprisonment as a violent habitual offender.

¶73. **AFFIRMED.**

BARNES, C.J., CARLTON, P.J., GREENLEE, LAWRENCE, SMITH AND EMFINGER, JJ., CONCUR. McDONALD, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY WESTBROOKS, J.; McCARTY, J., JOINS IN PART. McCARTY, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

McDONALD, J., CONCURRING IN PART AND DISSENTING IN PART:

¶74. I concur that Berryman's right to a speedy trial on Count II was not violated. I respectfully dissent regarding the majority's opinion that the indictment provided Berryman with sufficient notice that the State was pursuing sentencing under the violent habitual offender statute, Mississippi Code Annotated section 99-19-83 (Rev. 2020).

¶75. Berryman argues that the circuit court erred in sentencing him to life without parole under Mississippi Code Annotated section 99-19-83 [13] because the indictment was defective. Specifically, Berryman argues that based on the language of the indictment, he was not put on notice that the State sought a life sentence under section 99-19-83.

13 "Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more, whether served concurrently or not, in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence, as defined by Section 97-3-2, *shall be sentenced to life imprisonment*, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole, probation or any other form of early release from actual physical custody within the Department of Corrections." Miss. Code Ann. § 99-19-83 (emphasis added).

¶76. Rule 14.1(a) of the Mississippi Rules of Criminal Procedure provides that an indictment "shall be a plain, concise and definite written statement of the essential facts and elements constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation." MRCrP14.1(a). For an enhanced punishment for subsequent offenses, the State shall "specify such prior conviction(s) in the indictment, identifying each such prior conviction by the name of the crime, the name of the court in which each such conviction occurred and the cause number(s), the date(s) of conviction, and, if relevant, the length of time the accused was incarcerated for each such conviction ...." MRCrP 14.1(b)(1).

¶77. The Mississippi Supreme Court has held that "an indictment is generally sufficient if it tracks the language of the relevant criminal statute." *Jones v. State*, 215 So. 3d 508, 512 (¶13) (Miss. Ct. App. 2017) (quoting *Tran v. State*, 962 So. 2d 1237, 1241 (¶17) (Miss. 2007)). However, "using the exact language from the statute is not necessary if the words used have substantially the same meaning and the indictment is specific enough to give the defendant notice of the charge against [him]." *State v. Hawkins*, 145 So. 3d 636, 640 (¶8) (Miss. 2014) (citing *Madere v. State*, 794 So. 2d 200, 212 (¶33) (Miss. 2001)).

¶78. Berryman's indictment included the following language:

> BRIAN SCOTT BERRYMAN is hereby charged under Mississippi Code Annotated, Section 99-19-83, 1972 as amended, to be sentenced to the *maximum term of imprisonment as prescribed for such felony and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation* ....

The relevant felony for sentencing purposes in this case was the possession of a firearm by a felon. A conviction of this crime carries a maximum ten-year sentence. Miss. Code Ann. § 97-37-5(2) (Rev. 2014). The indictment cited section 99-19-83, which carries life imprisonment, by only referencing the section number. The indictment included no language from section 99-19-83. The language in the indictment comes from section 99-19-81, [14] stating that Berryman could only receive the maximum term of imprisonment for the felony, which in this case is ten years.

14 "Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, *shall be sentenced to the maximum term of imprisonment prescribed for such felony* and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation." Miss. Code Ann. § 99-19-81 (Rev. 2015) (emphasis added).

¶79. To support its argument that the indictment was not defective, the State and the majority cite *Grim v. State*, 102 So. 3d 1123 (Miss. Ct. App. 2010), *aff'd*, 102 So. 3d 1073 (Miss. 2012), where this Court found that the use of the two separate habitual offender provisions in the indictment put the defendant on notice that he could be sentenced under either provision. *Id.* at 1129-30 (¶24). In *Grim*, this Court cited *Henderson v. State*, 878 So. 2d 246, 248 (¶11) (Miss. Ct. App. 2004), in which both habitual offender statutes and language were included in the indictment. In *Henderson*, this Court stated that the "double reference was sufficient to give Henderson notice that he could be sentenced under either and gave him a fair opportunity to present a defense." *Id.* While *Grim* is not specific as to the language in the indictment, its reliance on *Henderson* would suggest that its facts were similar to *Henderson*.

¶80. But this case is clearly distinguishable from *Grim* and *Henderson*. In those cases, both habitual offender statutes and language were included in the indictment. Here, even the majority acknowledges that the indictment did not cite both habitual offender statutes. Berryman's indictment cited Mississippi Code Annotated section 99-19-83 by number only, but then the indictment erroneously tracked the language from Mississippi Code Annotated section 99-19-81 concerning the potential punishment Berryman faced. Mississippi Code Annotated section 99-19-81 provided that "a person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution ... shall be sentenced to the *maximum term of imprisonment prescribed for such felony* ...." (Emphasis added). Thus, instead of giving Berryman notice that if convicted, he would serve life imprisonment without eligibility for parole, the State only gave Berryman notice that he would serve the maximum sentence as to the charge of possession of a firearm by a felon, without eligibility for parole, which would be ten years.

¶81. The majority ignores the fact that Berryman's indictment improperly combines section 99-19-81 and section 99-19-83. Unlike *Grim*, which listed both habitual statutes and included the language of both statutes, Berryman's indictment misstates section 99-19-83 by using section 99-19-81's language, thus misleading Berryman as to his potential punishment. The majority attempts to bolster its argument by pointing out that the indictment did cite Mississippi Code Annotated section 97-3-2 (Rev. 2014), which contains a list of violent crimes. But the indictment's citation of the violent-crimes statute does not remedy the problem of the indictment's misstatement of the language of section 99-19-83. We cannot condone an indictment that lists one statute by number while simultaneously tracking the language of another statute. To do so is not only confusing but, more significantly, denies a defendant his right to receive fair notice and assess his risk of proceeding to trial or pleading guilty.

¶82. Furthermore, this Court and the Mississippi Supreme Court have stated in several cases that "[i]t is not necessary for the State to specify in the indictment which section of the habitual criminal statute they were proceeding under"; in those cases, the Supreme Court was examining indictments that included both habitual offender statutes. *E.g.*, *Johnson v. State*, 50 So. 3d 335, 338-39 (¶¶13,17) (Miss. Ct. App. 2010) (quoting *Ellis v. State*, 469 So. 2d 1256, 1258 (Miss. 1985)); *accord Osborne v. State*, 404 So. 2d 545, 548 (Miss. 1981). [15]

15 We used similar language in *Frazier v. State*, 907 So. 2d 985, 990 (¶12) (Miss. Ct. App. 2005), but that case is inapplicable to the case at hand. In *Frazier*, the defendant was sentenced under section 99-19-81 after his indictment was amended. *Id.* at (¶13). He received the maximum sentence for the felony for which he was charged, not life imprisonment. *Id.* On appeal, he sought to have his case reversed because the *order* amending the indictment contained inconsistencies. *Id.* at 990 (¶9). But the claimed inconsistencies did not affect Frazier's sentence, and he was properly sentenced. Because the motion to amend the indictment plainly announced that the State would proceed under section 99-19-81 and requested a five-year sentence, and the order allowing the amendment

> listed section 99-19-81, we found that the inconsistency in the order amending the indictment was not so misleading that Frazier experienced any prejudice. *Id.* at 991 (¶13). In Berryman's case, the indictment was initially flawed, improperly combining the citation of section 99-19-83 with the language of section 99-19-81, and never amended. Moreover, Berryman received the harsher life-imprisonment sentence, where Frazier did not.

¶83. In this case, the State erroneously combined the citation of section 99-19-83 with the language of section 99-19-81. If anything, the language in the indictment put Berryman on notice that if convicted he would only serve the ten-year maximum sentence prescribed by the felony statute. Additionally, while we recognize that the State listed Berryman's prior convictions pursuant to Rule 14.1(b) of the Mississippi Rules of Criminal Procedure, because the State listed section 99-19-83 but tracked the language of 99-19-81, the indictment was ambiguous as to which habitual offender statute was applicable. The indictment, at best, was confusing; at worst, it failed to give Berryman notice that he could serve life in prison. Under our rules, defendants should be given clear notice of the charges against them and the punishment sought.

Conclusion

¶84. In sum, I concur in part with the majority that Berryman's right to a speedy trial was not violated on Count II of the indictment. However, I dissent in part because Berryman's indictment was defective and failed to provide with him sufficient notice that he could be sentenced to life without eligibility for parole as a violent habitual offender under section 99-19-83. Therefore, I would reverse in part and render a sentence of ten years' incarceration based on section 99-19-81.

WESTBROOKS, J., JOINS THIS OPINION. McCARTY, J., JOINS THIS OPINION IN PART.

McCARTY, J., DISSENTING:

¶85. Because I believe precedent compels the dismissal of the entire indictment when a trial court finds that the right to a speedy trial was violated on a count within the indictment, I respectfully dissent.

¶86. As the United States Supreme Court explained, there is only one possible remedy for a violation of the "amorphous" right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514, 522, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). The sole cure for a violation is the "severe remedy of dismissal of the indictment when the right has been deprived." *Id.* "This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried." *Id.* "Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but *it is the only possible remedy*." *Id.* (emphasis added).

¶87. Our Mississippi Supreme Court has agreed that "[t]he *sole* remedy for the denial of a defendant's right to a speedy trial is dismissal of the *charges* against him." *Taylor v. State*, 672 So. 2d 1246, 1262 (Miss. 1996) (emphases added); *see Smith v. State*, 550 So. 2d 406, 409 (Miss. 1989) ("Of course, the sole remedy for denial of a defendant's right to a speedy trial is dismissal of the charges against him.").

¶88. Similarly, the Fifth Circuit has ruled under the federal Speedy Trial Act that "[i]f a defendant is not brought to trial within this period, then *the indictment* must be dismissed." *United States v. Jones*, 56 F.3d 581, 583 (5th Cir. 1995) (emphasis added); *see also United States v. Neal*, 27 F.3d 1035, 1042 (5th Cir. 1994) ("If the Act is violated, the indictment must be dismissed."); *United States v. Rogers*, 781 F. Supp. 1181, 1185 (S.D. Miss. 1991) ("If, on balancing these factors, a violation is found, dismissal of the indictment is the only possible remedy.").

¶89. So it is well established that the "only possible remedy" for a violation of the right to speedy trial is to dismiss the entire indictment. Yet in this case, the trial court segmented its analysis, looking at each charge separately, and examining the prejudice present to each charge. As to Count I, shooting into an occupied dwelling, the trial court found that the defendant would suffer prejudice because of the death of two witnesses who would bolster his defense. Accordingly, the trial court found this prejudice triggered dismissal of the charge for violation of the speedy-trial right.

¶90. However, the trial court then proceeded to analyze whether that same prejudice infected the other crimes with which the defendant was charged. The trial court reasoned that the "proposed testimony" of one of the deceased witnesses "has no bearing on whether Defendant, as a convicted felon, possessed the gun that was discovered in the house in which he was staying." Similarly, the trial court

concluded that "[n]either deceased witness was presented as having any evidence bearing on the drug charges" from a separate indictment, so "the Court therefore [found] no prejudice as to these charges."

¶91. Yet in dismissing only *one* of the charges due to a speedy-trial violation, the trial court created a *new* remedy. While the United States Supreme Court concluded in *Barker* that "the only possible remedy" is the dismissal of the *entire* indictment, and our Supreme Court has held *all* charges must be dismissed, the trial court in this case dismissed only *some* of the charges. No matter how well-meaning, this ruling plainly does not comport with clearly established constitutional law.

¶92. As a result, since "the only possible remedy" is the "severe remedy of dismissal of the indictment when the right has been deprived," we are bound by federal and State precedent to reverse and render. [16]

16 In light of the extreme language deployed by the United States Supreme Court in *Barker*—in which it lamented the "serious consequence" of a dismissal due to a violation of the right to a speedy trial—I see this as the only possible interpretation of speedy-trial precedent. The majority is wholly correct that neither *Barker* nor any of the other cases cited in this separate opinion address a situation where a trial court found one count in an indictment should be dismissed under a speedy-trial violation while other counts could proceed to trial. Indeed, this is in part because there does not seem to be any other case where such an approach was taken.
Barker held that the "only possible remedy" was dismissal, not "one of the possible remedies." *Barker*, 407 U.S. at 522, 92 S.Ct. 2182. Applying that holding to this case, there is only one remedy, and that is full dismissal of all charges.

¶93. To do otherwise would be to suddenly create an entirely new analysis for purposes of speedy trial. There is a reason the entire indictment is dismissed and not just individual charges. It is complicated enough for courts to calculate the fluid *Barker* factors for an indictment as a whole. It would create an unworkable morass if trial and appellate courts had to analyze *each* individual count in an indictment to ascertain if there was a speedy trial violation.

¶94. As one court has interpreted *Barker*, it is actually this "severe remedy" of total dismissal that distinguishes a speedy-trial violation. "There is no intermediate remedy for a violation of the speedy trial right such as the exclusionary rule or a new trial" since the only remedy is dismissal. *State v. Reynolds*, 196 Vt. 113, 95 A.3d 973, 977 (¶7) (2014). Nonetheless, the trial court here crafted an "intermediate remedy" of carving off one charge from multiple. Yet the constitutional right to a speedy trial cannot be divvied up.

¶95. It strains resources to do it in this case, where the defendant was charged with two counts in the indictment; it would be nearly impossible when a defendant was charged with the commission of ten or twenty or even thirty crimes. *See Terrell v. State*, 160 So. 3d 213, 214 (¶1) (Miss. 2015) (where a defendant was indicted for a whopping "twenty counts of mail fraud, conspiracy to commit mail fraud, fraudulent use of identity, conspiracy to commit fraudulent use of identity, timber theft, conspiracy to commit timber theft, false pretense, and conspiracy to commit false pretense"); *Sowers v. State*, 101 So. 3d 1156, 1157 (¶6) (Miss. 2012) (where defendant was indicted on 31 counts of two separate crimes).

¶96. There should only be one clock running for purposes of speedy trial, not twenty or thirty. Indeed, even when there are multiple defendants, there is only one clock. *See United States v. Cope*, 312 F.3d 757, 776-77 (6th Cir. 2002) (holding that under the federal Speedy Trial Act, when "multiple defendants are charged together and no severance has been granted, one speedy trial clock governs"); *accord Flores v. State*, 574 So. 2d 1314, 1321 (Miss. 1990) ("[S]ince the right to a speedy trial is a right personal to the accused, the right should not be waived because of delays occasioned by a co-defendant for which the accused was not in any way responsible.").

¶97. Courts have grappled with the "multiple clock" issue before, but normally when there are multiple indictments or new co-defendants. In Mississippi, "[t]he prosecution may not circumvent an accused's demand for a speedy trial by seeking a new indictment for the *same offense* and then proceeding upon the new indictment." *Taylor v. State*, 672 So. 2d 1246, 1257 (Miss. 1996) (emphasis added). [17]

17 However, if the original indictment is dismissed, the speedy-trial clock is restarted with the re-indictment. *See Murray v. State*, 967 So. 2d 1222, 1229 (Miss. 2007) (Where defendant's first

> indictment was dismissed by nolle prosequi, the date of the original indictment did not count towards the speedy trial analysis when he was re-indicted later.); *Forrest v. State*, 782 So. 2d 1260, 1268 (Miss. Ct. App. 2001) ("[T]he 270 day right should begin at the date of the new indictment.").

¶98. Likewise, in the Fifth Circuit, "[t]he filing of a superseding indictment does not affect the speedy trial clock for offenses charged in the original indictment or any offense required to be joined under double jeopardy principles." *United States v. Bermea*, 30 F.3d 1539, 1567 (5th Cir. 1994). Under this interpretation of the law, "[t]he clock continues to run from the original indictment or arraignment, whichever was later, and all speedy trial exclusions apply as if no superseding indictment had been returned." *Id.* This approach "prevents the government from circumventing the speedy trial guarantee through the simple expedient of obtaining superseding indictments with minor corrections." *Id.*; *but see United States v. Harris*, 566 F.3d 422, 429 (5th Cir. 2009) (When a subsequent indictment widens the scope of the criminal investigation, such as by adding new conspirators, "the starting point for the speedy trial clock is ... reset to the date of the arraignment on the superceding indictment.").

¶99. Similarly, in Ohio, a subsequent indictment "made against an accused would be subject to the same speedy-trial constraints as the original charges, if additional charges arose from the same facts as the first indictment." *State v. Baker*, 78 Ohio St.3d 108, 676 N.E.2d 883, 885 (1997). However, "[a]dditional crimes based on different facts should not be considered as arising from the same sequence of events for the purposes of speedy-trial computation." *Id.* at 885-86; *see also State v. Parker*, 113 Ohio St.3d 207, 863 N.E.2d 1032, 1036 (¶20) (2007) ("[S]peedy-trial time is not tolled for the filing of later charges that arose from the facts of the criminal incident that led to the first charge.").

¶100. So under these state and federal approaches to new indictments, even if the defendant in this case had been separately indicted for the crimes in this case, all the charges against him that "arose from the same facts" are still subject to the *same* speedy-trial clock. Under this analogous precedent, whether in one indictment or many, if the charges arise from the same facts, they are subject to one clock. I find a "one clock" approach monumentally clearer than the one implicitly adopted by the majority today.

¶101. I further write separately to emphasize that Berryman spent an estimated 1,234 days under the control of the State before his trial. This, despite the assurance that "[t]he history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." *Klopfer v. North Carolina*, 386 U.S. 213, 226, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). There the Supreme Court traced the American right to a speedy trial back to English guarantees of due process and liberty announced in 1215 and 1166. *Id.* at 223, 87 S.Ct. 988. The Court noted that the Virginia Declaration of Rights enshrined it at the very dawn of our country in 1776, establishing that "a man ha[s] a right to ... a speedy trial." *Id.* at 225, 87 S.Ct. 988. Our state followed suit. *See* Miss. Const. art. 3, § 26 ("[T]he accused shall have a right to ... a speedy and public trial by an impartial jury[.]").

¶102. The right to a speedy trial should be treated no less and no more than our sacred rights to speak our minds or to bear arms in defense of our homes, or our right to even *have* a trial should we be arrested. We should not allow a constitutional right to be fumbled away by bureaucracy and confusion, as it was in this case. Nor should its deprivation be used to oppress our citizens. [18]

18 "One of the concerns of criminal defendants in the Mississippi of times past was not the deprivation of a speedy trial," but in trial being held so quickly they could not adequately prepare. *Guice v. State*, 952 So. 2d 129, 145 (Miss. 2007) (Diaz, P.J., dissenting) (collecting cases showing how the shift over time from ultra-speedy time to trial to ultra-delays in trial); *see Robinson v. State*, 223 Miss. 70, 82, 77 So. 2d 265, 269 (1955) (affirming a conviction of death for conviction of rape when sentencing was only *six days* from the attack).

¶103. Once upon a time the Mississippi Supreme Court held, "The right to a speedy trial means what it says." *Flores*, 574 So. 2d at 1323. Because the right must mean what it says as to *all* charges, and not just for some, the "only possible remedy" is to dismiss the entire indictment and any charges stemming from the same factual nexus. Therefore, I respectfully dissent from the conclusion that Berryman's speedy-trial right was not violated.

All Citations

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See Miss. Rules App.Proc. 35-A, regarding the publication and citation of unpublished opinions.
Supreme Court of Mississippi.

Brian Scott BERRYMAN
v.
STATE of Mississippi

2020-CT-00710-COA

Filed: 03/01/2022

Closed: 05/19/2022

Motion Desc: Petition for Writ of Certiorari

Opinion

***1** Certiorari - Denied

All Citations

Slip Copy, 2022 WL 2032198 (Table)

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APPENDIX N

ARRAIGNMENT ORDER

APPENDIX N

Jail

IN THE CIRCUIT COURT OF TISHOMINGO COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. **CAUSE NO. CR** 17-183

Brian Scott Berryman

ARRAIGNMENT ORDER

On this date Defendant, in the presence of his/her attorney, John R White, and the District Attorney, appeared in Open Court where he/she was served with a copy of the Indictment in this cause, waived a formal reading of said Indictment, and entered a plea of **NOT GUILTY** to the charge of

Ct I: Shoot into an occupied dwelling

Ct II: poss weapon by convicted felon

IT IS THEREFORE ORDERED: (1) That the Defendant remain in the custody of the Sheriff of this County unless he/she shall make an appearance bond in the sum of $MDOC Custody No Bond according to the law and approved by the sheriff.

(2) That the above named attorney is hereby appointed to represent the Defendant in this case. Defendant warrants that the information contained in the Affidavit of Indigence and biographical information is correct.

(3) That the State shall complete requested discovery pursuant to Rule 9.04 of the UCCR not later than 30 days prior to the trial date. Defendant shall make reciprocal discovery as directed by said rule.

(4) That all preliminary motions shall be filed and brought to the attention of the Court Administrator for setting on the next regularly scheduled motion day. It shall be the responsibility of the moving attorney to insure said motions are heard.

(5) That any agreement concerning plea negotiation shall be concluded on or before the next "plea day" as scheduled and a plea entered on or before that date; otherwise all pleas will be "open". Defendant shall meet with their attorney on or before Jan 7, **2019,** for purposes of discussing a guilty plea(s).

(6) That this cause is continued on motion of the Defendant and set for trial during the next regularly scheduled term on a date to be set by the Court prior to that term by separate order.

(7) That Defendant maintain contact with their attorney and keep him/her advised of their mailing address and how to contact them by phone.

(8) Failure of Defendant to act in accord with the requirements of this Order shall result in cancellation of Defendant's appearance bond and being held in custody until the case can be tried.

This the 7th day of November, 2018.

Paul S. Funderburk

CIRCUIT COURT JUDGE

John R White

ATTORNEY FOR DEFENDANT

Brian Berryman

DEFENDANT

FILED

NOV 07 2018

DONNA HENRY DILL
CIRCUIT CLERK
TISHOMINGO COUNTY, MS.

EXHIBIT 2

APPENDIX O

18 USC § 3161

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 208. Speedy Trial (Refs & Annos)

18 U.S.C.A. § 3161

§ 3161. Time limits and exclusions

Effective: October 13, 2008
Currentness

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

(A) undertake to obtain the presence of the prisoner for trial; or

(B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does

demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

CREDIT(S)

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2076; amended Pub.L. 96-43, §§ 2 to 5, Aug. 2, 1979, 93 Stat. 327, 328; Pub.L. 98-473, Title II, § 1219, Oct. 12, 1984, 98 Stat. 2167; Pub.L. 100-690, Title VI, § 6476, Nov. 18, 1988, 102 Stat. 4380; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub.L. 110-406, § 13, Oct. 13, 2008, 122 Stat. 4294.)

Notes of Decisions (1654)

18 U.S.C.A. § 3161, 18 USCA § 3161
Current through PL 117-41.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 208. Speedy Trial (Refs & Annos)

18 U.S.C.A. § 3162

§ 3162. Sanctions

Currentness

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

CREDIT(S)

(Added Pub.L. 93-619, Title I, § 101, Jan. 3, 1975, 88 Stat. 2079.)

Notes of Decisions (241)

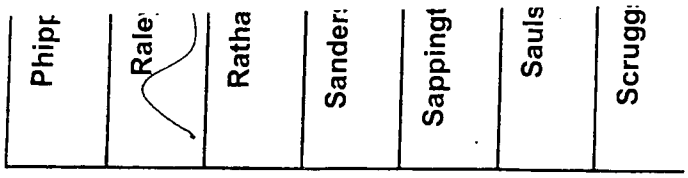
18 U.S.C.A. § 3162, 18 USCA § 3162
Current through PL 117-39.

End of Document

APPENDIX P

ARREST/BONDING SHEET

APPENDIX P



Tisl t

Bonding Sheet

DATE OF ARREST: 2/6/17 **TIME:** 0500 **ARRESTING DEPT:** TCSD

NAME: Berryman, Bryan

MISD.CHARGES _____

FELONY CHARGES: ① Poss of Cont. Sub. (Oxycodone)
② Poss of Cont. Sub. (Hydrocodone)
③ Shooting Weapon into a dwelling
④ Felon in Possession of a firearm

THER AGENCIES HOLDS AND CHARGES: Hold for MDOC + Wanted in Covington TN

	BOND 1	BOND 2	BOND 3	BOND 4
ESPONSIBLE OURT	Circuit	Circuit	Circuit	Circuit
OURT DATE	6-23-17 9AM	6-23-17	6-23-17	6-23-17
ASH BOND	5000	5000	40,000	5,000
STICE URT FEE				
IL BOND	5000	5000	40,000	5,000
OCESS FEE	26	26	26	26
BY	Cummings	Cummings	Cummings	
LDS				

CONTACTED: _____ DATE: __/__/____ TIME: _____

_____ BONDING AGENT: _____

TOWED BY: _____

PRINTED: Y N REASON IF NO:

NO. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

BRIAN SCOTT BERRYMAN – PETITIONER

VS.

STATE OF MISSISSIPPI, ET.AL. – RESPONDENT(S)

MOTION FOR APPOINTMENT OF COUNSEL

PETITIONER Moves this HONORABLE COURT to APPOINT COUNSEL to represent him IN the CERTIORARI PROCEEDINGS AS he is indigent and has AT ALL times APPEARED before the Courts *IN FORMA PAUPERIS*, and C[illegible] being Appointed to represent him.

COUNSEL WAS Appointed by the TISHOMINGO COUNT[illegible] -ENT him in the trial COURT, Miss. Court[illegible] his MOTION TO PROCEED in FORMA PO[illegible]

PETITIONER ASSERTS he is[illegible] to the Criminal Justice Ac[illegible] COURT SO ORDER.

IN THE STATE OF: Mississippi
COUNTY OF: GREENE
subscribed And sworn before ME [illegible]
August, 2022.

NOTARY PUBLIC

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

BRIAN SCOTT BERRYMAN _____ — PETITIONER
(Your Name)

VS.

STATE OF MISSISSIPPI, ET,AL. — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

TISHOMINGO COUNTY CIRCUIT COURT; COURT OF APPEALS FOR THE STATE OF MISSISSIPPI; SUPREME COURT FOR THE STATE OF MISSISSIPPI

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☒ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____
_____, or

☒ a copy of the order of appointment is appended. (APPENDIX A, B AND C).

Brian Scott Berryman
(Signature)

APPENDIX A

1. ORDER GRANTING DEFENDANT TO PROCEED IN FORMA PAUPERIS DATED MARCH 3, 2020 (SIDE 1)

2. CORRESPONDENCE FROM STATE CIRCUIT COURT CLERK TO THE CLERK OF THE STATE COURT OF APPEALS/SUPREME COURT CLERK (SIDE 2)

IN THE CIRCUIT COURT OF TISHOMINGO COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. CAUSE NO. CR17-151
CR17-183

BRIAN SCOTT BERRYMAN DEFENDANT

ORDER

THIS CAUSE is before the Court on Defendant Brian Scott Berryman's Motion to Proceed *in forma pauperis* on appeal. This Court certifies that the Defendant is indigent and may proceed *in forma pauperis*.

IT IS THEREFORE ORDERED that Brian Scott Berryman's Motion to Proceed *in forma pauperis* shall be and same is **GRANTED**. The Circuit Clerk shall mail a copy of this Order to the Defendant and the Clerk for the Mississippi Supreme Court.

SO ORDERED, this the 3rd day of March, 2020.

Paul Funderburk

PAUL S. FUNDERBURK
CIRCUIT JUDGE

TISHOMINGO COUNTY
FILED
MAR 03 2020
JOSH MCNATT, CIRCUIT CLERK
BY Kimberly Wilson

27.7

Josh McNatt

Tishomingo County Circuit Court Clerk

1008 Battleground Drive
Room #204
Iuka, Mississippi 38852

Office (662) 423-7026
Fax (662) 423-1667
Cell (662) 424-3835

March 3, 2020

Honorable Jeremy Whitmire
Clerk of Mississippi Suprema Court
PO Box 249
Jackson, MS 39205-0249

RE: Brian Scott Berryman vs. State of Mississippi
Tishomingo County Cause CR 17-183 & CR 17-151
Suprema Court No. 2020-TS-00198 - -

Mr. Whitmire, I have enclosed ta certified copy of the order to Proceed *in forma pauperis* granted by the Circuit Court *on March 3, 2020. The* information sheet you requested sent with the checks from Tishomingo County will not reflect this order. At the time I completed the information sheet Mr. Berry had not been granted IFP status. If more information is required from me please let me know.

Sincerely,

Josh McNatt 3/3/2020

Josh McNatt

Cc: File

TISHOMINGO COUNTY
FILED
MAR 03 2020
JOSH MCNATT, CIRCUIT CLERK
BY Kimberly Wilson

276

joshmcnatt@co.tishomingo.ms.us

APPENDIX B

1. ORDER APPOINTMENT OF COUNSEL Dated 6/11/2020

IN THE CIRCUIT COURT OF TISHOMINGO COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS. CAUSE NO. CR17-151
CR17-183

BRIAN SCOTT BERRYMAN DEFENDANT

ORDER

The Court hereby appoints Will Bristow, Esq. to represent Defendant in the above criminal causes.

SO ORDERED AND ADJUDGED this the 11th day of JUNE, 2020.

KELLY L. MIMS
CIRCUIT JUDGE

ADMINISTRATOR

JUN 11 2020

PROCESSED
NOT FILED

STATE OF MISSISSIPPI
COUNTY OF TISHOMINGO
I, JOSH MCNATT, Clerk of the Circuit Court of the said County and State do hereby certify that the foregoing constitutes a true and correct copy of said instrument of writing as appears of record in Circuit Book, on page CR 17-151 of records now on file in said clerk's office CR17-183
Given under my hand and official seal, this 15th day of June 20 20
JOSH MCNATT
By D.C.

CIRCUIT COURT SEAL
TISHOMINGO COUNTY, MS

107|481

TISHOMINGO COUNTY
FILED
JUN 15 2020
JOSH MCNATT, CIRCUIT CLERK
BY Susan Long

APPENDIX C

ORDER GRANTING LEAVE of Court TO PROCEED ON APPEAL IN FORMA PAUPERIS DATED 7/1/2020

IN THE CIRCUIT COURT OF TISHOMINGO COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI — PLAINTIFF

VS. — CAUSE NO.: **CR17-183**

BRIAN SCOTT BERRYMAN — DEFENDANT

ORDER GRANTING LEAVE OF COURT TO PROCEED ON APPEAL *IN FORMA PAUPERIS*

THE COURT HAS BEFORE IT the Motion of Defendant for Leave of Court to Proceed on Appeal *In Forma Pauperis*, and the Court, having considered the premises, affirmatively finds the Defendant to be indigent and thus finds this motion to be well-taken. Therefore, it is hereby

ORDERED that the Defendant be, and hereby is, granted leave of this Court to proceed with his appeal *in forma pauperis*.

SO ORDERED this the 1st day of July, 2020.

TISHOMINGO COUNTY CIRCUIT JUDGE

STATE OF MISSISSIPPI
COUNTY OF TISHOMINGO
I, JOSH MCNATT, Clerk of the Circuit Court of the said County and State do hereby certify that the foregoing constitutes a true and correct copy of said instrument of writing as appears of record in Circuit Book, on page CR 17-183 of records now on file in said clerk's office.
Given under my hand and offic at seal, this 6th day of July 20 20
JOSH MCNATT, D.C.
By

107/572

CIRCUIT COURT SEAL TISHOMINGO COUNTY, MS

TISHOMINGO COUNTY
FILED
JUL 01 2020
JOSH MCNATT, CIRCUIT CLERK
BY