IN THE SUPREME COURT OF MISSISSIPPI

NO. 2013-KA-00226-SCT

EDWARD M. MYERS a/k/a EDWARD MYERS

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	09/22/2008
TRIAL JUDGE:	HON. SAMAC S. RICHARDSON
TRIAL COURT ATTORNEYS:	BRYAN BUCKLEY REBECCA MANSELL DARLA PALMER
COURT FROM WHICH APPEALED:	MADISON COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: HUNTER N. AIKENS GEORGE T. HOLMES
ATTORNEYS FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: LISA L. BLOUNT JOHN R. HENRY, JR.
DISTRICT ATTORNEY:	MICHAEL GUEST
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	REVERSED AND REMANDED - 07/17/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

WALLER, CHIEF JUSTICE, FOR THE COURT:

¶1. Edward Myers appeals his conviction for the armed robbery of Gabriel Lewis. We find that the trial court abused its discretion in excluding the testimony of a defense witness where there was no evidence of a willful discovery violation. Accordingly, we reverse

Myers's conviction and remand for a new trial. On remand, we direct the trial court to conduct a hearing to determine whether Myers's right to a speedy trial was violated.

FACTS

¶2. On October 28, 2004, Edward Myers was at his sister Yvette's house when he discovered that Yvette's teenage son Jeremy had possession of a handgun. Myers and Jeremy got into an argument over the handgun outside Yvette's house, and Myers was able to take the gun from Jeremy. Myers then fired the gun into the air twice. When Yvette heard the gunshots, she called the police. After she called the police, she followed Myers to see where he was going. She observed Myers walking along the railroad tracks towards a trucking lot about two blocks from her house. When he got to the lot, he got into a truck with another person, and Yvette saw them "light up," meaning that they were smoking something. Yvette could not identify the other person in the truck.

¶3. Madison County Deputies John Harris and Stan Fisher responded to Yvette's disturbance call. The officers parked next to the trucking lot to wait for backup. Shortly thereafter, Gabriel Lewis approached them from the trucking lot and informed them that he had just been robbed. Lewis, a truck driver for J.B. Hunt, had been picking up a trailer at the trucking lot when a man armed with a handgun approached him, demanding money. The man had told Lewis that he had just killed a man down the road and was trying to get out of town. Lewis had given the man five dollars, and the man had run off.

¶4. As the officers were inspecting the trucking lot, a man carrying a handgun appeared from under a trailer and fled on foot from the scene. Harris and Fisher pursued the man on foot and apprehended him after a short chase. The officers recovered a.22 caliber pistol

loaded with eight rounds, a crack pipe, and five one-dollar bills from the man. The officers took the man into custody and took him back to their patrol cars, where Lewis was still waiting. Lewis identified the man, Edward Myers, as the man who had robbed him. The police took a statement from Lewis at the scene. Lewis identified Myers by name in his written statement, but at trial he testified that he had never met Myers and that the police had not told him Myers's name.

¶5. A few days after his arrest, Myers gave a voluntary statement admitting to the robbery. Specifically, Myers stated, "I saw a man standing by his truck so I ran up to him with the pistol in my hand I asked him for some money. The man gave me four or five dollars and I ran off." At trial, though, Myers's version of events differed greatly from his written statement. He testified that he and Lewis had known each other for about six months at the time of the incident, and that Lewis had been buying drugs from him. On the night in question, Myers had run into Lewis at the trucking lot after leaving Yvette's house. Lewis wanted to send Myers to get some drugs for him, but Myers already had some crack cocaine on his person. Myers and Lewis smoked the crack cocaine in Lewis's truck, Lewis gave Myers five dollars for the drugs, and Myers left. Myers then saw lights from a patrol car, so he ran into the woods to dispose of the rest of the drugs. Myers testified that he saw the police talking to Lewis and came out of hiding to tell them that Lewis had not done anything wrong, but he ran away when he realized he had not gotten rid of all of his drugs. Myers explained that he did not mention any of this in his written statement because Lewis had told the police he was not pressing charges, and because he did not want to get Lewis in trouble.

PROCEDURAL HISTORY

¶6. A Madison County grand jury indicted Myers for armed robbery on January 4, 2005. The indictment alleged that on October 28, 2004, Myers had taken five dollars from Lewis against his will by exhibiting a deadly weapon. Myers's first trial, held on June 24, 2008, resulted in a hung-jury mistrial. Myers's second trial, held on August 7, 2008, also resulted in a mistrial because two defense witnesses were unavailable for trial. Myers's third trial commenced on September 16, 2008.

¶7. On the day before Myers's third trial, Myers's attorney notified the trial court and the prosecution for the first time that Jacques Branch was present in court and available to testify. Branch's testimony was "about the fact that he had seen Edward Myers and Gabriel Lewis together on different occasions and that's basically rebuttal testimony of Mr. Lewis." Myers's attorney stated that she had been looking for a potential witness to give such testimony to corroborate Myers's defense, but she could not find anyone even up to the date of Myers's second trial. Myers had continued to search for potential witnesses, but he could not get in touch with Branch because he did not have Branch's correct contact information. Myers finally was able to get in touch with Branch on the Friday before trial by contacting Branch's niece. The trial court gave the prosecution an opportunity to interview Branch that evening and then revisited the issue the following day, after the State had rested its case-in-chief. The State never asked for a continuance or mistrial but continued to argue that Branch's testimony should be excluded. The trial court held that Branch would not be allowed to testify, pointing out that two mistrials already had occurred, and that Myers had "had ample time since we were here last time to secure witnesses and had plenty of time to

inform the State who those witnesses were." The trial court did not explicitly rule that Myers had committed a willful discovery violation, but its ruling seems to imply such.

¶8. At the conclusion of that trial, the jury found Myers guilty of armed robbery. The trial court sentenced Myers to thirty-nine years' imprisonment, with nine years suspended and five years of post-release supervision. The trial court denied Myers's subsequent motions for judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial, and Myers appealed to this Court. On appeal, Myers argues that (1) the trial court improperly excluded a defense witness from testifying, (2) his right to a speedy trial was violated, and (3) the jury's verdict was against the weight of the evidence. Finding the first two issues to be dispositive, we decline to address the weight of the evidence.

DISCUSSION

I. Whether the trial court erred in excluding the testimony of Jacques Branch.

¶9. Myers claims that the trial court abused its discretion by excluding the testimony of Jacques Branch. Myers alleges that Branch would have testified that Lewis and Myers knew each other prior to the incident in question, and that he had seen Myers and Lewis together on prior occasions.

¶10. Although the trial court did not give a specific reason for its exclusion of Branch's testimony, the State alleges that Branch was excluded because Myers willfully had committed a discovery violation by failing to disclose him. "In reviewing rulings of a trial court regarding matters of evidence, relevancy and discovery violations, the standard of review is abuse of discretion." ***Montgomery v. State***, 891 So. 2d 179, 182 (Miss. 2004)

(citing ***Conley v. State***, 790 So. 2d 773, 782 (Miss. 2001)). This Court must determine "(1) whether such a violation occurred and, if so, (2) whether the exclusion of this evidence was an appropriate remedy." ***Williams v. State***, 54 So. 3d 212, 213-14 (Miss. 2011).

A. Whether Myers committed a discovery violation by failing to disclose Branch to the prosecution.

¶11. A defendant has a constitutional right to call witnesses in his or her favor. *See* U.S. Const. amend. VI; Miss. Const. art. 3, § 26 (1890). However, a defendant also must meet certain discovery requirements regarding the testimony of witnesses. Rule 9.04 of the Uniform Rules of Circuit and County Court Practice governs discovery procedures in criminal cases. According to that rule, the parties must disclose to each other the names and addresses of all witnesses in chief they intend to call at trial. URCCC 9.04(C). This rule applies to witnesses who are actually known by the parties, "or by the exercise of due diligence may become known." *Id.* "Both the state and the defendant have a duty to timely supplement discovery." URCCC 9.04(E). If, after initially complying with discovery procedures, a party discovers new evidence, that evidence must be disclosed promptly to the other party and, if trial already has commenced, to the trial court. *Id.*

¶12. Because matters of discovery violation are within the discretion of the trial court, this Court generally has deferred to the trial court's ruling in cases where there is evidence that the defendant was dilatory in locating a witness or in disclosing the witness's identity. For example, in ***Williams v. State***, 54 So. 3d 212, 213 (Miss. 2011), the defendant was charged with murder for shooting a man outside a nightclub. The defendant claimed he shot the man in self-defense. ***Id.*** In support of his theory of the case, he planned to call as a witness the

bouncer at the nightclub, who would testify that the victim was in possession of a gun on the night of the shooting. ***Id***. The trial court did not allow the bouncer to testify about the victim's possession of a gun because that fact had not been disclosed to the State during discovery. ***Id.*** On appeal, the defendant argued that the trial court had erred in excluding testimony regarding the victim's possession of a gun. ***Id.*** The trial court had not found that the bouncer's undisclosed testimony was actually known or should have been known by the defense, nor that it was not promptly disclosed to the prosecution. ***Id.*** This Court reasoned, "If none of these elements was present, then there was no discovery violation at all." ***Id.*** However, this Court ultimately found that the trial court did not abuse its discretion in finding a discovery violation, because the record indicated that due diligence may not have been exercised by the defendant during discovery. ***Id.*** Specifically, the defendant's attorney admitted that he had not begun preparing for the case until a month before trial, even though he had been appointed to the case for a year. ***Id.*** In addition, the bouncer was not interviewed by the defense until the week before trial. ***Id.*** Accordingly, this Court affirmed the trial court's finding that the defendant had committed a discovery violation. ***Id.***

¶13. Here, although the trial court did not specifically rule that Myers had committed a discovery violation, evidence in the record supports such a finding. Initially, it appears that Myers and his attorney complied with discovery requirements by disclosing to the State all known witnesses. Rule 9.04 requires the disclosure of information that is known, or, "by the exercise of due diligence may become known, *to the defendant* or defendant's counsel." URCCC 9.04(C) (emphasis added). While the record suggests that Myers's attorney had no knowledge of Branch or his specific testimony, Myers clearly knew of Branch's identity, if

not his contact information, well before trial. But Myers failed to disclose this information to the prosecution or even to his own attorney. If Myers had disclosed Branch's identity in a timely manner, it is possible that Branch could have been located sooner. At the very least, Branch's identity could have been disclosed to the prosecution prior to the day before trial.

¶14. Giving deference to the trial court's ruling on this matter, as our standard of review requires, we find that the trial court did not abuse its discretion in finding that Myers had committed a discovery violation by failing to disclose Branch to the prosecution in a timely manner. *See* ***Morris v. State***, 927 So. 2d 744, 747 (Miss. 2006) (affirming trial court's exclusion of defense witness testimony where the record supported the finding of a willful discovery violation, even though the trial court did not specifically make such a finding). Even so, this Court must still determine whether the exclusion of Branch's testimony was the proper remedy.

B. Whether the exclusion of Branch's testimony was the proper remedy.

¶15. Prior to trial, if the court determines that a party has violated discovery procedures, it may order the discovery of the information not previously disclosed, grant a continuance, or "enter such an order as it deems just under the circumstances." ***Morris***, 927 So. 2d at 747; URCCC 9.04(I). The weight of the sanction should be based on the motivation of the offending party in violating the discovery rule. ***Coleman v. State***, 749 So. 2d 1003, 1009 (Miss. 1999). The general rule is that evidence must not be excluded. ***Williams***, 54 So. 3d at 215 (citing ***Morris***, 927 So. 2d at 747). But where the court determines that a discovery violation is "willful and motivated by a desire to obtain a tactical advantage," exclusion of

the evidence may be entirely proper. ***Darby v. State***, 538 So. 2d 1168, 1176 (Miss. 1989). Nevertheless, exclusion of evidence is a radical sanction that "ought be reserved for cases in which the defendant participates significantly in some deliberate, cynical scheme to gain a substantial tactical advantage." ***Houston v. State***, 531 So. 2d 598, 612 (Miss. 1988). The court cannot disregard the "fundamental character of the defendant's right to offer the testimony of witnesses in his favor." ***Coleman v. State***, 749 So. 2d 1003, 1009-10 (Miss. 1999) (citation omitted).

¶16. The fact that evidence was recently discovered, by itself, is insufficient proof that a discovery violation was willful and motivated by a desire to obtain a tactical advantage. ***Williams***, 54 So. 3d at 215. As discussed previously, this Court in ***Williams*** found sufficient evidence of a discovery violation where the defendant had failed to disclose certain witness testimony to the prosecution. ***Id.*** at 214. However, this Court then reasoned, "It would be a mistake to adopt a posture in which we assume that recently discovered evidence is part of some scheme to defraud justice and require the defendant to prove otherwise." ***Id.*** at 215. Because the defense had disclosed the identity of the witness, had provided a partial summary of his testimony, and had disclosed the newly discovered testimony before the witness took the stand, this Court held that the untimeliness of such disclosure alone was not enough to prove a willful discovery violation. ***Id.***

¶17. We find that the evidence in this case does not evince a willful discovery violation. First, no evidence indicates that Myers's attorney was aware of Branch's identity prior to the day he showed up for trial. In addition, the defense disclosed Branch prior to trial, giving the prosecution an opportunity to prepare for his testimony. In ruling that Branch's testimony

would be excluded, the trial court seemed most concerned with the fact that Myers's two previous trials had resulted in mistrials. The first mistrial was the result of a hung jury and cannot arguably be attributed to the defendant. The second mistrial was due to a death in Myers's family which caused Yvette, an unsubpoenaed witness, to be unavailable for trial. These setbacks do not suggest to this Court that Myers deliberately was attempting to delay his trial. The trial court was concerned with the timing of Branch's disclosure, but that alone is not sufficient evidence to justify the "radical sanction" of exclusion of evidence. ***Houston***, 531 So. 2d at 612. Because there is insufficient evidence that Myers's alleged violation of Rule 9.04 was motivated by a desire to obtain a tactical advantage, we find that the trial court erred in excluding Branch's testimony.

¶18. However, such error requires reversal only if Myers can show that he was prejudiced or harmed by the exclusion of the evidence. ***Jackson v. State***, 594 So. 2d 20, 25 (Miss. 1992). This Court has found prejudice where the trial court excludes evidence that tended to support the defendant's theory of the case. For example, in ***Williams***, 54 So. 3d at 216, this Court found prejudicial error in the exclusion of the bouncer's testimony that the victim had a gun on the night of the shooting because this testimony corroborated the defendant's theory of self-defense. Also, in ***Ross v. State***, 954 So. 2d 968, 1001 (Miss. 2007), this Court found prejudicial error in the exclusion from evidence of a State witness's prior written and recorded statements, which contradicted her testimony at trial. Even though the defense was allowed to impeach the witness with her prior inconsistent statement, this Court still found that the exclusion of the written and recorded statements themselves from evidence prejudiced the defendant's case. ***Id.*** The witness's testimony was the only evidence linking

the defendant to the crime, and her credibility was a critical issue that the jury needed to consider. ***Id.***

¶19. We find that Myers's defense was substantially prejudiced by the trial court's exclusion of Branch's testimony. This case featured sharply contrasting evidence, with the credibility of each side's version of events playing a critical role in the jury's deliberations. At Myers's first trial, Harold Small corroborated Yvette's testimony as well as Myers's own testimony that Myers was smoking crack cocaine with Lewis in the truck when the police arrived. The fact that Myers's first trial ended with a hung jury is strong evidence of the importance of such testimony, which clearly strengthened Myers's theory of the case. Delays beyond Myers's control caused Small to be unavailable for Myers's third trial. As Small was no longer available, Branch's testimony became critical to Myers's defense. Most importantly, Branch's testimony would have directly contradicted Lewis's claims that he did not know Myers, especially in light of the fact that Lewis used Myers's name in his written statement to the police. In addition, Branch's testimony would have helped explain Myers's justification for initially admitting to a robbery rather than telling the police the truth about Lewis. Finally, Branch's testimony would have allowed the jury to infer that Lewis was the unidentified man Yvette saw smoking with Myers at the trucking lot. When considering the opposing theories presented to the jury, Branch's testimony was critical to supporting Myers's defense, and the exclusion of Branch's testimony was prejudicial error.

II. Whether Myers's right to a speedy trial was violated.

¶20. Myers argues that his constitutional and statutory rights to a speedy trial were violated because his first trial did not commence until 1,335 days after his arrest and 830 days after

his arraignment. As an initial matter, the State argues that Myers's speedy-trial claims are procedurally barred because he did not pursue the issue to a ruling by the trial court. This argument is incorrect. The United States Supreme Court has rejected the notion that a defendant can waive the right to a speedy trial forever by failing to timely assert it. ***Barker***, 407 U.S. at 528. As this Court held in ***Brengettcy v. State***, 794 So. 2d 987, 994 (Miss. 2001), "While failure or delay in raising a speedy trial claim may cost a defendant points in the ***Barker*** analysis, there is no procedural bar solely for failing to properly pursue the claim in open court." *See also* **Flores v. State**, 574 So. 2d 1314, 1323 (Miss. 1990) (holding that defendant's "failure to consistently badger the prosecution" to bring him to trial did not eliminate his speedy-trial claim). Therefore, we do not find Myers's constitutional speedy-trial claim to be procedurally barred.

¶21. Myers was arrested on October 28, 2004. On June 6, 2005, Myers sent a letter to the Madison County circuit clerk inquiring into the status of his case and requesting to be put on the "Court list." Myers later mailed a pro se "Motion to dismiss charges for failure to provide a fast and speedy trial," but the record does not indicate whether this motion was ever filed or served on the State.[1] After this date, the record is silent regarding Myers's speedy-trial claim. Myers was appointed counsel on March 17, 2006, but no other motions were filed or arguments made regarding the speedy-trial claim. The above correspondence is the only evidence presently in the record relating to Myers's speedy-trial claim.

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[1] The certificate of service accompanying this motion was left blank.

¶22. The current state of the record in this case places this Court in the precarious position of analyzing Myers's speedy-trial claim for the first time on appeal, without the benefit of a trial court hearing or ruling on the issue. This Court's standard of review for speedy-trial challenges is as follows:

> Review of a speedy trial claim encompasses a fact question of whether the trial delay rose from good cause. Under this Court's standard of reveiw, this Court will uphold a decision based on substantial, credible evidence. ***Folk v. State***, 576 So. 2d 1243, 1247 (Miss. 1991). If no probative evidence supports the trial court's finding of good cause, this Court will ordinarily reverse. [***Id.***] The state bears the burden of proving good cause for a speedy trial delay, and thus bears the risk of non-persuasion. ***Flores v. State***, 574 So. 2d 1314, 1318 (Miss. 1990).

DeLoach v. State, 722 So. 2d 512, 516 (Miss. 1998). Where the parties have had the benefit of a hearing on the issue, but the trial court's analysis of the ***Barker*** factors is lacking, this Court has found it appropriate to perform a de novo review of the defendant's speedy-trial claim. *See* ***id.*** at 517 (conducting a de novo speedy-trial analysis where the trial court failed to articulate its reasons for denying the defendant's motion to dismiss for lack of a speedy trial); ***Flora v. State***, 925 So. 2d 797, 817 (Miss. 2006) ("Although on the record before us we are unable to allocate a specific number of days of delay to each party, we are persuaded that sufficient good cause was shown related to matters beyond the control of the State, for us to uphold the decision by the trial court."). On the other hand, where the record lacks sufficient evidence to support a proper de novo review, the more appropriate course is to remand to the circuit court to conduct a ***Barker*** analysis. *See* ***McGee v. State***, 608 So. 2d 1129, 1134 (Miss. 1992) (reversing and remanding to the trial court for a ***Barker*** analysis where the record did not establish the actual reasons for the delays in the defendant's trial).

See also ***Barnes v. State***, 577 So. 2d 840, 844 (Miss. 1991) (reversing defendant's conviction due to ineffective assistance of counsel, remanding for a new trial, and directing the trial court on remand to conduct a ***Barker*** analysis, where the record on appeal did not allow this Court to determine the cause of the delay in the defendant's previous trial).

¶23. Under the facts of this particular case, we decline to review Myers's speedy-trial claim for the first time on appeal. In a case such as this, where the length of the delay is presumptively prejudicial, the prosecution must present evidence justifying the delay. ***Wiley v. State***, 582 So. 2d 1008, 1012 (Miss. 1991). Here, the State was never given the opportunity before the trial court to carry its burden to show good cause for the delay in bringing Myers to trial, and it cannot present new evidence on appeal to make such a showing. *See* ***McGee v. State***, 40 So. 2d 160, 165 (Miss. 1949) (quoting ***Pacific R. Co. of Mo. v. Ketchum et al.***, 101 U.S. 289, 25 L. Ed. 932 (1879)) ("'We take a case on appeal as it comes to us in the record, and receive no new evidence.'"). Nor can Myers present this Court with new evidence, not presented to the trial court, demonstrating prejudice resulting from the delay in his trial. *See* ***Barker***, 407 U.S. at 532. Without more specific evidence explaining the reasons for the delay in Myers's trial, we cannot accurately determine the ultimate factual question of whether good cause existed for the delay in this case. *See* ***Folk***, 576 So. 2d at 1247 ("A finding of good cause is a finding of ultimate fact."). Therefore, it would be inappropriate for us to rule on Myers's speedy-trial claim for the first time on appeal.

¶24. As previously discussed, this case is being remanded for a new trial. Prior to Myers's new trial, the trial court shall conduct a hearing on Myers's speedy-trial claim and allow the

parties to present evidence relevant to the ***Barker*** analysis. If, after the hearing, the trial court determines that Myers's right to a speedy trial was violated, it shall dismiss the charges against Myers, as that is the sole remedy for a speedy-trial violation. ***Price v. State***, 898 So. 2d 641, 647 (Miss. 2005). If no speedy-trial violation is found, the case shall proceed to trial.

CONCLUSION

¶25. For the foregoing reasons, we reverse Myers's conviction and remand this case to the Madison County Circuit Court for further proceedings consistent with this opinion.

¶26. **REVERSED AND REMANDED.**

RANDOLPH, P.J., LAMAR, PIERCE AND COLEMAN, JJ., CONCUR. DICKINSON, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY KITCHENS, CHANDLER AND KING, JJ.

DICKINSON, PRESIDING JUSTICE, CONCURRING IN PART AND DISSENTING IN PART:

¶27. If history teaches us anything, it is that this Court has little interest in a defendant's constitutional right to a speedy trial, or the State's statutory obligation to bring an accused to trial withing 270 days of arraignment.

¶28. After his arrest, Edward Myers was incarcerated for seventeen months, during which time (1) he wrote a letter informing the court clerk that he had not been before a judge, and demanding to be brought to court; and (2) he filed a pro se "Motion to dismiss charges for failure to provide a fast and speedy trial" and "memorandum in support of Motion to Dismiss Charges for Failure to Provide a fast and Speedy Trial." Despite his efforts, for seventeen months, Myers had *no initial appearance; no preliminary hearing; no appearance before any*

judge of any kind; no grand jury proceeding; and no lawyer. These are the facts, and they are uncontested.

¶29. Rather than decide this case, the majority sloughs it off to a trial judge to hold a hearing. For what? There are no witnesses to call. There was no judge, no prosecutor, no lawyer, and no file in the district attorney's office. There was no court docket to be crowded.

¶30. The so-called "hearing" that is to take place on remand will result in a trial judge's finding of no violation (thus providing the majority its usual abuse-of-discretion refuge), or a trial judge's adjudication of this obvious speedy-trial violation, which means this Court once again will have dodged the issue, keeping intact its nearly quarter-century perfect record of finding no speedy-trial violations.

¶31. We have the entire record before us, and it clearly demonstrates both that the State violated Myers's right to a speedy trial, and that the State did not bring him to trial within the 270-day statute of limitations. In its brief, the State provides us nothing whatsoever to suggest otherwise.

¶32. Yet the majority chooses to remand this case and allow the State to go outside the record in search of something to counter Myers's arguments. Interestingly, defendants are not afforded the same courtesy when they seek to have hearings before the trial courts. They are required to provide affidavits showing what evidence they can produce, should they be granted a hearing. Here, the State has not even asked for a hearing, and has neither attached an affidavit nor suggested that any evidence exists that would counter Myers's claims. With respect, I believe the true reason for the remand is for the majority to avoid the issue, as our dismal record on speedy-trial issues bears out.

¶33. Of the more than sixty speedy-trial cases presented here over the past twenty-two years, this Court has found not a single violation. Not one. In fact, as the few who read my occasional dissents will recall, three years ago in ***Johnson v. State***, a majority of this Court buried the right to a speedy trial without so much as a tombstone,[2] but with my meager attempt at an obituary tacked onto the end.[3]

¶34. Given this history, one would think that this Court's majority could simply declare the right to a speedy trial does not exist. This merciful act would spare defendants, defense counsel, prosecutors, and trial judges the time, expense, and bother of going through the absurd motions of "analyzing" the ***Barker*** factors (discussed later), only to find in each case that this one (that weighs heavily in favor of the accused) was waived, or that one (that weighs in favor of the accused) was unimportant, or the other one (that weighs slightly in favor of the State) overrides all the others. Stated another way, it is impossible for anyone familiar with the ***Barker*** factors to take this Court's speedy-trial analysis seriously.[4]

¶35. So one wonders why the majority continues its efforts to maintain the fiction that some day, in some case, the right to a speedy trial will be recognized. Simply put, today's majority – by refusing to find and adjudicate this clear speedy-trial violation – makes clear that a ***Barker*** analysis is a complete waste of time and should be abandoned; and that the right to a speedy trial in Mississippi is nonexistent.

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[2] ***Johnson v. State***, 68 So. 3d 1239, 1248 (Miss. 2011) (Dickinson, P.J. dissenting).

[3] ***Id.*** at 1247-1259 (Dickinson, P.J., dissenting).

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

¶36. So today, because the majority plows through its usual mock analysis of the ***Barker*** factors, I am compelled again to say that, "[b]ecause I believe the Sixth-Amendment right to a speedy trial is as important to us today as it was when it was proposed by our Founding Fathers in 1789, and ratified by the people in 1791, I respectfully dissent" to remanding this case for a hearing.[5]

Summary of the Facts

¶37. After Edward Myers was arrested for allegedly stealing $5 by displaying a gun, he sat in jail for 505 days without a hearing of any kind or a lawyer – but not for lack of Myers's efforts. During that time, he wrote a letter to the court clerk requesting a court hearing; he sought help from the inmate legal assistance program; and he wrote a *pro se* motion to dismiss for statutory and constitutional speedy-trial violations. The delay between his arrest and trial was 1,335 days,[6] 1,119 of which he spent in a jail cell. After he was convicted, the trial judge delayed ruling on his post-trial motions for 970 days, preventing Myers from filing an appeal.

Timeline

¶38. Because speedy-trial claims are fact-intensive, and the events concerning Myers's case span years, I provide below a detailed timeline:

October 28, 2004 – Arrested and incarcerated;

January 4, 2005 – Indicted;

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[5] ***Id.*** at 1248 (Dickinson, P.J. dissenting).

[6] This 1,335-day delay is from arrest to Myers's first mistrial. The eighty-four days following the first mistrial and Myers's ultimate conviction do not weigh against the State, as it timely proceeded through two mistrials.

June 6, 2005 – Demanded to be brought to court by writing a letter to the circuit clerk stating: "Right now I'm in the dark about the charge of Arm Robbery, I've been trying to get in touch with the clerk for awhile and I finally got an address to write you all. . . . I haven't had a initial nor a preliminary hearing, so I'm writing to ask you to put me on the Court list. The case manager here at Marshall County said that I'm eligible for a hearing, on these charges, with all do respect, I would like to hear something soon. If I don't I would have to take legal action."

January 24, 2006 – Filed pro se "Motion to dismiss charges for failure to provide a fast and speedy trial" and "memorandum in support of Motion to Dismiss Charges for Failure to Provide a fast and Speedy Trial"

March 17, 2006 – Case was assigned to the public defender's office;

March 17, 2006 – Waived arraignment, entered not-guilty plea, and trial was set;

August 7, 2006 – Trial court issued an order titled: "Order Resetting Trial *AFTER DEFENDANT'S DEMAND* and as a result of a crowded docket." The order states, in part: "It appearing on motion *ore tenus* of the State to reset this cause for trial *that the defendant has demanded a trial*, and another case with a priority setting was tried on the date this cause was set for trial, ..." (Emphasis added.) The order set the case for trial on August 21, 2006.

September 7, 2006 – Because the trial did not take place on August 21, the trial court issued another order titled: "Order Resetting Trial *AFTER DEFENDANT'S DEMAND* and as a result of a crowded docket." (Emphasis added.) The order states, in part: "It appearing on motion *ore tenus* of the State to reset this cause for trial *that the defendant has demanded a trial*, and another case with a priority setting was tried on the date this cause was set for trial, ..." (Emphasis added.) The order set the case for trial on September 12, 2006.

The trial did not take place on September 12, as scheduled. Instead, the record fell silent for *377* days; *NOTE: The State neither offers an explanation nor points to anything in the record that explains this delay. There is no order granting a continuance for good cause shown, as required by Section 99-17-1 (discussed later), so this delay – standing alone – is sufficient for this Court to find a speedy-trial violation*;

September 19, 2007 – Trial court noticed the case on a past docket and, again, set it for trial;

October 9, 2007 – Myers's attorney filed an entry of appearance;

October 12, 2007 – Parties agree to a trial date;

November 21, 2007 – Myers released on bond;

February 9, 2008 – Parties agree to reset the trial;

June 24, 2008 – Myers's first ***trial*** resulted in a mistrial because the jury deadlocked by a vote of 7-5;

August 7, 2008 – Myers's second trial ended in a mistrial;

September 16, 2008 – After Myers's third trial, the jury found him guilty of armed robbery.

¶39. It is worth repeating that, after he was convicted, it took the trial court 970 days to rule on Myers's post-trial motions, preventing him from filing his direct appeal for several more years. Myers has raised both a violation of his Sixth Amendment right to a speedy trial and a violation of Section 99-17-1, which required the State to bring him to trial in 270 days following arraignment.

Sixth Amendment Right to a Speedy Trial

¶40. The Sixth Amendment right to a speedy trial "is one of the most basic rights preserved by our Constitution."[7] Both the Sixth[8] and the Fourteenth[9] Amendments of the United States Constitution, as well as Article 3, Section 26 of the Mississippi Constitution, guarantee a

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[7] ***Klopfer v. North Carolina***, 386 U.S. 213, 226, 87 S. Ct. 988, 995, 18 L. Ed 1 (1967).

[8] U.S. Const. amend. VI.

[9] U.S. Const. amend. XIV § 1.

defendant this basic right.[10] When we are presented a claim that the State has violated a defendant's Sixth Amendment right to a speedy trial, we are supposed to apply a four-part balancing test (called the ***Barker*** factors) created by the U.S. Supreme Court in ***Barker v. Wingo***: (1) length of the delay; (2) reason for the delay; (3) assertion of the right; (4) prejudice.[11] We are supposed to "balance" those factors to determine whether, considered as a whole, they weigh in favor of or against the State, and no single factor is "either a necessary or a sufficient condition to the finding of a deprivation of the right to a speedy trial,"[12]

FACTOR 1: Length of the Delay

¶41. The Sixth Amendment right to a speedy trial attaches when a person is accused of a crime.[13] This Court considers an eight-month delay between the initial accusation and the trial presumptively prejudicial, triggering further ***Barker*** analysis.[14]

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[10] Miss. Const. art. 3 § 26.

[11] ***Barker***, 407 U.S. at 531.

[12] ***Id.*** at 533: *see* also ***Ben v. State***, 95 So. 3d 1236, 1242 (Miss. 2012) (citing ***Barker***, 407 U.S. at 533).

[13] ***Handley v. State***, 574 So. 2d 671, 674 (Miss. 1990) (quoting ***Lightsey v. State***, 493 So. 2d 375, 378 (Miss. 1986), *superceded by statute on other grounds* ("For constitutional purposes, the right to a speedy trial attaches, and the time begins running, 'at the time of a formal indictment or information or else the actual restraints imposed by arrest and holding to a criminal charge.'"); *see also* ***United States v. Marion***, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468 (1971) ("[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.").

[14] ***Ben***, 95 So. 3d at 1242 (citing ***McBride v. State***, 61 So. 3d 138, 142 (Miss. 2011)).

¶42. Here, police arrested and detained Myers on October 28, 2004, and brought him to trial 1,335 days later. This delay is more than four times the delay necessary to raise the presumption of prejudice and to require further ***Barker*** analysis. This factor weighs heavily in Myers's favor, and against the State.

FACTOR 2: Reason for the Delay

¶43. The State bears the burden of bringing the defendant to trial,[15] and "where the defendant has not caused the delay, and where the prosecution has declined to show good cause for the delay we must weight this factor against the prosecution."[16] Because this case presents several periods of extended delay, I will analyze each:

The Initial 505-day Delay in Bringing Myers Before the Court and Appointing Him Counsel

¶44. Police arrested Myers on October 28, 2004. He was never provided an initial appearance, even though Uniform Rule of Circuit and County Court Practice 6.03 required the State to provide him one within forty-eight hours of arrest;[17] and he was never provided a preliminary hearing as required by Rule 6.04.[18] In fact, Myers remained in jail without any hearing of any kind before any court for seventeen months. On January 4, 2005, Myers was indicted. Then, on March 17, 2006, he was appointed an attorney, he waived arraignment, and the trial court set his first trial date for August 8, 2006.

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[15] ***Vickery v. State***, 535 So. 2d 1371, 1377 (Miss. 1988) (citations omitted).

[16] ***Id.***

[17] URCCC 6.03.

[18] URCCC 6.04.

¶45. In responding to this appeal, the State had a burden to provide this Court with any evidence it had available to it concerning the issues raised. The State has provided us nothing to explain the 505-day delay between arrest and arraignment. Instead, the State says it "would ***assume*** [the delay] was due to Myers being in a MDOC correctional facility in another county and the time and difficulty associated with bringing him back to Madison County."

¶46. Even *assuming* the State's assumption is correct, the U.S. Supreme Court has held that where a defendant is already incarcerated in one jurisdiction, but he faces separate charges in a different jurisdiction, that jurisdiction has a constitutional duty to bring him before a court:

> By a parity of reasoning we hold today that the Sixth Amendment right to a speedy trial may not be dispensed with so lightly either. Upon the petitioner's demand, [the jurisdiction where charges were pending] had a *constitutional duty to make a diligent, good-faith effort to bring him before the . . . .court for trial*.[19]

[19] ***Smith v. Hooey***, 393 U.S. 374, 379, 89 S. Ct. 575, 579, 21 L. Ed. 2d 607 (1969) (emphasis added).

¶47. And, back in the days when this Court recognized the right to a speedy trial,[20] it considered this issue in another case and stated that the "*right to [a] speedy trial cannot be dispensed on [the] ground that [the] accused is serving time in another jurisdiction.*"[21] And the U. S. Supreme Court has clearly stated that the Sixth Amendment right to a speedy trial

> has universally been thought essentially to protect at least three basic demands of criminal justice in the Anglo-American legal system: "(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself." *These demands are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction*.[22]

¶48. So, it is no answer for the State to say it "assumes" the delay was caused by Myers being held in a different jurisdiction, and that it would be too difficult and too time-consuming for it to prosecute Myers. The State offers no legitimate, good-faith reason for its 505-day delay in bringing Myers before the court and appointing him counsel, so the first

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[20] As I stated in ***Johnson v. State***:

> In 1972, the United States Supreme Court handed down ***Barker v. Wingo*** [citation omitted] . . . . In the forty years since ***Barker***, this Court has applied the ***Barker*** factors to speedy-trial issues in ninety-eight cases—forty before 1992, and fifty-eight since.
>
> Of those first forty cases, all decided prior to 1992, this Court found speedy-trial violations approximately one-fourth of the time. But in the fifty-eight cases decided since 1992, this Court has not found a single violation. Fifty-eight cases in a row over the past nineteen years—and all decided in favor of the State.

Johnson, 68 So. 3d at 1248-49 (Dickinson, P.J., dissenting).

[21] ***Perry v. State***, 419 So. 2d 194, 199 (Miss. 1982) (citing ***Smith***, 393 U.S. at 378) (emphasis added).

[22] ***Smith***, 393 U.S. at 378-81 (emphasis added).

505 days must count heavily against the State, which bore the burden of bringing Myers to trial.[23]

The Crowded-Docket Delays

¶49. Finally, on August 7, 2006, *the day before Myers's trial was set to begin*, the State moved *ore tenus* to have the trial reset. Myers opposed this delay, but, because of another case that had "priority," the trial court granted the State's motion and reset the trial. But in doing so, the trial court clearly recognized that Myers was demanding a trial.

¶50. On September 7, 2006, after failing to bring Myers to trial on the rescheduled date, the State again moved to have the trial reset for September 12, 2006. The trial court granted the State's motion and entered an order identical to the previous order. And again, the trial court clearly recognized that Myers "has demanded a trial."

¶51. Myers's arraignment occurred on March 17, 2006. The first trial-court order establishing that Myers had demanded a trial was entered on August 7, 2006, and the second order, which separately recognized Myers's demand for a trial, was entered on September 7, 2006. Both these orders were entered less than 270 days following arraignment.

¶52. The State did not bring Myers to trial as scheduled on September 12, 2006. Instead, the record falls silent for 377 days, without explanation. Then, on September 19, 2007, the trial judge happened to notice that Myers's case had fallen through the cracks,[24] so he *sua sponte* set another trial date on October 15, 2007.

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[23] *See* ***Vickery***, 535 So. 2d at 1377.

[24] The order stated: "It appearing to the Court that this cause remains on a past trial docket, . . . this cause shall be and hereby is set for trial at 9:00 a.m. on the 15th day of October, 2007. . . ."

¶53. We repeatedly have held that delay caused by overcrowded dockets must be weighed against the State – although "less heavily" than for other reasons[25] – and that "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."[26] So the 174-day delay caused by the Madison County Circuit Court's overcrowded dockets[27] must weigh slightly against the State. But, following the 174-delay that weighs slightly against the State, is another delay of 377 days that is totally unexplained. This delay must weigh heavily against the State.

The Agreed Delay

¶54. The delay from October 12, 2007, until Myers was finally tried was caused by agreements between the parties, so this period does not weigh against the State.

The Entire Delay Factor

¶55. Not counting the agreed delay,[28] there was a 505-day initial delay during which Myers was never brought before any court. This delay weighs heavily against the State. Then, there was a 174-day delay caused by Madison County's "overcrowded docket." This delay weighs slightly against the State. Finally, there was a 377-day delay that is unexplained which weighs heavily against the State. Given that 882 days of the total delay

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[25] ***McBride***, 61 So. 3d at 141 (quoting ***Barker***, 407 U.S. at 531).

[26] ***McBride***, 61 So. 3d at 141.

[27] I cannot help but mention that the assertion of an overcrowded docket in Madison County is suspect, given the Madison County District Attorney's recent public opposition to the Legislature's attempt to separate Madison and Rankin Counties into two separate districts. According to the district attorney, the cases are flowing through the circuit court without problem.

[28] 256 days.

of 1,056[29] days must weigh heavily against the State, and that another 174-day delay weighs slightly against the State, the reason-for-delay ***Barker*** factor must weigh heavily against the State.

FACTOR 3: Assertion of the Right

¶56. "'[A] defendant "has no duty to bring himself to trial . . . . Still, he gains far more points under this prong of the ***Barker*** test where he has demanded a speedy trial.'"[30] Myers easily satisfies this factor. After being incarcerated for months – and without the benefit of counsel – Myers wrote a letter to the Circuit Clerk of Madison County, pointing out that he had never had a preliminary hearing or initial appearance, and requesting that the State bring him before the court. He stated:

> My name is Edward Myers and I'm writing concerning the charge that I have there in Madison County. Right now I am in the dark about the charge of armed robbery. I've been trying to get in touch with the clerk for a while . . . . *I haven't had a initial or preliminary hearing, so I am writing to ask you to put me on the court list . . . . I'm eligible for a court hearing*, on these charges, with all due respect, *I would like to hear something soon*. If I don't I would have to take legal action. . . . I write concerning my life which is very important to me. Can you write back to inform me of the situation[?]

(Emphasis added.)

¶57. This letter, while not inflected with legalese or terms of art, clearly demands that the State bring him to court. The letter was ignored. Neither the State nor the trial court took any action in response to Myers's letter for another 232 days, so Myers wrote a "Motion to

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[29] And this does not even account for the twenty-three days that passed from the order setting the trial for the fourth time and the entry of the first agreed order.

[30] ***Thomas v. State***, 48 So. 3d 460, 476 (Miss. 2010) (quoting ***Jefferson v. State***, 818 So. 2d 1099, 1107-08 (Miss. 2002) (quoting ***Brengettcy v. State***, 794 So. 2d 987, 999 (Miss. 2001))).

Dismiss Charges for failure to Provide a Fast and Speedy Trial,"[31] alleging that the State had violated both his constitutional and statutory right to a speedy trial. Again he was ignored until another fifty-one days had passed.

¶58. Twice more, Myers asserted his right to a speedy trial, as reflected in two separate court orders, both of which stated that "the defendant has demanded a trial." Still, the State and the trial court ignored his requests. Myers could not bring himself to trial – that burden rests with the State. Because Myers repeatedly and unambiguously demanded a trial, this ***Barker*** factor must weigh heavily against the State.

FACTOR 4: Prejudice

¶59. In addressing prejudice, the ***Barker*** Court outlined the three interests that a speedy trial protects, and that courts should consider during the prejudice analysis: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern; (3) limiting the possibility of impairing the defense.[32] Although, since 1992, this Court has not once found those interests to have been breached, it at least recognizes that they exist.[33]

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[31] The record does not clearly indicate whether this motion was filed with the clerk's office, and the majority correctly notes that the certificate of service was left blank. But that motion was attached to the trial judge's September 7, 2006, Order Resetting Trial on the State's Motion. And that motion clearly notes that the defendant demanded a trial. Accordingly, the State was on notice of the defendant's attempt to litigate his right to a speedy trial.

[32] ***Barker***, 407 U.S. at 532.

[33] *See* ***Jenkins v. State***, 947 So. 2d 270, 277 (Miss. 2006) ("In considering whether Jenkins was prejudiced by the delay, we must look to the three interests for which the speedy trial right was designed: '(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.'") (quoting ***Mitchell v. State***, 792 So. 2d 192, 213 (Miss. 2001) (citing ***Barker***, 407 U.S. at 532)).

¶60. The purpose of the Sixth Amendment right to a speedy trial has little to do with preventing prejudice. In fact, the U.S. Supreme Court, in ***United States v. MacDonald***, held that:

> The Sixth Amendment right to a speedy trial is thus *not primarily intended to prevent prejudice to the defense caused by passage of time*; that interest is protected primarily by the Due Process Clause and by statutes of limitations. The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.[34]

¶61. And so Myers's incarceration in another county on a different charge for some period of time actually "aggravat[es] and compoun[ds]" the prejudice Myers suffered on this charge pending in Madison County.[35] This Court, too, has held that pending charges in one

[34] ***United States v. MacDonald***, 456 U.S. 1, 8; 102 S. Ct. 1497, 1502; 71 L. Ed. 2d 696 (1982) (emphasis added).

[35] The Sixth Amendment right to a speedy trial:

> . . . has universally been thought essentially to protect at least three basic demands of criminal justice in the Anglo-American legal system: "(1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself." *These demands are both aggravated and compounded in the case of an accused who is imprisoned by another jurisdiction*.
>
> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from "undue and oppressive incarceration prior to trial." But the fact is that the delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. . . .
>
> And while it might be argued that a person already in prison would be less likely than others to be affected by "anxiety and concern accompanying

jurisdiction cause prejudice to a defendant serving time in a different jurisdiction on a different charge.[36] Thus it cannot serve to minimize prejudice Myers suffered.

¶62. As the U.S. Supreme Court stated in ***McDonald***,[37] merely being incarcerated impaired Myers's liberty, disrupted his life, and created anxiety concerning the pending charges[38] –

> the public accusation," there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large. . . .
>
> "(I)t is in their effect upon the prisoner and our attempts to rehabilitate him that detainers are most corrosive. The strain of having to serve a sentence with the uncertain prospect of being taken into the custody of another state at the conclusion interferes with the prisoner's ability to take maximum advantage of his institutional opportunities. His anxiety and depression may leave him with little inclination toward self-improvement."
>
> Finally, it is self-evident that "the possibilities that long delay will impair the ability of an accused to defend himself" are markedly increased when the accused is incarcerated in another jurisdiction. Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired.

Smith, 393 U.S. at 378-380 (internal citations omitted) (emphasis added).

[36] ***Perry***, 419 So. 2d at 200 ("Perry was prejudiced in serving a lengthy period of time at Parchman without the opportunity to participate in various rehabilitation programs due to the pendency of the Harrison County charges."); *see also* ***Bailey v. State***, 463 So. 2d 1059, 1063 (Miss. 1985) ("Bailey was prejudiced by serving approximately 10 1/2 months in Parchman without the opportunity to participate in rehabilitation programs due to the pending burglary charges.").

[37] ***MacDonald***, 456 U.S. at 8.

[38] ***Id***.

which resulted in some prejudice. And being "locked up" also inevitably hindered Myers's ability to "gather evidence, contact witnesses, or otherwise prepare his defense."[39]

¶63. But this Court ignores these findings and instead has held that the defendant must make "[a]n evidentiary demonstration of prejudice," and that simply stating that the defendant has suffered anxiety is not enough to infer prejudice.[40] But even if this is so, Myers's failure to pass the majority's litmus test for prejudice merely robs him of a factor in his favor. The absence of the majority's concept of prejudice cannot weigh in favor of the State. If it did, a defendant who could not produce "[a]n evidentiary demonstration of prejudice" could be incarcerated indefinitely without a trial. Surely the majority sees this.

¶64. And even accepting the majority's view of the prejudice factor, the absence of prejudice is not dispositive of the ***Barker*** analysis. Actual prejudice is only a single factor in the ***Barker*** analysis, and the U.S. Supreme Court has gone to great lengths to establish clearly that proof of actual prejudice is *not necessary* to succeed on a claimed speedy-trial violation.

¶65. In ***Moore v. Arizona***, the U.S. Supreme Court found that the Arizona Supreme Court erred when it held that a showing of prejudice was essential to establish a constitutional speedy-trial claim.[41] Specifically, the U.S. Supreme Court stated:

> The state court was in fundamental error in its reading of ***Barker v. Wingo*** and in the standard applied in judging petitioner's speedy trial claim. ***Barker v.***

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[39] *See* ***Barker***, 407 U.S. at 533.

[40] ***Murray v. State***, 967 So. 2d 1222, 1232 (Miss. 2007) (citing ***State v. Magnusen***, 66 So. 2d 1275, 1285 (Miss. 1994)).

[41] ***Moore v. Arizona***, 414 U.S. 25, 26, 94 S. Ct. 188, 189, 38 L. Ed. 2d 183 (1973).

> ***Wingo*** expressly *rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial*.[42]

¶66. Then, in ***Doggett v. U.S.***, the U.S. Supreme Court again made clear that prejudice is only one factor in the balancing test, and "consideration of prejudice is not limited to the specifically demonstrable . . . *affirmative proof of particularized prejudice is not essential to every speedy trial claim*."[43] And again, back when this Court recognized the right to a speedy trial, it applied the U.S. Supreme Court's holding in ***Moore v Arizona***:

> [T]he U.S. Supreme Court has made it clear that *an affirmative showing of prejudice is not necessary in order to prove a denial of the constitutional right to a speedy trial*.[44]

¶67. Simply put, a defendant need not succeed on this prong to succeed ultimately on a claimed speedy-trial violation.

Balancing the Barker factors

¶68. The U.S. Supreme Court intended the ***Barker*** analysis to be a balancing test.[45] No one factor is necessary or sufficient to find a speedy-trial violation.[46] We are supposed to complete the delicate weighing of each factor.[47]

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[42] ***Id.*** (emphasis added).

[43] ***Doggett v. U.S.***, 505 U.S. 647, 655, 112 S. Ct. 2686, 2693, 120 L. Ed. 2d 520 (1992).

[44] ***Trotter v. State***, 554 So. 2d 313, 318 (Miss. 1989), *superceded by statute on other grounds.*

[45] ***Barker***, 407 U.S. at 533.

[46] ***Id.***; *see also* ***Bailey***, 463 So. 2d at 1062.

[47] ***Id.***

¶69. Here, the length of the delay, the reason for the delay, and the assertion of the right all weigh heavily in Myers's favor. And even assuming the prejudice factor weighs against Myers, it certainly does not outweigh the other three factors. Accordingly, any fair weighing of the ***Barker*** factors in this case results in finding a violation of Myers's Sixth Amendment right to a speedy trial. After all, this Court (back in 1985) examined a case where the factors weighed exactly as they do today and held that this same balance favored the defendant:

> Under both ***Barker*** and ***Bailey***, three factors weigh against the state: (1) assertion of the right by Burgess, (2) the reason for the delay by the state, and (3) the length of the delay. These outweigh item (4) prejudice, if the ***Barker*** and ***Bailey*** holdings that no one factor is dispostive are to have any meaning at all.[48]

¶70. Because I would find that the ***Barker*** analysis weighs in heavily in Myers's favor, and that no reasonable trial judge could hold otherwise, I would hold that the State violated Myers's Sixth Amendment right to a speedy trial.

Speedy-Trial Statute

¶71. In addition to the constitutional right to a speedy trial, the Legislature has provided 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 and seventy (270) days after the accused has been arraigned."[49] This statute of limitations has been completely ignored by this Court for decades. Here, 830 days – *more than three times the statute of limitations* – passed between Myers's arraignment and his trial.

Section 99-17-1

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[48] ***Burgess v. State***, 473 So. 2d 432, 434 (Miss. 1985).

[49] Miss. Code Ann. § 99-17-1 (Rev. 2007).

¶72. In ***Barker***, the U.S. Supreme Court, without ambiguity, found that the constitutional right to a speedy trial cannot be waived by inaction.[50] And states are free to provide more protections than the Constitution allows, but not less. But, instead of adhering to this constitutional mandate or to the plain, unambiguous language of Section 99-17-1, we instead left behind any notion of judicial restraint, respect for Legislative enactments and principles of constitutional law, and the well-settled rule that criminal statutes must be construed in favor of the defendant.[51]

¶73. I do not believe this Court has the authority to create a rule that requires the defendant to assert the statutory speedy-trial claim within 270 days of arraignment. But even if we do, Myers did. And in any case, the U.S. Supreme Court has said such a right may not be waived by inaction. I would find that Myers was not required to assert the speedy-trial violation to be protected under Section 99-17-1; and that, even if he was, he did.

¶74. On August 7, 2006 – 143 days after Myers's arraignment – the trial court entered an order to reset Myers's trial date. In that order, the trial court ruled that Myers had demanded a trial:

> IT APPEARING on motion *ore tenus* of the State to reset this cause for trial that *the defendant has demanded a trial* and another case with a priority setting was tried on the date this cause was set for trial . . . .

¶75. Then, on September 12, 2006 – 179 days after Myers's arraignment – the trial court again reset the trial date and made a ruling that Myers had demanded a trial:

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[50] ***Barker***, 407 U.S. at 528.

[51] ***United States v. Brown***, 33 U.S. 18, 25, 68 S. Ct. 376, 380, 92 L. Ed. 442, 448 (1948); *see also* ***State v. Burnham***, 546 So. 2d 690, 692 (Miss. 1989).

> IT APPEARING on motion *ore tenus* of the State to reset this cause for trial that *the defendant has demanded a trial* and another case with a priority setting was tried on the date this cause was set for trial . . . .

¶76. So, not only did Myers demand the State bring him to trial three separate times, he did so twice after – and within 270 days of – arraignment. And the trial court made two separate rulings (after arraignment) recognizing that Myers did so. And *still*, 651 days passed after Myers's last demand before the State actually brought him to trial.

Good Cause and Prejudice

¶77. Under the language of the statute, when, as here, the delay between arraignment and trial exceeds 270 days, the State is precluded from prosecuting the case "[u]nless good cause be shown, and continuances duly granted by the court. . . ."[52] But this Court has held that "only those delays attributable to the State count towards the 270 days."[53]

¶78. As explained in great detail above, at least 551 days between Myers's arraignment and his trial are attributable solely to the State. This Court, however, has held that, for the purpose of determining "good cause" under the speedy-trial statute, "docket congestion can constitute 'good cause' for delay."[54] Because 174 days of the delay were caused by priority trials, I will not count this time against the State. But that still leaves the unexplained 377 days that Myers's case was left on a past trial docket with no continuance for good cause shown, and no order whatsoever entered. These 377 days must weigh against the State.

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[52] Miss. Code Ann. § 99-17-1.

[53] ***Sharp v. State***, 786 So. 2d 372, 378 (Miss. 2001) (citations omitted).

[54] ***McGee v. State***, 608 So. 2d 1129, 133 (Miss. 1992).

¶79. But the analysis cannot end there, because, somewhere along the line of this Court's muddled caselaw on this issue, we have confused and intertwined the speedy-trial statute of limitations with the constitutional right to a speedy trial.[55] In doing so, this Court created another addition to Section 99-17-1, which appears nowhere in the language of the statute. Now, not only does the defendant have to assert the statute of limitations before it runs (unheard of with respect to any other statute of limitations), he also must prove that he was prejudiced by the delay.[56]

¶80. A strict – or even somewhat less than strict – interpretation of the language of Section 99-17-1 does not require a finding of prejudice. A majority of justices on this Court simply made it up. I would hold that the speedy-trial statute of limitations – like all other statutes of limitations – applies irrespective of any consideration of prejudice.

¶81. The Legislature enacted Section 99-17-1 as a statute of limitations. Nothing in the statute refers to a defendant's "right." The statute simply places a time limit on the State's right to try a defendant. Such a statute of limitations is perfectly logical, since the Legislature must respond to the public's demand that justice not be delayed. And neither this Court nor any court has ever held that, absent a showing of prejudice, a statute of limitations does not apply.

¶82. Because the State was responsible for at least a 377-day delay between Myers's arraignment and his trial, I would find that the State failed to prosecute the case within the 270-day statute of limitations.

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[55] *See* ***Guice v. State***, 952 So. 2d 129, 147 (Miss. 2007) (Diaz, J., dissenting).

[56] ***Guice***, 952 So. 2d at 139-140.

¶83. Because the State violated Myers's constitutional right to a speedy trial; and because it failed to prosecute the case within the 270-day statute of limitations, I would reverse and render.

KITCHENS, CHANDLER AND KING, JJ., JOIN THIS OPINION.