No. 22-5336

IN THE
Supreme Court of the United States

BRIAN SCOTT BERRYMAN,
Petitioner,

v.

THE STATE OF MISSISSIPPI,
Respondent.

On Petition for Writ of Certiorari to the Mississippi Court of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Petitioner was charged in one indictment on two counts: shooting into a dwelling and possessing a firearm as a felon. The state trial court ruled that delay of petitioner's trial prejudiced him—and violated his Sixth Amendment speedy-trial right—on the first count but not on the second count. The trial court thus dismissed only the first count. Petitioner was convicted on the second count. Did the Mississippi Court of Appeals err in upholding the trial court's ruling that dismissal of the unlawful-possession count was not warranted?

2. Did the Mississippi Court of Appeals err in affirming the rejection of petitioner's state-law statutory speedy-trial claim when Mississippi law requires a showing of prejudice on such a claim and petitioner could not make that showing?

3. Did the Mississippi Court of Appeals err in ruling that petitioner's indictment, which cited and tracked Mississippi's violent habitual-offender sentencing statute, satisfied state-law requirements for notifying petitioner that he could be sentenced under Mississippi's violent habitual-offender statute?

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The Mississippi Court of Appeals' opinion (Petition Appendix (App.) J) is reported at 337 So. 3d 1116. That court's order denying rehearing (App. C) is not reported. The Mississippi Supreme Court's order denying certiorari (App. C) is reported at 338 So. 3d 127 (table).

JURISDICTION

The Mississippi Court of Appeals' judgment was entered on November 9, 2021. That court denied rehearing on February 15, 2022. The Mississippi Supreme Court denied review on May 10, 2022. The petition was filed on June 2, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATEMENT

1. Petitioner Brian Berryman has been convicted of capital murder, burglary of a dwelling, armed robbery, robbery, and possessing a firearm as a felon. App. J 4 (¶ 7), 30 (¶ 68). This case focuses on the last conviction.

In February 2017, petitioner entered his neighbor's trailer and fired a gun into the bedroom. App. J 2 (¶ 3). A deputy responded and took statements from the trailer's occupants, David Thacker and his girlfriend Tina Alexander. *Ibid.* Thacker and Alexander identified petitioner as the shooter. *Ibid.* The deputy searched the trailer and found eight spent .22-caliber shell casings and one live .22-caliber round. *Ibid.* He saw bullet holes in the bedroom door and a bedroom wall. *Ibid.*

Three deputies went to petitioner's home, which was two houses down from the trailer. App. J 2 (¶ 4). They arrested petitioner. App. J 2-3 (¶ 4). Petitioner's face was bruised and bloodied. App. J 3 (¶ 4). He said that Thacker had "beat him up."

Ibid. He said that he did not have any guns in his home but he consented to a search of his home. *Ibid.* Deputies found a .380-caliber pistol, a .22-caliber rifle, .22-caliber ammunition, .380-caliber ammunition, and drugs. *Ibid.*

Petitioner was taken to the Tishomingo County Sheriff's Office, where he waived his *Miranda* rights and made a statement. App. J 3 (¶ 5). According to that written, signed statement: Thacker had asked petitioner to bring over some moonshine. *Ibid.* Petitioner did so and let Thacker and Alexander have some of it. *Ibid.* Thacker asked to borrow a DVD from petitioner, but petitioner refused. *Ibid.* Thacker then hit petitioner in the face "about three times." *Ibid.* Petitioner left and "a little bit later" he "grabbed [his] .22 rifle and [his] .380 pistol and drove over to [Thacker's] trailer." *Ibid.* He went to the back porch, opened the door, and yelled to Thacker. *Ibid.* Thacker jumped from his bed and grabbed the barrel of petitioner's rifle. *Ibid.* Alexander ran to the front door, and petitioner then fired "three or four rounds" so that Thacker would release the rifle. *Ibid.* Thacker released the gun and ran out. App. J 3-4 (¶ 5). Petitioner went home. App. J 4 (¶ 5). Knowing that "the law would be coming," he "started getting drunk." *Ibid.* Petitioner said that he shot into Thacker's bedroom only to scare him and that, had he intended to kill Thacker and Alexander, he would have "just shot them both while they were in bed." *Ibid.*

At the time, petitioner was on parole from a life sentence for capital murder. App. J 4 (¶ 6). But he had absconded from supervision years before and was subject to an arrest warrant for violating his parole. *Ibid.* So, after his arrest, he was put in state custody for that violation and his parole was revoked. *Ibid.*; *see* App. J 20 (¶ 48).

2. In September 2017, a Tishomingo County grand jury indicted petitioner for shooting into a dwelling and possessing a firearm as a felon. App. J 4 (¶ 7). Based on his prior convictions, he was indicted as a violent habitual offender under Miss. Code Ann. § 99-19-83, which allowed a sentence of life without parole. *Ibid.*

In June 2018, petitioner filed a pro se demand for trial and motion to dismiss for denial of his right to a speedy trial. App. J 4 (¶ 8). Four months later, he filed another pro se demand for trial and motion to dismiss. *Ibid.*

In November 2018, petitioner was arraigned. App. J 4 (¶ 9). The trial court appointed counsel for him. *Ibid.* That attorney had just been elected to be a judge, however, and was unable to represent petitioner after his arraignment. App. J 4-5 (¶ 9). Petitioner and the attorney signed the arraignment order continuing the case to the next court term. App. J 5 (¶ 9). Two weeks later, petitioner filed a pro se demand for trial, a motion to dismiss, and a motion for appointed counsel. *Ibid.*

In January 2019, the trial court appointed Richard Bowen to represent all indigent defendants in Tishomingo County, though the appointment order was not entered on the docket in petitioner's case. App. J 5 (¶ 10). Bowen realized "sometime in the first half [of] 2019" that he had prosecuted petitioner for capital murder, so he told the conflict public defender, Daniel Sparks, that Sparks would need to represent petitioner. *Ibid.* In April 2019, petitioner filed another pro se demand for trial and motion to dismiss. App. J 5 (¶ 11).

In June 2019, the trial court entered an order continuing the case. App. J 5 (¶ 12). The order says that it was granted on Sparks' motion, though the record does not contain any such motion. *Ibid.* Petitioner challenged the continuance in the

Mississippi Supreme Court, which dismissed for lack of an appealable judgment. App. J 6 (¶ 14). In October 2019, petitioner moved the trial court to dismiss for want of prosecution, alleging a speedy-trial violation, and moved for appointed counsel. App. J 5-6 (¶ 13).

From September 2019 to April 2020, the assigned trial judge was unavailable due to illness. *See* App. J 18 (¶¶ 42, 43). In January 2020, petitioner moved the other available trial judge to recuse because he had prosecuted petitioner for robbery in 1983. App. J 6 (¶ 15). That judge granted his motion in March 2020. *Ibid.*

Also in March 2020, the trial court (through a different judge) ruled on petitioner's motions for appointed counsel. App. J 6 (¶ 16). The court stated that petitioner had been represented by counsel since his arraignment. *Ibid.* But because no order appointing counsel had been entered on petitioner's docket, the court entered an order appointing Sparks nunc pro tunc. *Ibid.*

In April 2020, petitioner filed a mandamus petition asking the Mississippi Supreme Court to order the trial court to rule on his October 2019 motion to dismiss for want of prosecution. App. J 7 (¶ 18). The trial court responded that petitioner had not tried to notice the motion for a hearing, but that court set the motion for a hearing on June 22, 2020, and ordered the State to respond to it. *Ibid.* The Mississippi Supreme Court dismissed the mandamus petition. *Ibid.*

On June 11, 2020, the trial court appointed new counsel for petitioner because Sparks had been elected to the Mississippi Senate and had duties in the legislative session. App. J 7 (¶ 19).

At the June 22, 2020 hearing on petitioner's motion to dismiss for a speedy-trial violation, petitioner testified that a potential defense witness, Marshall Edge, had died on February 22, 2018. App. J 7-8 (¶ 21). According to petitioner, Edge lived between petitioner's and Thacker's homes and could have testified that petitioner did not have a gun when he walked to Thacker's trailer. App. J 8 (¶ 21). Petitioner submitted Edge's obituary. *Ibid.* Petitioner also said that another neighbor, Nancy Brooks, told him that Edge wanted to testify for petitioner. App. J 8 (¶ 22). Petitioner did not call Brooks at the hearing. *Ibid.*

Ruling on petitioner's speedy-trial claim, the trial court ordered dismissal of the shooting-into-a-dwelling charge but not the felon-in-possession charge. BIO Appendix (BIO App.) 6-7 (order). In doing so, the court balanced the four factors for assessing a speedy-trial claim that this Court set forth in *Barker v. Wingo*, 407 U.S. 514 (1972): "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530. The trial court ruled that the first three factors favored petitioner, BIO App. 3-5, but that the delay prejudiced him—and violated his Sixth Amendment speedy-trial right—only on the shooting-into-a-dwelling count, not on the felon-in-possession count, BIO App. 5-7. The court reasoned that the absence of Edge's proposed testimony—that petitioner "did not have a gun going to or leaving" Thacker's house—prejudiced petitioner's defense against the shooting-into-a-dwelling charge. BIO App. 6. But that testimony "has no bearing on whether" petitioner, "as a convicted felon, possessed the gun that was discovered" in his home—and so did not prejudice his felon-in-possession defense. *Ibid.*

The trial court also rejected petitioner's state-law statutory speedy-trial claim. BIO App. 7 n.8. Under Mississippi law, "all offenses for which indictments are presented ... shall be tried no later than two hundred seventy (270) days after the accused has been arraigned" "[u]nless good cause be shown, and a continuance duly granted by the court." Miss. Code Ann. § 99-17-1. The court ruled that petitioner was not denied this right because fewer than 270 days of post-arraignment delay were attributable to the State and (alternatively) because petitioner had not shown prejudice on the felon-in-possession count. BIO App. 7 n.8.

The case proceeded to trial. The State called several deputies as witnesses and introduced petitioner's written statement. App. J 9 (¶ 24). Petitioner was the only defense witness. App. J 9 (¶ 25). His testimony differed significantly from his written statement. *Ibid.* He testified to the following: He was drinking moonshine with Thacker and Alexander in Thacker's trailer. App. J 9-10 (¶ 25). He loaned Thacker money to buy drugs. App. J 10 (¶ 26). After Thacker left to buy drugs, Alexander began performing oral sex on petitioner. *Ibid.* Thacker walked in on them, was "very upset," and "fired several shots into the bedroom" with a rifle he was carrying. App. J 10 (¶ 27). Petitioner wrestled the rifle from Thacker, Thacker ran away, and petitioner returned home with the rifle. App. J 10 (¶¶ 27-28). Thacker later entered petitioner's home unannounced, the two men fought more, Thacker pulled out a pistol and fired into the floor, one of petitioner's dogs bit Thacker, and Thacker apparently dropped the pistol and left. App. J 10-11 (¶ 28). Petitioner was arrested a few hours later. App. J 11 (¶ 29).

Petitioner denied making the written statement, claimed that his signature on the statement was forged, and denied consenting to a search of his home. App. J 11 (¶ 29). On cross-examination, petitioner could not explain the boxes of .22-caliber and .380-caliber ammunition in his home. App. J 11 (¶ 30). He testified that he did not take boxes of ammunition with him when he left Thacker's trailer. *Ibid.*

The jury convicted petitioner of unlawfully possessing a firearm as a felon. App. J 11 (¶ 31). The court sentenced him as a violent habitual offender to life imprisonment without parole. *Ibid.*; *see* App. B (amended judgment). The court rejected petitioner's argument that his indictment failed to notify him that he could be sentenced to life in prison. BIO App. 9-13 (transcript containing oral ruling).

3. The Mississippi Court of Appeals affirmed. App. J. It reached three conclusions relevant here.

First, the court of appeals upheld the trial court's ruling that petitioner was not denied his Sixth Amendment speedy-trial right on the felon-in-possession charge. App. J 12-24 (¶¶ 32-57). The court concluded that the 40-month delay from arrest to trial favored petitioner and was long enough to be "presumptively prejudicial," App. J 13 (¶ 35); *see* App. J 13-14 (¶¶ 34-35), 22 (¶ 54); that the reasons for delay were either neutral (changes in petitioner's counsel, the trial judge's illness, and the pandemic) or weighed against the State (mainly the 14-month delay from indictment to arraignment, when the State could have arraigned petitioner earlier but did not), App. J 14-19 (¶¶ 36-45); and that the petitioner asserted his speedy-trial right, App. J 19 (¶ 46). But the court of appeals upheld the trial court's finding that petitioner had not shown prejudice on the felon-in-possession count. *See* App. J 19-22 (¶¶ 47-

52), 23-24 (¶¶ 54-57). Petitioner had not claimed "prejudice in the form of 'oppressive pretrial incarceration' or 'anxiety and concern,'" because he had violated his parole before he was charged in this case and "was returned to ... custody to serve his life sentence for capital murder for that reason." App. J 20 (¶ 48). That left only the prospect of prejudice to petitioner's defense. App. J 20 (¶ 49). And the court of appeals upheld the trial court's finding that petitioner had not showed prejudice. App. J 22 (¶ 52). The court of appeals explained that petitioner's claim of a lost witness (Edge) and that witness's potential testimony lacked corroboration or substantiation, that petitioner had failed to call the other claimed witness (Brooks) at his speedy-trial hearing, and that petitioner's written statement "directly contradicted" the testimony that he claimed that Edge would have provided. App. J 21-22 (¶¶ 50-52). Considering the four *Barker* factors together, the court of appeals upheld the trial court's ruling that petitioner was not denied his Sixth Amendment speedy-trial right on the felon-in-possession charge. App. J 22-24 (¶¶ 53-57).

Judge McCarty dissented from this ruling. App. J 37-44 (¶¶ 85-103). Judge McCarty believed that "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." App. J 37 (¶ 85). He emphasized that in *Barker* this Court said that "dismissal of the indictment" "is the only possible remedy" when the speedy-trial right has been denied, 407 U.S. at 522, that Mississippi Supreme Court caselaw and Fifth Circuit caselaw (the latter under the federal Speedy Trial Act) contain similar language, and that dismissal of the felon-in-possession charge was therefore required once the trial court concluded that petitioner was denied his speedy-trial right on the

shooting-into-a-dwelling charge. App. J 38-40 (¶¶ 86-92). Judge McCarty acknowledged "that neither *Barker* nor any of the other cases" he cited "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." App. J 40 (¶ 92) n.16. But he believed that *Barker*'s "extreme language" requires that result. *Ibid.* He added that assessing speedy-trial claims charge by charge "would create an unworkable morass" given the "fluid" and "complicated" nature of the *Barker* analysis, App. J 40 (¶ 93), and would mean that multiple "clock[s]" will be running for speedy-trial purposes, App. J 41 (¶¶ 96-97); *see* App. J 42-43 (¶¶ 98-100).

In response to these points, the court of appeals' majority observed that petitioner had not advanced Judge McCarty's argument, App. J 26 (¶ 60) n.10; explained that *Barker* nowhere mandates dismissal of the "entire" indictment, App. J 26 (¶ 61); *see* App. J 26-27 (¶ 61); noted that *Barker* "did not even consider, let alone decide," whether "specific counts could be dismissed" for a speedy-trial violation, App. J 26-27 (¶ 61); and maintained that assessing speedy-trial claims charge by charge "is consistent with" *Barker* and "may be appropriate in some cases," App. J 27 (¶ 62). On that last point, the court emphasized that *Barker*'s prejudice factor "often proves to be the most important in the analysis," App. J 27 (¶ 63), and that prejudice "may be different for different counts," App. J 28 (¶ 64). The majority added that a charge-by-charge analysis will not be unworkable because "[t]he analysis of *Barker*'s first three factors will almost always be the same for all counts" (and there will be "only one clock" for all counts in a single indictment) and it is "hardly unworkable" to make

a separate prejudice finding on each count—as the trial judge did here. App. J 29 (¶¶ 66, 67) (internal quotation marks omitted).

Second, the court of appeals affirmed the trial court's ruling that petitioner was not denied his state-law statutory speedy-trial right. App. J 24-25 (¶¶ 58-59). The court of appeals held that petitioner failed to show prejudice because the only claimed prejudice (Edge's unavailability to testify) did not result from a statutory violation (Edge died before petitioner's arraignment and so before the statutory right had attached). App. J 25 (¶ 59).

Third, the court of appeals rejected petitioner's argument that his indictment failed to notify him that the State intended to sentence him under the violent habitual-offender statute, Miss. Code Ann. § 99-19-83. App. J 29-32 (¶¶ 68-71). He argued that he should have been sentenced instead under the nonviolent habitual-offender statute, Miss. Code Ann. § 99-19-81. App. J 30 (¶ 69). Rejecting that argument, the court explained that petitioner's indictment "specifically charged him under section 99-19-83" and "alleged all necessary prerequisites for sentencing under that statute." App. J 30-31 (¶ 70). Those elements include that petitioner had been convicted of two prior felonies (the indictment listed his prior felony convictions), that he had been "sentenced to and served separate terms" of a year or more for those convictions (the requirement of having actually served separate terms applies under the violent habitual-offender statute but not under the nonviolent habitual-offender statute), and that at least one prior conviction was a "crime of violence" under Mississippi law (another requirement that applies only under the violent habitual-offender statute). App. J 30 (¶ 68), 30-31 (¶ 70). The court held that the indictment

"was more than sufficient to put" petitioner "on notice that he would be sentenced under" the violent habitual-offender statute. App. J 31 (¶ 70).

Judge McDonald dissented from this last ruling. App. J 32-37 (¶¶ 74-84). She thought the indictment defective because it charged that petitioner could receive "the maximum term of imprisonment as prescribed for such felony," that "such felony" meant the felon-in-possession charge, and that the maximum sentence for that charge was ten years' imprisonment. App. J 33-34 (¶ 78) (emphasis omitted). Judge McDonald acknowledged that petitioner's indictment cited the violent habitual-offender statute, App. J 34 (¶ 78), and did not contest that the indictment alleged all elements of that statute. But she maintained that the indictment "improperly combine[d]" the violent and nonviolent habitual-offender statutes. App. J 54 (¶ 81). She would have "render[ed] a sentence of ten years' incarceration." App. J 37 (¶ 84).

The Mississippi Court of Appeals denied rehearing by a divided vote. App. C. The Mississippi Supreme Court denied further review. App. C.

REASONS FOR DENYING THE PETITION

Petitioner seeks this Court's review of three questions. Review is not warranted. The petition should be denied.

1. First, petitioner contends that a Sixth Amendment speedy-trial violation requires the dismissal of every count in an indictment, even when *Barker* would not call for dismissal of every count if evaluated charge by charge. Pet. 4-7, 20-21. Review of that question is not warranted.

Petitioner does not establish any lower-court conflict on that question. He does not contend that any other court has even addressed the question. Neither the

majority nor the dissent below cited another case addressing it. *Cf.* App. J 40 (¶ 92) n.16 (McCarty, J., dissenting) ("neither *Barker* nor any of the other cases" the dissent cited "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").

Percolation is warranted to allow other courts—beyond the one intermediate state appellate court here—to consider this question. The speedy-trial right balances "rights to a defendant" and "the rights of public justice." *Barker*, 407 U.S. at 522. Percolation could clarify how to balance those interests for multicount indictments, reveal whether the question presented will recur, and show the practical implications of the question presented. Judge McCarty maintained that assessing each charge separately "would create an unworkable morass," App. J 40 (¶ 93), and would mean that multiple "clock[s]" will be running for speedy-trial purposes, App. J 41 (¶¶ 96, 97). As the court of appeals' majority explained, however, both claims are dubious. On the first: "The analysis of *Barker*'s first three factors"—length of delay, reason for the delay, and the defendant's assertion of his speedy-trial right—"will almost always be the same for all counts." App. J 29 (¶ 66). It is not "unworkable" to make a separate finding for the fourth factor—prejudice—on each count (as the trial judge did here). *Ibid.* On the second: All charges in an indictment will have one clock. App. J 29 (¶ 67). Percolation could at least shed light on whether charge-by-charge assessments present any workability challenges.

This case is also a flawed vehicle for addressing this question. The question entered the case late, when Judge McCarty introduced it in his dissent on appeal. In fact, in the court of appeals petitioner argued for a "weighing of the *Barker* factors"

on the felon-in-possession count, which he maintained "should have resulted in dismissal" of that count. BIO App. 15 (petitioner's court-of-appeals brief). And this case presents unusual facts. When he was arrested, petitioner was in violation of his parole, and he was imprisoned because of his parole violation. App. J 20 (¶ 48). Petitioner thus would have been imprisoned anyway at all times relevant to the speedy-trial analysis. He did not claim prejudice in the form of oppressive pretrial incarceration or anxiety and concern of the accused—two of the three harms the speedy-trial right guards against. *Barker*, 407 U.S. at 532. The only relevant prejudice interest here was "the possibility that the defense will be impaired," *ibid.*, and the decision below rested on this feature, *see* App. J 20 (¶¶ 48-49). A more representative case would supply a better vehicle for this Court's review.

Last, the Mississippi Court of Appeals decided this question correctly. This Court has explained that "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Barker*, 407 U.S. at 522. Given the "amorphous" nature of the speedy-trial right and the competing concerns that it entails for the defendant and the public, *ibid.*, this Court has "reject[ed]" "inflexible approaches" to administering the right and has instead adopted "a balancing test" that looks to both sides' conduct, *id.* at 529, 530. Although that test "compels courts to approach speedy trial cases on an *ad hoc* basis," *id.* at 530, the approach is warranted for this context-dependent right that is not "comparable" to other procedural constitutional rights guaranteed to criminal defendants, *id.* at 522. And this Court has emphasized that the right protects against "the possibility that the defense will be impaired." *Id.* at 532. Indeed, an impaired

defense is "the most serious" prejudice concern "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Ibid.*

The Mississippi Court of Appeals' decision aligns with those principles. The court concluded that the 40-month delay from arrest was presumptively prejudicial to petitioner, App. J 13-14 (¶¶ 34-35); that the reasons for delay were either neutral or weighed against the State, App. J 14-19 (¶¶ 36-45); and that petitioner asserted his speedy-trial right, App. J 19 (¶ 46). But the court of appeals upheld the trial court's finding that petitioner had not shown prejudice on the felon-in-possession count. *See* App. J 19-22 (¶¶ 47-52), 23-24 (¶¶ 54-57). The court of appeals explained that petitioner's claim of a lost witness (Edge) and that witness's potential testimony lacked support and that petitioner's own written statement "directly contradicted" the testimony he claimed that Edge would have provided. App. J 21-22 (¶¶ 50-52). The court of appeals observed that the absence of prejudice favored the State and upheld the trial court's ruling that petitioner was not denied his speedy-trial right on the felon-in-possession charge. App. J 23-24 (¶¶ 54-57).

The court of appeals thus considered each *Barker* factor, 407 U.S. at 530, and reached its conclusion based on "the particular context of the case," *id.* at 522. Here, that context requires recognizing that petitioner faced two different charges and that prejudice can differ for different charges. Again, the speedy-trial right protects against "the possibility that the defense will be impaired." *Id.* at 532. Not every delay will impair the defense on every charge; delay can affect different charges differently. Suppose that a defendant allegedly stole from a store, then vandalized a building ten blocks away; that the defendant is charged in one indictment for theft and vandalism;

and that, during a pretrial delay, a witness to the alleged theft—but not the alleged vandalism—dies. In that case it may make sense to dismiss the theft charge because that witness's death could prejudice the defense on that charge. But it makes little sense to dismiss the vandalism charge based on the death of someone who was not a witness on that charge. That is just one example—and it is easy to think of others—showing that a charge-by-charge assessment aligns with the "functional" approach that this Court has embraced, *id.* at 522, while petitioner's approach is at home with the "inflexible approaches" that this Court has rejected, *id.* at 529.

Barker does say that "the only possible remedy" for a speedy-trial violation is "dismissal of the indictment." 407 U.S. at 522. But that statement points out that there is no tenable intermediate ground between dismissing a charge for a speedy-trial violation and allowing it to proceed to trial. *Cf. Strunk v. United States*, 412 U.S. 434, 440 (1973) (sentence reduction not a proper remedy for speedy-trial violation; dismissal of the charge was "the only possible remedy"). *Barker* did not consider—and so did not foreclose—the commonsense prospect of dismissing only one charge when the balance of factors favors that approach. Petitioner's reading of *Barker* fails to account for that decision's flexible approach and makes the already "unsatisfactorily severe remedy" for speedy-trial violations even more unsatisfactory. 407 U.S. at 522. The approach has little to commend it. The decision below is correct and does not warrant further review.

2. Next, petitioner asks this Court to consider whether a Mississippi state-law statutory speedy-trial claim requires a showing of prejudice. Pet. 7-17, 21. That is a state-law question that this Court may not review. *New York v. Ferber*, 458 U.S. 747,

767 (1982) ("the construction that a state court gives a state statute is not a matter subject to [this Court's] review"). And there is an alternative, independent reason for rejecting this claim: fewer than 270 post-arraignment days (the time needed to show a violation of the right) were the State's fault. BIO App. 7 n.8; *see* App. J 25 (¶ 58). Petitioner contends that the decision below conflicts with the federal Speedy Trial Act, 18 U.S.C. § 3161 *et seq*. Pet. 9-11. But that Act applies only to federal criminal prosecutions, *see* 18 U.S.C. §§ 3161, 3172, and the Mississippi Court of Appeals did not make any ruling under that Act. Last, the decision below does not conflict with Arizona caselaw. *Contra* Pet. 12-13 (citing *Von Feldstein v. State*, 150 P. 235 (Ariz. 1915)). That caselaw interprets Arizona law. 150 P. at 236. Arizona courts are entitled to interpret Arizona law differently from the way Mississippi courts interpret Mississippi law. Such different views of different laws do not make a lower-court conflict. And any such conflict would be immaterial because the question would still be one of state law that this Court cannot review.

3. Finally, petitioner asks this Court to consider whether his indictment adequately notified him that the State sought to sentence him as a violent habitual offender. Pet. 18-19, 21-22. But the Mississippi Court of Appeals did not decide any federal-law issue about the indictment. The court of appeals' analysis rested on state-law notice requirements for Mississippi's habitual-offender statutes. App. J 29-32 (¶¶ 68-71). This final question presented thus concerns only a matter of state law that this Court may not consider. *Ferber*, 458 U.S. at 767. And the court of appeals' ruling was correct. Under state law, an indictment's reference to both the violent and nonviolent habitual-offender statutes adequately notifies the defendant that he can

be sentenced under either. *Grim v. State*, 102 So. 3d 1123, 1129-30 (Miss. Ct. App. 2010). Petitioner's indictment cited the violent habitual-offender statute and tracked its requirements—requirements that, petitioner does not dispute, he met.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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November 10, 2022

Appendix A to
Respondent's Brief in Opposition

Order Denying Speedy Trial Claims
June 24, 2020

IN THE CIRCUIT COURT OF TISHOMINGO COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

VS.

TISHOMINGO COUNTY FILED JUN 24 2020 JOSH MCNATT, CIRCUIT CLERK

CAUSE NO. CR17-183
CR17-151

BRIAN SCOTT BERRYMAN DEFENDANT

ORDER

The above-styled and numbered cause of action is currently before the Court on the Defendant's Motion to Dismiss for Want of Prosecution and multiple motions for speedy trial. Consistent with the bench-ruling made following a hearing on these motions held on June 22, 2020, the Court finds as follows:

While on parole for previous convictions, Defendant was arrested on or about February 6, 2017, in relation to charges of possession of a controlled substance, shooting into a dwelling, and felon in possession of a weapon.[1] As a result of this arrest, Defendant's parole was revoked.[2] He has since remained incarcerated. During this period of incarceration, a Tishomingo County grand jury returned the indictments *sub judice*.[3] Defendant was subsequently arraigned on all charges on November 7, 2018. His trial is set to commence June 23, 2020. In light of this delay, Defendant moved the Court to dismiss his charges due to violations of his constitutional and statutory right to speedy trial.

"The constitutional right to a speedy trial attaches at the time a person is

[1] CR17-151 (two counts possession of controlled substance); CR17-183 (one count shooting into a dwelling and one count felon in possession of a weapon). Defendant allegedly shot into the home of one of his neighbors. A search of the building in which Defendant was located revealed drugs and guns.
[2] The Court notes Defendant also has a charge pending in Tennessee.
[3] The CR17-151 indictment was returned June 9, 2017. The CR17-183 indictment was returned September 22, 2017.

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accused, whether at arrest, indictment, or information." *Robinson v. State*, 920 So. 2d 1015, 1018 (Miss. Ct. App. 2005). This Court must apply the balancing test outlined in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), to determine whether Defendant's constitutional right to a speedy trial was violated. This test requires this Court to analyze the following factors: (1) length of the delay, (2) reason for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) whether the defendant was prejudiced by the delay. *Oliver v. State*, 20 So. 3d 16, 23 (Miss. Ct. App. 2009).

While the delay following Defendant's arrest is presumptively prejudicial, the State maintains the delay is a combination of negligence, crowded dockets, Defendant's requests, and other outside influences not attributable to the State. The State denies any deliberate design to violate Defendant's rights. "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 v. State*, 232 So. 3d 739, 745 (Miss. 2017). The State claims the delay between arrest and indictment is attributable to ongoing investigation. "[I]nvestigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage" and is a neutral delay. *State v. Woodall*, 801 So. 2d 678, 682-84 (Miss. 2001). Approximately 400 days passed between indictment and arraignment. The State claims this delay is due to

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Defendant's name negligently being left of the arraignment list. Delays caused by "mere negligence" are weighed against the State, but not as heavily as would be an intentional delay. *See Adams v. State*, 583 So. 2d 165, 168 (Miss. 1991). Post-arraignment, the causes were continued on motion of Defendant. Approximately 106 days elapsed due to Defendant's then-public defender ascending to the bench in this Circuit, the retirement and replacement of the over-flow public defender, and Defendant's new attorney discovering a conflict.[4] Defendant's cases were ultimately assigned to Daniel Sparks. "[D]elay caused by the withdrawal of the defendant's attorney which entails allowing the new attorney a reasonable time to become familiar with the case and prepare for trial cannot be weighed against the State because it is beyond the State's control." *Wesley v. State*, 872 So. 2d 763, 767 (Miss. Ct. App. 2004). In June 2019, the causes were continued "on Motion of the Defendant," and signed by Sparks. Defendant claims he did not authorize this continuance, but he is bound by his attorney's action. *See May v. State*, 285 So. 3d 639, 649 (Miss. Ct. App. 2019) ("May is bound by his lawyer's decisions as to the timing of trial and the need for a continuance. . . . A pro se demand for a speedy trial does not absolve the defendant of responsibility for a continuance that his own lawyer sought and obtained."). Subsequently, these causes were continued to account for a priority setting, the incapacity of a sitting judge,[5] and—more recently—Mississippi Department of Corrections policy not to transport inmates in light of COVID-19. None of these circumstances were within the State's

[4] Then-public defender John White originally represented Defendant. Attorney Greg Meyer was the back-up public defender. Richard Bowen was appointed as senior public defender. When he discovered a conflict, Defendant's cases were assigned to Daniel Sparks. Bowen and Sparks were appointed to replace White and Meyer respectively by circuit-wide order. Berryman conceded at the hearing that he had met with Sparks at least once and was informed by him that he was his new counsel.

[5] The Court also notes that Defendant moved for the recusal of Judge Funderburk. Thus, for a significant portion of time, there was but one judge in this Circuit who could preside over these causes.

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control and therefore cannot be weighed against it.

Taking all delays into account, all delays since arraignment are attributed to the Defendant, outside State control, or otherwise for good cause. The delay from indictment to arraignment was substantial, but was the result of negligence rather than intent, and therefore is not heavily weighed against the State.

The State concedes Defendant repeatedly asserted his right to a speedy trial. However, the State contends Defendant has not shown actual prejudice, which is the most important factor. *See May*, 285 So. 3d at 651. Defendant's pretrial incarceration has been due to his unrelated convictions, and is therefore not prejudice. *See McClendon v. State*, 124 So. 3d 709, 716 (Miss. Ct. App. 2013). Similarly, while Defendant is ineligible for parole and rehabilitative/educational programs outside the prison because of his violent convictions and out-of-state detainer from Tennessee, he is eligible for such program *within* the prison. Nor has Defendant shown any record evidence of debilitating anxiety, and the anxiety that come with incarceration "does not amount to prejudice worthy of reversal." *Id.*

"[T]he possibility of impairment of the defense is the most serious consideration in determining whether the defendant has suffered prejudice as a result of the delay. Generally, this Court will find prejudice where there was a loss of evidence, the death of a witness, or the investigation became stale." *Johnson v. State*, 68 So. 3d 1239, 1245 (Miss. 2011). To this end, Defendant claims the death of two witnesses, Marshal Edge and Clinton Buddy Holly.[6] Defendant testified that Edge

[6] Edge's death was raised in Defendant's motions and supported by an obituary. At the hearing, Defendant also raised Holly as a deceased witness.

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would have testified to seeing him go to and from the neighbor's house multiple times on the night of the incident and that Defendant did not have a gun with him in making these trips. Defendant testified that he was told by Nancy Brooks that Holly had told her that the neighbor had tried to sell to Holly the gun that Defendant allegedly used to shoot into the neighbor's house.

Neither deceased witness was presented as having any evidence bearing on the drug charges, and the Court therefore finds no prejudice as to these charges. The Court finds that Holly's alleged testimony would be inadmissible hearsay. Nor does the fact he previously tried to sell the firearm have any bearing on whether Defendant shot it into his dwelling or whether Defendant possessed it. Possession does not depend on ownership. Conversely, Edge's proposed testimony that Defendant did not have a gun going to or leaving the neighbor's house has some bearing on whether he shot into the neighbor's house, and is potentially admissible. *See, e.g.*, M.R.E. 804(b)(5). The Court therefore finds that Defendant has shown actual prejudice as to his charge of shooting into a dwelling. However, Edge's proposed testimony has no bearing on whether Defendant, as a convicted felon, possessed the gun that was discovered in the house in which he was staying.[7] Defendant has therefore shown no prejudice as to the felon in possession of a weapon charge.

Considering the totality of the circumstances, this Court hereby dismisses Count I of the indictment returned in CR17-183, shooting into a dwelling, as a

[7] Defendant asserts the house in which he was staying was not his house, nor did he live there; he only stayed there occasionally when he came down to work on it. The house belonged to his brother. This fact serves as one of the bases for Defendant's motions to suppress to be discussed by separate order.

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violation of Defendant's right to a speedy trial. However, because Defendant has not shown actual prejudice as to his charge of being a felon in possession of a weapon or the drug possession charges, his speedy trial claims as to those charges are denied.[8]

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant's Motion to Dismiss for Want of Prosecution and multiple motions for speedy trial shall be, and the same are hereby,

GRANTED as to Count I of CR17-183 (shooting into a dwelling) and

DENIED as to Counts I and II of CR17-151 (possession of controlled substances) and Count II of CR17-183 (felon in possession of a weapon).

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

KELLY L. MIMS
CIRCUIT JUDGE

TISHOMINGO COUNTY
FILED
JUN 24 2020
JOSH MCNATT, CIRCUIT CLERK
BY

Filed 6-24-2020
By KLM

Filed 6-24-2020

[8] Defendant also raises statutory speedy trial claims. *See* Miss. Code Ann. § 99-17-1 (requiring a defendant to be brought to trial no later than 270 days after his arraignment unless good cause is shown). Even if Defendant shows delay attributed to the State of over 270 days, he must also show actual prejudice. *See McBride v. State*, 61 So. 3d 138, 147 (Miss. 2011). While almost 600 days have passed since Defendant's arraignment, fewer than 270 are attributable to the State. 196 are attributable to continuances requested by Defendant. Approximately 236 are due to Judge Roberts' unavailability. Over 55 were due to COVID-19 concerns. None of these are attributable to the State. Even if attributable to the State, the prejudice analysis remains the same. Defendant has only shown actual prejudice as to his shooting-into-a-dwelling charge, and that charge is dismissed on constitutional speedy trial grounds.

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Appendix B to
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Oral Ruling Denying Sentencing Notice Claim
Trial Transcript pages 367-71

THE COURT: Ms. Graves, you may step down. Anything further, State?

MR. ROBBINS: No, Your Honor. Having proven, in our belief, beyond a reasonable doubt that the defendant has been convicted on two prior occasions of felony offenses, that he has served -- been sentenced to and actually served a year or more on those two convictions, those two separate cause numbers, that each of them arose out of separate events occurring at different times, that at least one of those crimes -- and actually all of them in this case are crimes of violence, it is the State's position that pursuant to Section 99-19-83 of the Mississippi Code, the only sentence available in this case is life in the custody of the Department of Corrections without any possibility for parole, probation, or any other type of early release. Thank you.

THE COURT: Defense?

MR. BRISTOW: Your Honor, it's the defendant's position that the indictment, as far as the habitual allegation, it does cite Mississippi Code Annotated Section 99-19-83. However, that portion of the indictment goes on to read that it contains language of Section 81, to where the sentence shall not be reduced or suspended nor shall be -- such person be

We take the position it's in the indictment, it's alleged in the indictment, it was not amended. And we take the position that this Court is only permitted to sentence this defendant to a ten-year sentence, day-for-day ten-year sentence, and we would ask the Court to sentence along those lines.

THE COURT: Anything further from the State?

MR. ROBBINS: No, Your Honor, other than the indictment sets out the elements of 99-19-83 and lists that section as the section for the enhancement.

THE COURT: Can I see the exhibits, please?

The Court acknowledges that the sentencing phase on enhancement is separate and apart from the case that we tried here today that was possession of a firearm by a convicted felon.

After hearing from the State and the defense, the Court finds that the defendant, first of all, was given an indictment during arraignment, as discussed previously in hearings in this court. I believe it was in 2017, around September, where he was indicted and then ultimately arraigned in 2018.

At that arraignment, he was handed an arraignment form, which he acknowledged receiving and signed. In that arraignment, it

that Brian Scott Berryman is hereby charged under Section 99-19-83 as amended. That is the 1983 habitual offender status which carries life in prison.

I acknowledge Mr. Bristow's statements about some of the language is not as precise as it should be. Sentenced to a maximum term of imprisonment as prescribed for such a felony or such sentence is misleading. It does track somewhat the language of 19 -- or Section 81.

However, if you go through the rest of the indictment, it talks about the previous crimes and singles out the terms that he had served on two of them and also discusses crimes of violence as defined in Section 97-3-2. The State could have moved to amend this at any time prior to now or prior to this hearing, prior to trial. And I do know that there was some discussion about it.

However, I do not think it's necessary, as I think the rule -- there has been case law that shows that even not putting the code section on here is not that important if you lay out -- I think it's proper and I think you should. But if you lay out the elements of Section 83, which was obviously laid out in this indictment, it was obviously served on the defendant three and a half years ago, or at least two years ago when

way. I don't think there is any surprise or lack of notice for the defendant that he knew he was looking at life in prison, even though the wording was unprecise inside the indictment.

And I also note that in rulings on amendments, if one had been made, they have often been allowed based on modifications to form and not substance. And substance, in this case, applies to the elements of the crime itself, not the sentencing portion or enhancement portion of the indictment.

So I do find that the defendant has notice, that the indictment is proper, although not perfect, and I find that the defendant has been twice -- or previously convicted at least twice. He has already admitted that he is a convicted felon. But I do find in the exhibits and evidence presented by the State that he has been convicted twice and has served more than one year on both the -- well, on multiple crimes actually, but on different occasions in Tishomingo County 3409 and also in Lee County 18,822.

The Court also takes judicial notice and finds that the charge of capital murder and burglary of an occupied dwelling at night with a deadly weapon, as well as armed robbery, are all violent offenses under Mississippi Code Section

committed both in Tishomingo County and the sentencing order -- or excuse me, the crimes that occurred in Tishomingo County on the 8th day of January, 1989, and those crimes that were committed in Lee County on the 27th day of August, 1982, arose from and are separate occasions and occurrences and locations, actually.

Therefore, the Court finds that the enhancement under Section 99-19-83 is proper, and the defendant shall be sentenced in accordance with that section.

Mr. Bristow, if you would --

MR. BRISTOW: Your Honor, would the record reflect the defendant's objection to being sentenced under Section 99-19-83 of the Mississippi Code?

THE COURT: So noted.

State, anything further before we move into sentencing?

MR. ROBBINS: No, Your Honor.

THE COURT: Anything from the defense? I'm going to allow you to speak in a minute, if you want to do that, in the sentencing phase. All right. If y'all will move to the podium.

Mr. Brian Scott Berryman, you came before the Court brought by a lawful indictment returned by the Tishomingo County grand jury on the charge of felon in possession of a deadly

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Appellant's Brief at 11
Berryman v. State, No. 2020-CT-00710-COA (Dec. 28, 2020)

getting Berryman through the process and eventually to trial, their explanations do not *justify* or show good cause for the delays. Negligence on the part of the State does not justify the delay; it merely explains it.

But Berryman showed actual prejudice. Initially, the trial court ruled that Berryman had not shown actual prejudice and, therefore, his right to a speedy trial had not been violated. (Tr. 103). The trial court later amended its ruling and held that, with respect to the shooting into a dwelling charge, Berryman had shown actual prejudice and dismissed the indictment on that charge. (Tr. 111-12). Berryman submits that the actual prejudice shown for Count I applies to Count II as well, and the weighing of the *Barker* factors should have resulted in dismissal of Count II.

The trial court found that Berryman was prejudiced by the death of a witness present the night Berryman was accused of shooting into a dwelling and was found with guns in his home. Marshall Edge died February 22, 2018. According to Berryman, Edge would have testified that he saw Berryman "when I went to the alleged complainant's house . . . with a bottle of whiskey and that when I come back, he – you know, he was on his porch. We had a conversation, and he saw me when I again went back to the residence. He would – he would have testified that I had no weapon, you know, whatsoever." (Tr. 22). Edge had expressed to another neighbor of Berryman's that Edge wanted to meet with Berryman's attorney and had information about the complainants and had evicted them from the home Berryman was accused of shooting into. (Tr. 24).