

NO. 22-5336

IN THE
SUPREME COURT OF THE UNITED STATES

BRIAN SCOTT BERRYMAN

PETITIONER

VS.

STATE OF MISSISSIPPI

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI to the
MISSISSIPPI COURT OF APPEALS

BRIEF IN REBUTTAL OF OPPOSITION

BRIAN SCOTT BERRYMAN
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PRO-SE

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QUESTIONS PRESENTED

1. Did the STATE trial Court commit "Plain ERROR" in ordering Count II (FELON IN POSSESSION OF FIREARM) To trial After it had dismissed Count I (Shooting into a dwelling) for violation of defendant's 6th Amendment Speedy trial right, which requires the "Sole Remedy" of dismissal of the indictment. Did the State trial Court have judicial discretion to reject Constitutional law and case precedent which is clearly established. Did the Mississippi Court of Appeals err in upholding the trial courts conviction which fails to comport with clearly establish Constitutional law and case precedent which required the "Sole Remedy" dismissal of the charges and indictment against him?

2. Did the Mississippi Supreme Court error in committing violence to the state Speedy-trial statute, cause enforcement of an unconstitutional Amendment of the statute, which the Legislative Act enacted did not require or imply in a criminal statute which must be decided in favor of lenity? And fails to comport with prior decisions of this Court?

3. Did state trial Court err in ruling that Petitioner's indictment was not faulty and placed Petitioner on notice of it's intent to sentence him to life without parole, and the state Court of Appeals err in upholding that conviction?

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OPINIONS BELOW

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 11-09-21. 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

ON FEBRUARY 6, 2017 PETITIONER WAS ARRESTED AND ACCUSED OF ENTERING A NEIGHBOR'S HOME AND FIRING A WEAPON IN THE DWELLING. APP. J 2 (¶ 3). DEPUTYS RESPONDED AND ALLEGEDLY TOOK STATEMENTS FROM DAVID THACKER AND HIS GIRLFRIEND TINA ALEXANDER. *Ibid.* HOWEVER, FROM BERRYMAN'S ARREST TO THE TIME OF TRIAL, THESE WITNESSES WERE UNABLE TO BE FOUND, AND IT WAS DISCOVERED BY THE SHERIFF'S INVESTIGATOR THAT DAVID THACKER HAD PROVIDED FALSE IDENTIFICATION AND SOCIAL SECURITY NUMBER, AND DID NOT EXIST (SEE REBUTTAL APP. A. EXCEPT OF INVESTIGATORS REPORT).

DEPUTIES ARRESTED BERRYMAN APP. J 2-3 (¶ 4), ON 2-6-2017

2. IN September 2017, A TISHOMINGO County grand jury indicted BERRYMAN, SEVEN (7) months after his Arrest on 2-6-2017, for shooting into a dwelling and felon in possession of a firearm. APP J 4 (¶ 7)

Based on prior convictions, PETITIONER WAS indicted AS A habitual offender, And Although cited Miss. Code Ann. § 99-19-83, the language of the indictment stated Plain and unambiguously, '... to be sentenced to the maximum term of imprisonment as prescribed and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation, ...' under Miss. Code Ann. § 97-37-5 (SEE PETITION APP. K 2, And PETITION APP. I).

IN June 2018, PETITIONER filed A pro-se demand for trial and motion to dismiss for denial of his Speedy trial right APP. J 4 (¶ 8). Four months later, he filed Another pro-se demand for trial and motion to dismiss.

IN November 2018, BERRYMAN WAS arraigned APP. J 4 (¶ 9), twenty one (21) months after Arrest, BERRYMAN WAS appointed An attorney, Hon. John White, who could not represent him at trial, for White had been elected to the Circuit Court AS A trial Court Judge and would Ascend to the bench before A trial date could be set. Two weeks later BERRYMAN filed Another pro-se demand for trial, motion to dismiss and for the Appointment of Counsel. APP. J 5 (¶ 9).

In January 2019, the trial Court appointed Hon. Richard Bowen to represent All indigent defendants in Tishomingo County, but failed to notify BERRYMAN of Any Appointment, And the order was not entered on the docket in Petitioner's CASE. APP. J 5 (¶ 10.).

Therefore, At this point BERRYMAN WAS still effectively without the benefit of Counsel. The STATE of Mississippi Claims that in the middle of 2019, that BOWEN realized that he had been the Prosecutor of BERRYMAN in a 2009 Capital Murder Case and CAUSED A Conflict of interest, therefore Assigned Hon. DANIEL SPARKS AS Conflict public defender. BERRYMAN WAS NEVER notified, nor WAS Anything entered into the docket of the CASE EVER Appointing SPARKS AS Counsel. Ibid. In April 2019, BERRYMAN filed Another demand for trial, 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 it WAS granted on SPARKS' motion, But the record does not contain any such motion being filed. Ibid. BERRYMAN challenged the continuance in the Mississippi Supreme Court, which WAS dismissed for lack of Appealable Judgment. APP J. 6 (¶14). On October 2019, BERRYMAN moved the trial Court to dismiss for want of prosecution, Asserting a Speedy-trial violation, And moved for Appointment of Counsel. APP J 5-6 (¶13).

In March 2020, the trial Court (Hon. KELLY Mims presiding) ruled on petitioner's motion for Appointment of Counsel, APP J 6 (¶16), Although BERRYMAN had never had any notification and had never met with Counsel Appointed from February 2017 At Arrest, until March 2022 ruling, the Court said BERRYMAN had been represented by Counsel since his Arraignment in November 2019. APP J 6 (¶16), but As no Court order Appointing Counsel WAS found in the docket of the CASE, Judge Kelly Mims entered an order Appointing SPARKS AS Counsel nunc pro tunc. Ibid. He was denied Counsel until trial 6-23-20.

When Will Bristow was appointed by the trial court for trial.

In June 22-23, 2020, Hon. KELLY WIMS ruling on BERRYMAN'S SPEEDY-TRIAL claim, the trial court ordered dismissal of Count I of indictment NO. CR17-183 (Shooting into a dwelling) charge, but refused to dismiss Count II (FELON in POSSESSION OF A FIREARM). BIO APPENDIX (BIO APP.) 6-7 (order). In Count I the court balanced the four factors that this Court set forth in BARKER V. Wingo, 407 U.S. 514 (1972): "Length of DELAY, the defendant's assertion of his right, the REASON for DELAY, And prejudice to the defendant." Id. at 530. The trial court ruled that the first three factors favored BERRYMAN, BIO APP. 3-5, but that the delay did prejudice BERRYMAN - and violated his Six Amendment Speedy-trial right, only Count I, not Count II, BIO APP. 5-7. The trial court also rejected BERRYMAN'S claim of 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" "Unless 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 because BERRYMAN had not shown prejudice in Count II. BIO APP. 7 n.8. However, the record of the case fails to show that the state showed good-cause, or/and that the state had requested any continuance, 543 day expired between arraignment (11-7-18) and trial (6-23-2020), violating the statute of limitation of 270 days, and the statute does not even imply that prejudice must be shown to prevail,

but has been added by violence by the Justices of the Mississippi Supreme Court in violation of Constitutional law and CASE precedent in CASE AS: United States v. Wiltberger, 5 Wheat. 76, 5 L. Ed 37; STATE v. Burnham, 546 So. 2d 690, 692 (Miss. 1989). The CASE proceeded to trial on June 23, 2020.

BERRYMAN denies MAKING ANY Statement, AS All Statements but his WAS handwritten, his WAS typed on computer, and BERRYMAN asserts his signature WAS forged. He Also denies consent to search his home. APP. J 11 (¶ 29).

The Jury convicted BERRYMAN of felon in possession of a fire-arm. APP. J 11 (¶ 31). The Court sentenced BERRYMAN to life without parole AS A Violent Offender. *ibid.* See APP. B (Amended Judgment). The Court rejected BERRYMAN's Argument that indictment NO. CR17-183 failed to notify him that he could be sentenced to life without parole. BIO APP. 9-13 (transcript containing oral ruling).

3. The Court of APPEALS upheld the trial courts ruling that Berryman was not denied his Sixth Amendment speedy trial right on Count II felon in possession of a firearm 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 (¶ 35). The trial court arguing reason for delay were either neutral (Changes in Counsel) that Berryman never knew he had, (trial judge illness, and Covid-19) none of which were declared in the record of the CASE, nor did the trial Court order or grant A Continuance AS Miss.

Code Ann. § 99-17-1 requires to show good cause, to grant a Continuance, to justify the trial Court to exceed the legislative time limitation past the 270 days allowed.

The State from Arraignment on November 7, 2018 to trial on June 23, 2020 (20 months, not as the Court of Appeals miscalculates as 14 months) as no good-cause was shown the trial Court, and the trial Court not granting a Continuance, this 20 month delay, according to case precedent Ford v. State, 589 So. 2d 1261 (1991) "Where the record is silent regarding the reason for delay, the clock ticks against the State, for the State bears the risk of non-persuasion on the good cause issue." Nations, 481 So. 2d at 761; See also Handley v. State, 574 So. 2d 671, 674 (Miss. 1990); Vickery, 535 So. 2d at 1375. The record is silent, see App. F, but the Court of Appeals upheld the finding that Berryman had not shown prejudice, an unconstitutional requirement of § 99-17-1, which is not required by statute, only by the Supreme Court of Mississippi Justices which judicially require, but is not legislatively required, to a criminal statute and has been deemed "unambiguous".

When the trial Court dismissed Count I (Shooting into a dwelling), the trial Court was without judicial discretion to consider whether Count II (Felon in possession of a firearm) did or did not violate the 6th Amendment, but was by Constitutional law and case precedent, required to dismiss the indictments against Berryman, as Count I had been found to violate Berryman's 6th Amendment Speedy trial right. A decision that was unopposed and not objected to by the State. BIO App. 6-2.

The trial Court determined that the Absence of Marshall Edges' testimony due to his death, prejudiced Berryman's defense BIO. APP. 6., But had no bearing on whether Berryman possessed a firearm at the time of his arrest. Ibid.

Berryman asserts that as Count I was dismissed with prejudice for violating his 6th Amendment Speedy-trial right, All other charges (Count II and Indictment NO. CR17-151) are all fruit of the poisonous tree, and as BARKER V. Wingo, Supra held:

'The Amorphous quality of the right also leads to the unsatisfactory severe remedy of the dismissal of the indictment when the right has been deprived. 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. Such a remedy is more serious than the exclusionary rule or a reversal for a new trial but it is the only possible remedy.' (footnote omitted).

Id. 407 U.S. At 522 [4].

When the trial Court found that BERRYMAN'S Speedy-trial right of the 6th Amendment had been violated, a fact unopposed by the State and not at issue in this case, the trial Court committed "Plain error" in not dismissing the entire indictment, and pursuant to the Rules of the Supreme Court of the United States, Rule 24 I.(A) '...At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.'

Plain error in the trial Courts ruling not to dismiss the indictment, but only a single charge, clearly does not comport to

Constitutional law and CASE precedent, and if allowed to stand, will affect the broad public, and defendant's within the State of Mississippi will be deprived of the Constitutional guarantee to a speedy trial based on this Court's decision in CASES of Constitutional law and CASE precedent will be changed, Federal and State.

In Strunk v. U.S., 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed. 2d 56 (1973) a case where the lower court sought to circumvent BARKER v. Wingo, supra, and also create a 'new remedy' for violation of a defendant's Speedy-trial right, sought to remedy such violation with a sentence reduction, this Court said:

'The Government's reliance on BARKER to support the remedy fashioned by the Court of Appeals is further undermined when we examine the Court's opinion in that case as a whole. It is true that BARKER described dismissal of an indictment for denial of a speedy trial as an 'unsatisfactorily severe remedy.' Indeed, in practice, 'it means that a defendant who may be guilty of a serious crime will go free, without having been tried.' 407 U.S. at 522, 92 S.Ct. at 2188, 33 L.Ed. 2d 101. But such severe remedies are not unique in the application of Constitutional standards. In light of the policies which underlie the right to a speedy trial, dismissal must remain, as BARKER noted, the only possible remedy. Ibid.

Given the unchallenged determination that petitioner was denied a speedy trial, the District Court judgment of conviction must be set aside; the judgment is therefore reversed and the case remanded to the Court of Appeals to direct the District Court to set aside its judgment, vacate the sentence, and dismiss the indictment. (Footnote omitted).

Id. 412 U.S., at 439-440 [8], 93 S.Ct. at 2264.

Just as the trial Court rejected Berryman's Assertion of A Speedy trial right violation in Court II, After Court I was found to violate his 6th Amendment right to A Speedy trial, requiring Judicially, A showing of Prejudice to prevail, which is not required by the Legislative Act (§ 99-17-1), As the record of the Case fails to show good-cause shown by the State, and fails to show Any Continuance being granted by the trial Court on the good cause issue between 11-07-18 through trial on 6-23-2020, the 594 days clearly Counts against the State, not the defendant as required in Ford v. State, supra., and exceeds the statute of limitation Legislatively enacted. App. G., even if the State Attempts to muddy the water. This Court said in ENMONS, (United States v. ENMONS, 410 U.S. 396, 411, 93 S.Ct. 1007, 35 L.Ed. 2d 379 (1973):

'EVEN if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded AS the Government suggest - for two reasons. First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. United States v. Wiltberger, 5 Wheat. 76, 95, 5 L.Ed. 37; United States v. Halseth, 342 U.S. 277, 280, 72 S.Ct. 275, 276, 96 L.Ed. 308; BELL v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 622, 99 L.Ed. 905; Arroyo v. United States, 359 U.S. 419, 79 S.Ct. 864, 867, 3 L.Ed. 2d 915; REWIS v. United States, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed. 2d 493. ...'

Id. 410 U.S., At 411 [67]. Miss. Code Ann. § 99-17-1 is a Criminal Statute, the Mississippi Supreme Court, unconstitutionally, and by violence (A Judicial Branch) Amended the statute which had been deemed "Plain and Unambiguous", the Court alone required A showing of prejudice to prevail, A fact that the Legislative Branch did not enact, or even imply in its words of the Act, and being a criminal statute, must be strictly construed in favor of lenity, yet the Past twenty (20) years, the Miss. Supreme Court fails to comport with

Constitutional laws, case precedent, and prior decisions of this most honorable Court, following its own designs and decisions, therefore, invalidating legislative law in favor of unconstitutional judicial law of a statute deemed plain and unambiguous, a fact that requires this Court to intervene and clarify, as it affects the broad public and is also plain error on the justices of the Mississippi Supreme Court in requiring a showing of actual prejudice to prevail, which the Mississippi legislative act did not require or imply. App. G.

3.(b) The United States Constitution, Article 6, Supremacy Clause states:

'This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of Any State to the Contrary notwithstanding.'

When Congress enacted the Federal Speedy Trial Act, pursuant to the 6th Amendment of the United States Speedy Trial clause, it became the Law of the Land pursuant to the U.S. Constitution Article 6, making any state speedy trial statute which is harsher in its requirements, unconstitutional pursuant to 18 U.S.C.A. §§ 3161-3174.

'... And the Judges in every State shall be bound thereby, Any Thing in the Constitution or Laws of Any State to the Contrary notwithstanding.'

Ibid. 'States are free to enact laws equal to, or more lenient, but not harsher than federally enacted laws. See Guice v. State, 952 So. 2d at 150 (¶73). id. Article VI, U.S. Constitution, Supremacy Clause.

As Miss. Code Ann. § 99-17-1 will not be followed by the Mississippi

Supreme Court Justices, and as the statute (899-17-1) is far more harsher than federally enacted Laws (18 U.S.C.A. §§ 3161-3174), the Statute must be viewed by this Court as Unconstitutional and Contrary to Federally enacted Law (FEDERAL SPEEDY TRIAL ACT), and must be overruled by this Court as it affects the broad Public.

4. The Court of Appeals states that BERRYMAN failed to call witnesses at trial, however, BERRYMAN had his trial Counsel request a continuance so witnesses could be compelled, but the trial court stated that in doing so, BERRYMAN appeared disingenuous in his demand for a speedy trial, and denied the motion for continuance.

One witness, Mrs. Nancy Brooks was in the courtroom to offer testimony, but trial Counsel Hon. Will Bristow said that she was not on defendant's witness list, which must be submitted to the Court.

REASONS FOR GRANTING THE PETITION

1. PETITIONER asserts that a 6th Amendment Speedy-trial violation requires the "sole remedy" "Dismissal of Indictment." BARKER, SUPRA; STRUNK, SUPRA. Constitutional law and case precedent calls for dismissal of the indictment when a speedy trial violation is found, not of individual charges... 'the sole remedy is dismissal of the indictment.' As there have never been an issue on this matter, there would not be a question

of the lower court issue on the matter. See Berryman v. State, 337 So. 3d 1116 (2021) (footnote 16 (9192)).

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... 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. ...

But instead, Justice McCarty said with authority:

"Our Mississippi Supreme Court has agreed that "[t]he sole remedy for a 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) (emphasis 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").

The Court of Appeals fails to hold ground and appears to simply muddy the waters in an attempt to continue to circumvent the "Sole Remedy" not one of the remedies, but the "Only Remedy" for violation of a defendant's speedy trial right, which did occur, causing Count I to be dismissed, requiring all following counts (Count II of No. CR17-183 and No. CR17-151) to be dismissed with prejudice, the trial court decision and Court of Appeals affirmation clearly warrants further review of this Court.

2. The Court of Appeals contends that Berryman's assertion on Mississippi state-law statute §99-17-1, is a question of state law and this Court may not review. However, when the statute became unconstitutional by judicial law, and U.S. Constitution Article 6, Supremacy Clause, it became reviewable by this Court and

requires review, as it clearly affects the broad public, does not comport with federal Court decisions of this Court, and pursuant to Article VI, is become Unconstitutional.

The State Court Argues that 18 U.S.C.A. §§ 3161-3174 applies only to federal cases, however, being made pursuant to the U.S. Constitution Speedy-trial law, Article VI of the Constitution and the 14th Amendment, is become the Law of the Land, and all Judges in every State are bound thereby. §§ 3161-3174 (Federal Speedy Trial Act) was enacted by U.S. Legislators pursuant to the U.S. Constitution 6th Amendment Speedy trial clause which is made effective on the States by the 14th Amendment equal protection of the Laws clause, thereby this Court clearly has jurisdiction to review, and requires further review of this Court as it affects every State (broad Public).

3. The Mississippi Court of Appeals asks this Court to deny Justice and not to review the fact that Berryman's indictment was faulty and improper, citing that no federal law issue being raised, however, clearly the 6th Amendment clause of the right to be informed of the charges is clearly shown, made applicable by the 14th Amendment.

Berryman was clearly by the words (substance) of the indictment not placed on notice of the States intent to seek Life without parole. The indictment was clear and concise that it sought the maximum sentence under Miss. Code Ann. § 97-37-5(2), making Berryman's sentence illegal, requiring further review of this Court.

Conclusion

BERRYMAN has shown that the issues he raises herein violates FEDERAL Constitutional Law, and further that AS these issues were failed to be raised by Court Appointed Counsel, that he failed to receive Assistance of Counsel guaranteed by the U.S. Constitution 6th and 14th Amendments, AS Well AS Constitutional Law, AS the failure to raise and adequately argue Constitutional right violations could not be deemed a "defense tactic", but a total failure of representation guaranteed by the 6th Amendment,

Clearly the record of the Case shows BERRYMAN was deprived by the Government of his 6th Amendment right to the Appointment of Counsel from Arrest to trial, and was not notified at any point in that time that he had Counsel for his defense. Even if the trial Court had appointed any Counsel AS BERRYMAN continually requested, no contact from such Counsel would invalidate the trial Court's claim that BERRYMAN was represented (1234 days from Arrest to trial 2-6-2017 through 6-23-2020)... if a man is not informed of Counsel appointed, and has no meaningful contact with such Counsel, does he really have such Counsel?

BERRYMAN prays for the sake of Justice, that this Court issue Certiorari for further review which is required

and for any other relief this Court deems just and appropriate.

Respectfully Submitted
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IN the STATE OF: MISSISSIPPI
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The Above signed, being duly Sworn and Subscribed does swear this the 7th day of December, 2022 that the foregoing is true and correct under penalty of perjury.

Melanie N. Clark
"NOTARY PUBLIC"



my Commission Expires:

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