SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

State of Mississippi — **Plaintiff/Appellee**

VS.

DOCKET NO. 2005-CP-00175-COA
DOCKET NO. 2010-TS-02039
TRIAL COURT CASE NO. 2000-00080

One 1970 Mercury Cougar, One 1992 Ford Mustang, One Ford Mustang, $355.00 U.S. Currency, And Willie Hampton — **Defendant/Appellant**

APPEAL FROM THE CIRCUIT COURT OF THE 11TH JUDICIAL DISTRICT OF

TUNICA COUNTY

OPENING BRIEF OF THE APPELLANT

WILLIE RAY HAMPTON

ORAL ARGUMENT REQUESTIED

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CERTIFICATE OF INTERESTED PERSONS

The Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Willie Ray Hampton, # 779948-011 (Defendant/Appellant)
2. Honorable Kenneth L. Thomas (Circuit Court Judge)
3. Honorable John T. Lamar (Attorney for Plaintiff/Appellee)
4. Honorable John M. Colette (Attorney for Defendant/Appellant)
5. Honorable Marvin D. Miller (Attorney for Defendant/Appellant, *Pro Hac Vice*)

John M. Colette, MSB [redacted]
Attorney of Record for Willie Ray Hampton

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STATEMENT REGARDING ORAL ARGUMENT

Your appellant believes oral argument would be helpful to the Court in this case due to the unusual rulings below and facts herein.

STATEMENT OF THE ISSUES

I. WHETHER THE LOWER COURT ERRED WHEN IT FAILED TO GRANT HAMPTON THE REMAND HEARING IT WAS DIRECTED TO CONDUCT PURSUANT TO THE COURT OF APPEAL'S MANDATE. ITS DEFECTS INCLUDED:

1. FAILURE TO ALLOW THE PRESENTATION OF EVIDENCE BY HAMPTON ON THE *BARKER V. WINGO*, 407 U.S. 514 (1972) FACTORS TO BE CONSIDERED REGARDING SPEEDY TRIAL;

2. FAILURE TO REQUIRE THE STATE OR TUNICA COUNTY TO PRESENT EVIDENCE ON THE REASON FOR THE DELAY;

3. FAILURE TO ALLOW HAMPTON TO BE PHYSICALLY PRESENT IN PERSON AT THE REMAND *BARKER* HEARING; AND

4. MAKING FINDINGS ON A *BARKER* ANALYSIS WITHOUT TAKING EVIDENCE.

STATEMENT OF THE CASE

I. Course of the Proceedings and Disposition in the Court Below.

The case began when Willie Hampton was arrested in Tunica County, Mississippi, on 21 March 2000, for violating state drug laws. A search warrant executed after his arrest resulted in the seizure of the property that is the subject of this forfeiture case. Nine days after his arrest, a forfeiture complaint was filed in the Tunica County Circuit Court to be served on him at an address in Oakland, California, although he was known to be in federal custody prior to the filing of the forfeiture case because federal authorities had brought federal drug charges against him based on the same conduct. When Hampton sought discovery in the Mississippi forfeiture case, an order was entered in November 2000, staying discovery, pending conclusion of the trial of the federal criminal case and of the federal civil case.[1]

The trial in the federal criminal trial concluded on 31 January 2001. The next event in the forfeiture case was a request by Hampton in December 2001 for Replevin of the property. Tunica County was aware of the conclusion of the federal criminal trial because its agents, who were involved in this forfeiture case, were also involved in the federal prosecution. Tunica County took no action after the conclusion of the federal criminal trial. The trial court also took no action.

In December 2004, Hampton filed a notice of change of address, and Tunica County filed another petition for forfeiture, which was out of time and was not authorized by the Circuit Court as an out-of-time filing, nor as an amended forfeiture complaint. A forfeiture hearing was noticed by Tunica County in December 2004 for 24 February 2005.

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[1] The federal civil action was governed by the Federal Rules of Civil Procedure, Rules 26 to 37, on discovery. Those rules allow the same discovery that would have been available in a Mississippi state forfeiture case.

On 18 February 2005, the Clerk of the Circuit Court filed a notice to dismiss the forfeiture case for want of prosecution. No action was taken on that notice.

It appears that a hearing was held in the Tunica County Circuit Court on the forfeiture on 24 February 2005; however, Hampton was not present in person, nor was he represented by counsel, nor was he present by any other means. He was then in federal custody pursuant to his sentence in the previously mentioned federal criminal prosecution. An order was issued after the hearing granting forfeiture to Tunica County.

An appeal of that order was duly noticed by Hampton. In August 2006, the Court of Appeals for the State of Mississippi reversed the forfeiture order and remanded the case to the Circuit Court of Tunica County because of the substantial length of the delay between the filing of the forfeiture case in March 2000, and the February, 2005 hearing, which resulted in the forfeiture order. The purpose of the remand was to allow the parties to present evidence for analysis of the speedy trial standards under *Barker v. Wingo*, 407 U.S. 514 (1972).

The hearing mandated by the remand of August 2006 was scheduled for April 2010; however, although Hampton's witnesses were present, he was not present. Despite a Circuit Court grant of a Writ of Habeas Corpus Ad Prosequendum, and Hampton's express willingness to pay the cost of his transport from federal prison to the trial court for the hearing, he was not present in person or otherwise. The hearing was reconvened on 15 July 2010, and Hampton was present via telephone from federal prison. He was *pro se*.

At the July 2010, remand hearing, the lower court did not require evidence by Tunica County, and did not allow any evidence to be presented by Hampton. That court believed that evidence could not be allowed at the hearing. After the conclusion of the hearing, the trial court

entered an order reaffirming the original decision of February 2005. A notice of appeal was duly filed by Hampton.

Because there was some confusion about Hampton's filing of his notice of appeal, a Show Cause Notice was issued by this Court on 16 August 2010 in Docket Number 2010-TS-02039. That Notice indicated that the notice of appeal had not been filed until 3 December 2010. A notice of appeal had been filed on that date; however, the original, notice of appeal was filed on 23 August 2010, making it timely under Rule 4(a) of the Mississippi Rules of Appellate Procedure.

Undersigned counsel, who is now admitted *pro hac vice* in this case, had filed an application for *pro hac vice* admission in this case, and subsequently, a motion was filed by Mississippi counsel, the Honorable John M. Colette, Esq., seeking to transmit the record on appeal and entry of a briefing schedule. The application for appearance *pro hac vice* was granted by this Honorable Court, and a briefing schedule was entered. This brief is timely filed consistent with that schedule.

II. Statement of the Facts.

This is a forfeiture case filed by Tunica County, Mississippi, against various seized property owned by Willie Hampton. It languished without any action from its filing in March 2000 until a forfeiture order was entered on 8 March 2005, after a 24 February 2005 hearing. That order was appealed, and the Court of Appeals for Mississippi, in a mandate issued on 22 August 2006, remanded the case for a hearing in the Circuit Court regarding the delay consistent with *Barker v. Wingo, supra.* Ultimately, a non-evidentiary remand hearing was held in July 2010, and this appeal is from that hearing.

This case began in March 2000, when state law enforcement agencies arrested Hampton and charged him with violation of Mississippi's controlled substances laws. The Tunica County Sheriff's Department seized items of Hampton's personal property, including the vehicles and funds at issue in this case.

Nine days later, on 30 March 2000, after the arrest on state charges, Tunica County filed a complaint for forfeiture in the Tunica County Circuit Court, and served Hampton with process. In March 2000, a federal complaint was also filed against him for, essentially, the same charges as in the Tunica County Circuit Court. Hampton was transferred to federal custody, detained, and prosecuted in the United States District Court in Jackson, Mississippi.

In October 2000, Hampton, through counsel, filed a notice of deposition seeking to depose Deputy Sheriff Jerome Hudson in the forfeiture case. (R. 06)[2] Deputy Hudson failed to attend the scheduled deposition. Hampton then filed an answer to Tunica County's forfeiture complaint in November 2000, a motion seeking contempt against Deputy Hudson for his failure to attend the deposition, and a motion to compel his attendance at a future deposition. In response, the County made an *ore tenus* motion to stay discovery. An order staying discovery was entered by the Circuit Court on 30 November 2000. (R. 72, 73)

Hampton had filed a civil suit in the Tunica County Circuit Court against the County Board of Supervisors regarding the case against him. That case was apparently removed, on motion to the United States Attorney's Office in Jackson, Mississippi, to the United States District Court in Jackson, where the criminal case against him was pending. The end result was that both the federal criminal prosecution and civil case were pending in the United States

[2] Excerpts of the Record, filed contemporaneously herewith, are hereinafter referenced as "(R.)"

District Court in Jackson. The State prosecution remained in the Tunica County Circuit Court; however, no action was taken on it.

The order granting the stay of discovery did not stay the case, as such; rather, it only stayed discovery pending completion of the criminal trial and the federal civil case. (R. 72, 73) The criminal trial concluded on 31 January 2001. After sentencing, there was no further prosecution pending against Hampton in the federal court. The only matter which remained was the federal civil case.[3] The law enforcement agents involved in the state and federal prosecution were the same and included the officer whose deposition led to the initial stay of discovery. The County took no action, whatsoever, regarding the stay or the forfeiture proceedings after the federal criminal trial ended. Hampton continued to be in federal custody.

On 17 December 2001, Hampton, acting *pro se*, filed a pleading entitled "Replevin" in the Circuit Court, which was his attempt to obtain dismissal of the forfeiture petition. No hearing was requested, and no action was taken by the Circuit Court, nor by opposing counsel. On 20 December 2004, Hampton filed a change of address, along with his prisoner number, with the Tunica County Circuit Court Clerk. His new address was a federal prison in Adelanto, California. Also on 20 December 2004, the County filed a new petition for forfeiture under the same Trial Court Case No., although there was no order by the Circuit Court granting the County leave to amend its prior petition or to file a new petition out of time.

In December 2004, Hampton's then counsel, Attorney David Hill, sent Tunica County's attorney a letter, indicating that he no longer represented Hampton. The following month,

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[3] Staying the discovery in the Mississippi forfeiture case pending resolution of the federal civil case was an anomaly, given the fact that Federal Rules of Civil Procedure 26 through 37 allowed the whole panoply of discovery available in other civil litigation, including depositions, such as the one that prompted the 30 November 2000 stay order in the first instance in this forfeiture case.

January 2005, Hampton filed a *pro se* pleading essentially requesting dismissal of the forfeiture case for the County's failure to prosecute it. He asserted that he wanted to have the case decided and asserted his speedy trial rights. (R. 07) On 18 February 2005, the Circuit Court Clerk filed a Clerk's motion to dismiss for want of prosecution, but the Circuit Court took no action. (R. 07) The Circuit Court appears to have conducted an *ex parte* hearing in February 2005, but there is no record of that hearing, only an order of 8 March 2005. (R. 07)

Hampton appealed the 8 March 2005 order, which appeal the Court of Appeals of Mississippi decided in *One 1970 Mercury Cougar, et al. v. Tunica County*, 936 So.2d 988 (2006) (Docket No. 2005-CP-00175-COA). The Court of Appeals reversed and remanded the case to the Circuit Court with instructions that it conduct a hearing to determine the reasons for the delay and to provide Hampton an opportunity to establish any prejudice he may have suffered, in accordance with the factors set out in *Barker v. Wingo, supra.*, regarding speedy trial rights.

When nothing had been done by the County or the Circuit Court about the August 2006, mandate directing a remand, Hampton filed a motion to suppress the evidence in September 2006, a request to inspect the property in October 2006, a request to comply with the remand hearing on 16 October 2006, a request for clarification of the mandate in November 2006, as well a request for return of the property, and a request for a mandamus regarding the hearing on 19 December 2006. (R. 08)

Hampton again sought a hearing in March 2007, filed an affidavit regarding the violation of his due process right in July 2008, as well as a motion for a mandatory hearing, and, in November 2009, and a motion for a judicial inquiry regarding non-compliance with the mandate. (R. 08-09) Finally, an order was entered on 4 February 2010 setting a hearing. (R. 09)

In April 2010, a hearing was scheduled, pursuant to the Court of Appeal's remand. Prior to that date, Hampton had provided the Circuit Court with a list of the witnesses he wanted summoned for the hearing. At the April 2010, hearing, however, Hampton was not present; he was in federal custody in California. Some of his witnesses, however, were present. (R. Tr. 16-17)[4] The court adjourned the hearing which was reconvened on 15 July 2010, and did not, so far as the record establishes, excuse Hampton's witnesses or otherwise release them at the April hearing.

In the interim, the Circuit Court entered an order granting his request for a Writ of Habeas Corpus Ad Prosequendum permitting Hampton to appear for the July 2010, hearing provided he pay the costs necessary for that to occur. (R. 137) Hampton was willing to pay the costs and requested that the United States Marshals Service in Oxford, Mississippi, advise him about the arrangements that needed to be made and the cost for transportation to the hearing. When they informed him that they could not comply, he sought to pay the costs to the proper Mississippi authority. (R. 193, 198) No effort was made to transport Hampton, nor to allow him to pay the costs for transportation so that he could appear at the hearing.

In May 2010, Hampton filed a renewed motion of subpoenas for the production of witnesses, including a list of the names and addresses for those whom he wanted subpoenaed for the proceeding, as well as a modified witness list and a proposed list of exhibits. (R. 152-155)[5]

On 15 July 2010, Hampton was informed by the authorities at the federal prison that he was to attend the hearing in the trial court that very moment via telephone. Hampton appeared via telephone, his witnesses were not present, he was not able to present his evidence regarding

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[4] The transcript of the 15 July 2010 hearing in the trial court, filed with the Record excerpt, is hereinafter referenced as "(R. Tr. ---)."

[5] It should be noted that the witness and exhibit lists that are referenced here had a hearing date that was "(To Be Determined)" because Hampton had not received notice of that date.

the prejudice he suffered as the result of the delay, nor other facts regarding the lack of any valid reason for the delay. Even though willing to pay the necessary costs to attend in person, he was not afforded such an opportunity. He appeared *pro se* via telephone and objected to not being allowed to confront his accusers, call his witnesses, and present his side of the case. (R. Tr. 9-14, 17-20)

During that July 2010, hearing, the County Attorney presented no evidence and called no witnesses. His argument was that they could not proceed in the forfeiture case after Hampton's federal criminal case was concluded because there was an order they had obtained staying discovery. (R. Tr. 7) Additionally, the County opined that Hampton should have obtained counsel and attended the 24 February 2005 hearing. (R. Tr. 7, 8) The County said he chose not to attend. The reasons for the delay were not otherwise addressed and the time between the August 2006 remand and the 15 July 2010 remand hearing was not addressed.

Hampton's response to the County Attorney's argument was that he wanted himself and his witnesses at the court so that he could make his case regarding the delay and the prejudice he suffered. (R. Tr. 9, 10, 12, 13, 14) Hampton addressed the fact that the record was silent regarding the reasons for the delay and reiterated that he wanted an opportunity to question the witnesses regarding the County's actions and the unwarranted delay they caused and to present his own witnesses regarding the delay, its causes, and the prejudice to his case that resulted. (R. Tr. 9-14, 17-20) Hampton also indicated that the Circuit Court had an obligation to assist him in being able to attend to protect his rights.

Subsequent to the 23 August 2010 Notice of Appeal filed by Hampton with the Circuit Court, a Show Cause Notice was issued by this Court on 16 December 2010 in Docket No. 2010-TS-02039. That Notice recounted that the Notice of Appeal had not been filed until 3 December

2010. While a Notice of Appeal had been filed on that date, the original Notice of Appeal was filed and docketed in the Circuit Court on 23 August 2010, making it timely under Rule 4(a) of the Mississippi Rules of Appellate Procedure.[6]

Responding to this Court's Show Cause Notice, Hampton filed, *pro se*, a response which contained the timely Notice of Appeal, the Circuit Court docket sheet noting its timely filing, and an Affidavit of the Honorable Sharon G. Reynolds, Circuit Clerk. Additionally, he provided documentation regarding requests for transcripts and designation of the record, as well as a written argument answering the Show Cause Notice.

After an application for the undersigned counsel, to be admitted *pro hac vice*, and a motion to order transmission of the record on appeal and to enter a briefing schedule were filed, a briefing schedule was set. This brief is timely filed.

SUMMARY OF THE ARGUMENT

This is a forfeiture case regarding Mr. Hampton's property filed by Tunica County in March, 2000. Discovery was stayed in November, 2000. No hearing was held until February, 2005. Mr. Hampton was not present because he was in custody. A forfeiture order was entered against him in March, 2005. It was appealed and this Court remanded the case to the circuit court in August, 2006, for a hearing regarding the lengthy delay and the issue of prejudice of Mr. Hampton. That hearing was held in July of 2010, but the Court did not require the County to present evidence regarding the lengthy delay and would not allow Mr. Hampton to present evidence regarding either the delay or the issue of prejudice. His request for witnesses and exhibits was denied. His offer to pay the costs so that he could appear at the hearing was refused. He appeared *pro se* by telephone.

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[6] The additional Notice of Appeal on 3 December 2010 was filed at the suggestion of the Circuit Court Clerk; it does not negate the timely filed Notice of Appeal of 23 August 2010.

The lower court failed to comply with the remand directive, denied Mr. Hampton his due process rights, and did not allow the creation of a record which this Court can review regarding the speedy trial issue. The matter should be remanded for a proper evidentiary hearing so that a record can be made and Mr. Hampton can be afforded his due process rights.

ARGUMENT

I. STANDARD OF REVIEW.

"Review of a speedy trial claim involves a question of fact: whether the trial delay arose from good cause." *Carr v. State*, 966 So.2d 197, 200 (¶5) (Miss. App. 2007) (citing *Flora v. State*, 925 So.2d 797, 814 (¶58) (Miss. 2006) and *DeLoach v. State*, 722 So.2d 512, 516 (¶12) (Miss. 1998)). This Court "will uphold the trial court's finding of good cause," based on analysis of the four *Barker v. Wingo*, 407 U.S. 514 (1972) factors, "if that decision is supported by *substantial, credible evidence*...However, if no *probative evidence* supports the trial court's findings, [this Court] must reverse the decision and dismiss the charge." *Id.* (emphasis added).

When the trial court fails to articulate factual findings on the *Barker* factors, this Court will conduct a *de novo* analysis of those factors. *See Scott v. State*, 8 So.3d 871, 890 (¶33) (Miss. App. 2008) (citing *DeLoach*, 722 So.2d at 516 (¶15)). The *de novo* standard of review has applied where "the trial court did not require the State to file a response to... [the] speedy trial motions nor did the court discuss the *Barker* factors in denying the motions." *Scott*, 8 So.3d at 890, 893 (¶33, ¶41) (remanding for an evidentiary hearing).

The trial court's order filed 30 July 2010 holding that "the forfeiture proceedings against One 1970 Mercury Cougar and others were properly conducted and [the court] properly granted the forfeiture," (R. 256-58), survives neither standard of review because the trial court did not

hold an evidentiary hearing as ordered by the Court of Appeals on remand (R. 20), at which Hampton was present in person.

II. THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THE *BARKER V. WINGO*, 407 U.S. 514 (1972) FACTORS, WHICH WAS ORDERED BY THE COURT OF APPEALS ON REMAND.

In *One 1970 Mercury Cougar, et al. v. Tunica County*, 936 So.2d 988, 992-93 (¶19-¶20) (Miss. App. 2006), the Court of Appeals of Mississippi "reverse[d] and remand[ed] in order to allow the parties to present a record that would allow analysis by th[e] Court under the *Barker* standard." The *Barker* factors, applied to forfeiture actions via *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983), are:

> (1) the length of the delay, (2) the reason for the delay, (3) the claimant's assertion of his or her rights, and (4) the prejudice to the claimant caused by the delay...Of these factors, the most critical is the prejudice to the accused.

Jones v. Green, 946 S.W.2d 817, 826 (Tenn. Ct. App. 1996); *see One 1970 Mercury Cougar*, 936 So.2d at 992 (¶16, ¶18) (adopting *Jones v. Green, supra.*).

As to the fourth *Barker* factor, prejudice to the claimant, the *Jones* Court further explained that "persons seeking to prove that a delay impaired their ability to present favorable evidence must demonstrate actual prejudice *by offering some proof* of the witness's expected testimony and of their efforts to assure that these witnesses would attend the hearing." *Jones*, 946 S.W.2d at 827 (emphasis added). The requirement of proof, at an evidentiary hearing, is further supported by recognition that it is a factual issue. *See, also, Commonwealth v. Goldman*, 496 N.E.2d 426 (Mass. 1986).[7]

In *Goldman*, the Supreme Judicial Court of Massachusetts held that "[w]hether delay is reasonable calls for a determination of fact." "Neither the Commonwealth nor the defendant

[7] *See Commonwealth v. Two Parcels of Land*, 724 N.E.2d 739, 746 (Mass. Ct. App. 2000) (citing *Goldman* and cited in *One 1970 Mercury Cougar*, 936 So.2d at 992 (¶16)).

offered evidence on th[at] question, nor did either request a hearing on the issue. Apparently, the judge concluded as a matter of law that a forfeiture decision could await sentencing on related criminal charges." The Court held that "there should have been an *evidentiary hearing* before a judge on the unreasonableness of the delay before entry of the forfeiture judgment." *Id.* at 427-28 (emphasis added).[8]

By final way of example, in *Scott*, the Court of Appeals of Mississippi held, on the fourth *Barker* factor, that it was "unable to determine from the record whether Scott in fact lost any witnesses or documentary evidence during the time period between his arrest and trial and whether any such loss was the result of the delay caused by the State..." *Scott*, 8 So.3d at 893 (¶41). The Court "remand[ed] this case for an *evidentiary hearing* addressing the forms of prejudice Scott asserts and a determination of whether Scott was, in fact, prejudiced as a result in the delay of his trial." *Id.* (emphasis added).

Clearly, a trial court cannot make factual findings without evidence. *See, e.g., Kay v. Kay*, 12 So.2d 622, 627 (¶20) (Miss. App. 2009) (chancellor's factual finding that a percent of Greg's student loan debt was marital property, based on Greg's undisputed *testimony* that a portion of those loan proceeds were used for living expenses during the marriage, was supported by *substantial evidence*); Miss. R. Civ. Pro., Rule 52(a)-(b); Fed. R. Civ. Pro., Rule 52(a)(1), (3), (5).

In this case, the trial court made clear at the remand hearing on 15 July 2010 that "[w]e're not here to involve ourselves with evidence." (R. 20) Hampton argued "that [was] the whole purpose," which is supported by the case law on the application of the four *Barker* factors in civil

[8]*See also State v. Nourallah*, 726 So.2d 923, 926 (La. App. Ct. 1998) (on an evidentiary hearing and cited in *One 1970 Mercury Cougar*, 936 So.2d at 992 (¶16)).

forfeiture actions.[9] *Id.*; *see Jones*, 946 S.W.2d at 827; *Goldman*, 496 N.E.2d at 427-28; *Nourallah*, 726 So.2d at 926. The trial court's refusal to allow Hampton to present evidence, or to require Tunica County to present evidence, renders any factual finding unsupported by *substantial, credible evidence*, and thus, requires reversal. *See Carr*, 966 So.2d at 200 (¶5). There is no evidence for this Court to conduct a *de novo* review. *See Scott*, 8 So.3d at 890 (¶33).

The trial court's rebuke to Hampton about there would be no evidence conflicts with its prior, proper issuance of subpoenas to Hampton's witnesses, some of whom did appear at the April 2010 hearing, as Tunica County acknowledged at the July 2010 hearing. (R. Tr. 16) The April hearing was adjourned, as detailed in section III, *infra.*, when Hampton, incarcerated in Colorado, was unable to appear in person in accordance with the court's order of a Writ of Habeas Corpus Ad Prosequendum.[10] *See* (R. Tr. 14)

The witnesses subpoenaed by Hampton to the April hearing, however, were ordered "there to remain from day to day until discharged by law to testify on behalf of...Hampton...in a certain case pending in said court wherein State of Mississippi is Plaintiff, and One Mercury Cougar, et-al, Defendant." *See* (R. 170-80)[11] While those witnesses were not discharged by law, they did not appear when the adjourned hearing resumed on 15 July 2010. *See* (R. Tr. 12)

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[9] *See also* (R. Tr. 19) (Hampton argued "I'm afforded the opportunity to call witnesses that you are denying me the right to call. How can I prove my prejudice and go back to the Supreme Court with a record if I'm not afforded those rights." The trial court had indicated that the "proceeding [was] not on the merits. [They were] here procedurally.")

[10]The court concluded that Hampton's "motion [was] well taken and should be granted." (R. Tr. 144) Hampton's motion, filed on his behalf by his then attorney, argued that "his presence in Tunica Circuit Court is necessary. Further, in order to prepare for trial, the Defendant should be transported to the Boliver County Detention Center as soon as possible and held...[there] until the trial of this matter." (R. Tr. 95)

[11] It is noteworthy that two of the eleven subpoenas issued were not served, as reflected by the blank return of service, (R. 170-71), and one was issued in duplicate, (R. 170, 180) Hampton had requested twelve subpoenas for the April 2010 hearing. (R. 85-86) On June 14, 2010, Hampton filed a renewed motion, which requested the issuance of sixteen subpoenas for the continued hearing date, *i.e.*, the motion

Further, subpoenas were not issued and served for all of Hampton's witnesses for the July hearing. *See* n. 11, *supra*. Hampton was denied the right to present that testimonial evidence at the *Barker* hearing ordered by this Court on remand.

It is also important that the trial court never ruled on Hampton's motions for contempt and to compel the attendance of Tunica County Sheriff Deputy, Lieutenant Jerome Hudson, a key witness on the search and seizure of the property alleged in the forfeiture action,[12] at a deposition for which he was subpoenaed and failed to appear. *See* (R. 6) Those motions precipitated the *ore tenus* motion to stay discovery made by the County, for which there is no record. The trial court granted that motion by order filed 30 November 2000. (R. 72-73)

Hampton *ipso facto* was denied discovery prior to a hearing on the merits of the forfeiture action. He was not present and apparently was not served with notice. *See* n. 18, *infra*. Discovery was also not allowed prior to the remand, *Barker* hearing.[13] Hampton, who filed an Exhibit List before that hearing, *see* (R. 157-59, 188-90), was not present in person to submit any of those thirty-four exhibits, or any other exhibits, to the trial court, *see* (R. Tr. 2) (Hampton was present on 15 July 2010 by telephone). The trial court denied Hampton the evidentiary hearing ordered by the Court of Appeals and supported by the case law.

Hampton also notes the trial court correctly denied Tunica County's request that the court take judicial notice of and include in the record Tunica County's brief. (R. Tr. 5, 23, 28) The

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included the same twelve witnesses, some of whom already were under subpoena, and four additional witnesses. (R. 181-84) On June 28, 2010, Hampton filed a motion to subpoena one additional witness, bringing the total to seventeen. (R. 207-08) The trial court did not issue any additional subpoenas.

[12] *See, e.g., United States v. Bowens*, 161 Fed. Appx. 383 (5th Cir. 2004) (unpublished).

[13] Hampton filed a motion to lift the stay of discovery on February 1, 2010, but the trial court never ruled on his motion. *See* (R. 12-13). The State did not move to lift the stay prior to filing the second petition for forfeiture on December 20, 2004, which it filed without moving for leave to amend, as required by Rule 15 of the Mississippi Rules of Civil Procedure. The State also did not seek leave to file out of time.

court could not do so pursuant to Rule 201(a) of the Mississippi Rules of Evidence, which provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

The facts alleged in Tunica County's brief on the *Barker* factors clearly were in dispute. *See, e.g.,* (R. 15-45) ("Motion and Second Request: Mandamus to Require Court Decision...," Affidavit of Truth..." and "Attachments" filed *pro se* 10 February 2010); (R. 56-76) ("Tuncia County, Mississippi's Memorandum Brief Opposing Willie Hampton's Violation of Due Process Claim" filed 22 February 2010); (R. at 105-45) ("Willie Hampton's Response to Tunica Counties [sic] Memorandum Brief..." filed *pro se* on 22 March 2010).

The only "evidence" arguably admitted by the trial court and "made a part of the record," on the request of Tunica County, was "the defendant's timeline of relevant facts in this case," though it is not clear what document Tunica County referenced by its request. (R. 8-9) That "timeline of relevant facts" did not provide substantial evidence on the reason for the delay favorable to the State or Tunica County, who have acted interchangeably as the plaintiff in the underlying forfeiture action. Reversal and remand is required for the trial court to comply with the Court of Appeal's 2006 remand order.

The need for an evidentiary hearing is further supported by arguments offered in the trial court on the *Barker* factors. The first factor, the length of delay, as this Court held, was substantial. *One 1970 Mercury Cougar*, 936 So.2d at 992 (¶18). The State filed a complaint for

forfeiture on 30 March 2000; discovery was stayed eight months later on 30 November 2000.[14] (R. 6) In Mississippi, "an eight month delay is presumptively prejudicial." *Perry v. State*, 637 So.2d 871, 874 (Miss. 1994) (citing *Smith v. State*, 550 So.2d 406, 408 (Miss. 1989)); *Johnson v. State*, No. 2008-CT-00537-SCT (¶7) (Miss. June 30, 2011).

On the second *Barker* factor, the reason for the delay, the burden is on the State. *See Ben v. State*, No. 2009-CA-01495-COA (¶12) (Miss. App. May 31, 2011) (citing *Stark v. State*, 911 So.2d 447, 450 (¶11) (Miss. 2005)). Hampton also may present evidence on the reason for the delay as a participant in the hearing. He was not afforded an opportunity to do so, nor does the record provide substantial evidence, or any evidence for *de novo* review, to support the trial court's 2010 order.

While "it is not unusual for civil forfeiture actions to be continued until after the underlying *criminal* proceedings are concluded[,] *[s]ee, e.g., Escamilla v. Tri-City Metro Drug Task Force*, 999 P.2d 625, 630 (Wash. Ct. App. 2000); *State v. Nourallah*, 726 So.2d 923, 924 (La. App. Ct. 1998)," *One 1970 Mercury Cougar*, 936 So.2d at 992 (¶16) (emphasis added), no court has held that pending *civil* proceedings warrant the stay of civil forfeiture actions.

Miss. Code § 41-29-179(1), similarly, provides only that "the court may postpone said forfeiture hearing to a date past the time any *criminal action* is pending against said owner." *Id.* (emphasis added).[15] However, without statutory authority or supporting case law, the November 2000 trial court order stayed discovery "until final adjudication of the federal causes of action,

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[14] Once prejudice is presumed on the first factor, as it was here, additional facts, including his Replevin filed December 17, 2001 and the State's next pleading, its petition for forfeiture filed three years later on December 20, 2004, relate to the second and third *Barker* factors, for which the Court of Appeals ordered an evidentiary hearing on remand. *See* (R. 6). That evidentiary hearing was not held.

[15] *See also One 1970 Mercury Cougar*, 936 So.2d at 991 (¶14) (citing Miss. Code § 41-29-197(1)).

both *civil* and criminal, which originate from the same set of facts and circumstances." (R. 72) (emphasis added).

Such an order defied logic. The Federal Rules of Civil Procedure, in particular, Rules 26 to 37, allowed Hampton to obtain discovery in his federal civil cause of action "which originate[d] from the same set of facts and circumstances" as the Mississippi forfeiture action. The authorized federal discovery would include depositions, *see, e.g.,* Federal Rules of Civil Procedure 30-32, such as of the deposition of Jerome Hudson, the same discovery that led to the State's *ore tenus* motion to stay discovery in the Mississippi court.

Further, the record before this Court still does not include evidence of when the criminal proceedings concluded.[16] *See One 1970 Mercury Cougar*, 936 So.2d at 992 (¶17). Tunica County appended to its brief an order of dismissal in the federal civil case, *Hampton v. Tunica County Board of Supervisors, et al.*, No. 2:06-cv-00100-SA-SAA, entered on 24 August 2009, not a judgment in the federal criminal case. (R. 74) It also offered no testimony or other *evidence* on the reason for the delay. Reversal and remand for an evidentiary hearing in accord with the 2006 remand order are required.

On the third *Barker* factor, the claimant's assertion of his rights, Hampton argued in his brief that he timely filed an answer to the initial complaint for forfeiture and that he asserted his right to a speedy trial in his Replevin pleading filed 17 December 2001. *See, e.g.,* (R. 6, 112, 121, 133). The State did not file an answer to the Replevin and did not file any other pleading until three years after Hampton asserted his rights, when, on 20 December 2004, the State filed an amended petition for forfeiture. (R. 6)

[16] Hampton asserted in his brief, filed in the trial court, that his federal criminal trial concluded on January 31, 2001. (R. 123)

Hampton was not present in person at the 15 July 15 2010 hearing, and thus, was not able to offer into evidence the previously filed Replevin as an exhibit, or any other evidence, including testimony, on his assertion of his speedy trial rights. There is no substantial evidence in the record, nor any evidence for *de novo* review, to support the trial court's 2010 order.

On the fourth *Barker* factor, prejudice to the claimant caused by the delay, the trial court again had no evidence on which to base its decision. Hampton requested subpoenas for seventeen witnesses; eleven were issued for the April 2010 hearing, of which eight were served; those witnesses remained under subpoena for the July 2010 hearing. (R. 85-86, 170-84, 207-08) Hampton was denied the right to present the testimony of any witnesses to establish prejudice, the "the primary inquiry...[of which] is whether the delay has hampered the claimant in presenting a defense on the merits, through, for example, the loss of witnesses or other important evidence." *See $8,850 in United States Currency*, 461 U.S. at 569.

Tunica County did not offer any proof, by testimony or otherwise, but counsel, who had no personal knowledge, argued based on pure speculation that:

> Mr. Hampton, he chose not to participate. Now, Mr. Hampton may say, well, I was in prison in California or Colorado or wherever I was at the time. But this is, since I've been hired, this is my third time to appear before this Court on this very same matter,[17] and every time I've been here, Mr. Hampton was able to arrange Mr. Laher to appear on his behalf. There's no reason why Mr. Hampton could not have arranged someone to appear on his behalf back on February 24th of 2005.[18]

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[17] Hampton notes that the Court of Appeals reversed and remanded this matter on 22 August 2006, and, despite his efforts to demand a hearing in compliance with the remand order, *see, e.g.,* (R. 15-45), Tunica County made no effort to notice a hearing until after one was ordered by the trial court, for the first time three and a half years after the remand was entered. (R. 14, 168)

[18] It is noteworthy that not only does the certificate of service on the notice of the "February 24, 2004" hearing, filed 20 December 2004, not include Hampton's inmate number or any reference to the prison at which he was incarcerated, but it appears to contain an incorrect P.O. Box. (R. 75-76) (emphasis added). The lack of notice is supported by the docket sheet in No. 2000-0080, which reflects that Hampton filed a motion to dismiss for failure to prosecute on January 31, 2005, a request for the clerk to effect dismissal on 10 February 2005, and a motion to compel discovery on 11 March 2005. *See* (R. 7).

(R. 7-8) Of course, argument is not evidence, and further, under Rule 602 of the Mississippi Rules of Evidence, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." On this factor, as on the second and third *Barker* factors, this Court should reverse and remand for an evidentiary hearing in accord with the 2006 remand order.

III. THE TRIAL COURT ERRED IN DENYING HAMPTON THE RIGHT TO BE PRESENT IN PERSON AT THE *BARKER* HEARING ORDERED BY THIS COURT ON REMAND.

The due process clause, Section 1 of the Fourteenth Amendment of the United States Constitution, provides: "nor shall any State deprive any person of life, liberty, or property without due process of law." In *Mullane v. Central Hanover Bank Trust Co.,* 339 U.S. 306, 314 (1950), the United States Supreme Court explained that: "'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 395, 394...This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to *appear* or default, acquiesce or contest." *Id.* (emphasis added).

That right applies no less to incarcerated individuals who own property that the state has sought to forfeit. In *Robinson v. Hanrahan*, 409 U.S. 38, 39-40 (1972), the Supreme Court, applying *Mullane*, made clear that: "'An elementary and fundamental requirement of due process in any proceeding which is to be accorded finally is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and *afford them an opportunity to present their objections*." *Id.* (emphasis added).

In *Robinson*, the interested property owner "remained in custody throughout the forfeiture proceedings, [and] did not receive such notice [of forfeiture] until his release;"

forfeiture was ordered after an ex parte hearing. *Id.* at 39. An incarcerated individual's right to present objections is no less protected by the due process clause than that of any other individual. As the Supreme Court explained in *Tennessee v. Lane*, 541 U.S. 509, 523 (2004): "The Due Process Clause also requires the States to afford certain civil litigants a 'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)."

In this case, Hampton, through counsel and *pro se*, filed petitions for writs of habeas corpus ad prosequendum so that he could appear in person in the trial court at the remand, *Barker* hearing. (R. 49-54, 95-97, 101-03, 195-97, 201-06) The trial court granted that petition on 29 March 2010 as to the April 2010 hearing. (R. 137) The court found that Hampton's "motion [was] well taken and should be granted." (R. 137) The motion filed by his attorney argued that "his presence in Tunica Circuit Court is necessary...[I]n order to prepare for trial, the [he] should be transported...as soon as possible and held...until the trial of this matter." (R. 95)

In response to that order, Hampton made every effort to determine who would transport him to Mississippi and the cost of that transportation so that he could make payment in advance of the *Barker* hearing. *See* (R. 198-206). He requested transportation from the United States Marshals Service, which request was declined, (R. 199), and then requested assistance from the clerk of the trial court based on the Marshals response, (R. 198). In a motion to the trial court, he relied, in part, on his right to "meaningful due process and access to the court." (R. 202)

Hampton was not present for the July 2010 hearing in person; he attended via telephone call. *See* (R. 2) While Hampton had an attorney present in the trial court, but that attorney was there only "to make sure that someone [was] there in case anything [went] on in court and [was] to speak for [him]," in the event he was not even present by telephone. Hampton was, as a

litigant, *pro se*. As detailed in section II, *supra.*, Hampton was not present in person, thus he could not offer into evidence any documentary exhibits, (R. 157-59, 188-80), and the witnesses that he subpoenaed, or for whom he requested subpoenas, were not present to offer testimonial evidence, (R. 85-86, 170-84, 207-08); (R. 12).

Hampton was denied a meaningful opportunity to appear and to be heard, as protected by the due process clause. *See Mullane, supra.; Robinson, supra.; Lane, supra.* Reversal and remand for an evidentiary *Barker* hearing and one at which Hampton is physically present, in person, is required.

Hampton further notes that, as a matter of first impression, the Court of Appeals of Mississippi, in *Alfa Mut. Ins. Co. v. Cascio*, 909 So.2d 174, 182-83 (¶32-¶33) (Miss. App. 2005), held that there is no requirement that a civil defendant who chooses not to be physically present for trial be present at trial. The court specifically noted, however, that "this question appears to us to be one which our supreme court has not explicitly considered." *Id.* at 183 (¶34). In this case, Hampton unequivocally chose to appear; he repeatedly voiced his decision to be physically present for the remand, *Barker* hearing. *Alfa Mut. Ins. Co.* is both inapposite and not controlling authority.

Not only did Hampton want to be, and did all he could to be, physically present, but a forfeiture action, unlike the subrogation action at issue in *Alfa Mut. Ins. Co.*, is quasi-criminal in nature. As this Court held in *Saik v. State*, 473 So.2d 188, 191 (Miss. 1985), "[f]orfeiture statutes are penal in nature and must be strictly construed." Further, the United States Supreme Court has applied the Eighth Amendment of the United States Constitution to forfeitures, acknowledging their criminal nature. *See, e.g., United States v. Bajakajian*, 523 U.S. 321 (1998)

(forfeiture of $357,144 for conviction for failing to report the transportation of more than $10,000 would violate the Eighth Amendment).

Because a forfeiture action is quasi-criminal in nature, and the due process clause of the Fourteenth Amendment guarantees the right to a meaningful opportunity to be present and to be heard in this civil proceeding, this Court should reverse and remand for an evidentiary *Barker* hearing, in compliance with the 2006 remand order, and it should be one at which Hampton is physically present, in person, also in accord with the trial court's own writ of habeas corpus.

CONCLUSION

For the foregoing reasons, as set out in this brief, given the facts and the appropriate authorities, this matter should be remanded to the Circuit Court of Tunica County for a proper hearing, at which Tunica County will be required to prove, by appropriate evidence, if any, the second Barker factor, the reason for the delay. Hampton should be allowed, by this Court, at that hearing, to present evidence regarding the second, third, and fourth *Barker* factors, *i.e.,* the reason for the delay, his assertion of his rights, and the prejudice he suffered as a consequence thereof, and any other factors pertinent to a determination pursuant to the *Barker.*

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, John M. Colette, attorney for Defendant/Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF FOR THE APPELLANT to the following:

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