IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL LATAVIN SMITH — APPELLANT

VERSUS

NO. 2006-KA-01946-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLANT

APPEAL FROM THE CIRCUIT COURT OF GEORGE COUNTY

HONORABLE ROBERT P. KREBS, CIRCUIT JUDGE

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CERTIFICATE OF INTERESTED PARTIES

I, Bernard Gautier, hereby certify that the following listed persons have an interest in this case. This representation is made in order that the Justices of this Court may evaluate possible disqualification or recusal.

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The undersigned is unaware of any other person who has an interest in the outcome of the instant case.

SO CERTIFIED, this the 15th day of JUNE, 2007.

BERNARD GAUTIER
Attorney of Record for Appellant Michael Latavin Smith

TABLE OF CONTENTS – BRIEF FOR APPELLANT

Page No.

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES CITED

Page Nos.

Cases:

Cases: **Page Nos.**

Cases: **Page Nos.**

Page Nos.

Mississippi Constitution:

United States Constitution:

Statutes:

Uniform Rules of Circuit and County Court Practice:

Other Authorities:

STATEMENT OF THE ISSUES

Issue I **Whether the admissions or confession of Smith were properly admitted despite failure to timely provide an initial appearance, failure to provide counsel, and inability of Smith to understand his rights and understand and agree to waivers.**

Issue II **Whether Smith was denied his guaranteed rights to a speedy trial where continuances were granted without good cause and appointed attorneys forfeited his right without his knowledge or agreement.**

Issue III **Whether the court committed an abuse of discretion when it denied Smith's motion for a sequestered voir dire on the limited issues of race and intimate interracial relationships.**

STATEMENT OF THE CASE

Procedural History

This is an appeal from a conviction of murder and a sentence of Life in the Mississippi Department of Corrections that was imposed, after a jury trial, by the Circuit Court of the Nineteenth Judicial District in George County at the June 2006 Term thereof (CP. 241, 246, RE. 4, 5).

The January 2004 Grand Jury, recalled 13 October 2004, returned an indictment against Defendant/Appellant here, Michael Latavin Smith (Smith), charging that he "on or about August 11, 2004, did willfully, feloniously and without the authority of law kill and murder Joanna M. Eubanks, a human being, with deliberate design to effect the death of Joanna M. Eubanks" (CP. 4, RE. 13).

Smith was served with his Capias on 19 October 2004 (CP. 6). On 1 November 2004 he was arraigned and entered a plea of Not Guilty (T. 9, CP. 7, RE. 37). He had been incarcerated in the George County jail since 12 August 2004 at which time he had turned himself in (T. 449-50).

He had been interrogated regarding this charge on 12 August 2004 and again on 17 August 2004 as his case was further investigated by law enforcement officers. Prior to his arraignment on 1 November 2004 he had not seen an attorney (T. 7). At that time Honorable Sidney Barnett was appointed to stand with him for "only arraignment" (T. 9, CP. 7, RE. 37).

Considerable time passed principally due to continuance orders granted without good cause or the knowledge of Smith (to be examined in Issue II of this Brief for Appellant) before he was finally put to trial on 26 June 2006.

Smith asserted his constitutional and statutory right to a speedy trial by motion filed 27 April 2005 (CP. 23-26, at 24; RE. 21-24, at 22).

On 21 June 2006 a specific Motion to Suppress was filed regarding statements made by Smith (CP. 194-96, RE. 18-20). A hearing on the Motion to Suppress was held on 26 June 2006 (T. 107-85). The motion was denied (T. 184-85, RE. 7-8).

On 12 June 2006 a Motion to Dismiss for State's Failure to Afford a Speedy Trial was filed (CP. 184-87, RE. 25-28). A hearing on this motion was had on 15 June 2006 (T. 67-87) and the same was denied (T. 86-87, RE. 9-10).

On 12 April 2006 a Motion for Individual Sequestered Voir Dire on Juror Attitudes Toward Race and Intimate Interracial Relationships was filed (CP. 167-70, RE. 29-32). A hearing on this motion was had on 15 June 2006 (T. 87-93) and the motion was denied (T. 92-93, RE. 11-12).

The issues raised by all of these motions are each preserved in Smith's Motion for New Trial, Or, In the Alternative, a J.N.O.V., filed 7 July 2006 (CP. 248-51, RE. 14-17). This motion was argued 15 September 2006 (T. 611-39) and denied (T. 636-39, CP. 306, RE. 6).

Present counsel was appointed to pursue this appeal by Order of 7 December 2006 (CP. 312).

Facts Relevant to the Issues

Smith was indicted for the deliberate-design murder of Joanna M. Eubanks (Eubanks). At the time of the killing he was approximately 20 years of age and she was 19 (T. 111, 364). Smith was an African-American or black. Eubanks was white (T. 111, 354), with "blonde hair, blue eyes" according to the district attorney in his opening statement to the jury (T. 336). They were lovers and had been for several months. The shooting took place in the trailer where Smith lived and where Eubanks had come to visit him. The purpose of her visit is disputed.

What is not disputed is that no one else observed what went on in that trailer and that when the bullet that killed her was fired the gun was held by Smith and was aimed by him at Eubanks' head. The bullet struck her just below the nose (T. 425, 458).

Smith panicked, ran to an adjacent trailer where relatives lived, sobbing, beating his head, saying it was an accident (T. 374-75, 382). The next day, 12 August 2004, he turned himself in to the sheriff's office (T. 113, 449-50). He was interrogated four or five times before seeing an attorney.

At all times he has insisted that the shooting was an accident (T. 374, 391, 393, 453). This was the primary theory of his defense. His story as to how the accident occurred changed with repeated interrogation by law enforcement officers, from a claim that the gun had fired while he was cleaning it to it had fired while engaged in a sort of Russian roulette in which he clicked once while aiming at himself and a second time discharging the bullet that killed Eubanks.

Other than raising a question and offering an ambiguous answer as to the distance from the gun to Eubanks' face there was no scientific evidence that even tended to disprove Smith's second explanation.

The State offered the testimony of Eubanks' mother, Ann Eubanks, that on the morning of the shooting, 11 August 2004, her daughter had told her that she was going to break off her relationship with Smith that day (T. 367-68). This testimony provided the prosecution with its theory of the case: "If I can't have you, no one can" (T. 336, 342).

At the close of the evidence the jury was instructed on the elements of accident (CP. 198, 215), manslaughter (CP. 214), and both deliberate-design murder and depraved-heart murder (CP. 206-07).

Smith filed a Motion to Suppress his statements (CP. 194-96, RE. 18-20). He was interrogated for approximately 2½ hours on 12 August 2004, one day after the shooting (T. 452). This session produced approximately 15 minutes of tape. He was questioned again on the 13th of August, and again on the 17th of August for 1 hour and 46 minutes. On each occasion he gave statements that were introduced into evidence by the State (see FtNt 1 on page 9 of this Brief). The 17 August statement contained was undoubtedly the most serious and incriminating admission by Smith.

In all of this time from 12 August 2004 until 18 August 2004 he had not seen an attorney nor had he had an initial appearance. He urges here that the State's behavior denied him right to counsel, that he did not understand his rights as he was not capable of understanding them, and that he could not knowingly and intelligently waive them.

His mother testified to his intellectual limitations (T. 163-75). He finished only the 5th grade, repeating several grades. He had been treated with behavior-modifying drugs most of that time.

The motion to suppress was denied (T. 184-85, RE. 7-8). These matters are argued in Issue I of this Brief.

Smith filed a Motion to Dismiss for State's Failure to Afford a Speedy Trial (CP. 184-87, RE. 25-28). Much earlier he had filed a motion demanding a speedy trial (CP. 24, RE. 22). Some 683 days passed from his arrest to his trial date of 26 June 2006. Smith argues that continuances were granted without good cause; that he was in no way responsible for frequent substitution of his appointed counsel nor for the court's failure to take steps to remedy that situation; that he at no time sought or agreed to any continuance prior to the 18 April 2006 motion (CP. 276-78, RE. 56-58); and that again he was incapable of making a knowing, intelligent, and voluntary waiver and made none. Accordingly, his constitutional and statutory rights were violated by the delay. This argument is Issue II of this Brief.

Smith filed a Motion for Individual Sequestered Voir Dire on Juror Attitudes Toward Race and Intimate Interracial Relationships (CP. 167-70, RE. 29-32). His motion included a partial list of questions that should be asked of the potential jurors while sequestered, arguing that only in that manner could candid and full answers be obtained and Smith's rights to informed challenges and a fair trial be preserved.

After argument of counsel (T. 87-92) the court denied the motion (T. 92-93, RE. 11-12). In the course of the trial and voir dire there were several matters spoken either to the jury or by members of the panel which supplement the already serious doubt regarding the court's wisdom in denying this motion. The matter is argued in Issue III of this Brief.

SUMMARY OF THE ARGUMENT

Issue I **Whether the admissions or confession of Smith were properly admitted despite failure to timely provide an initial appearance, failure to provide counsel, and inability of Smith to understand his rights and understand and agree to waivers.**

Michael Latavin Smith was arrested on 12 August 2004 for a killing that had occurred on 11 August 2004. On the night of 12 August, a Thursday, he was questioned extensively regarding the killing. The following day he was questioned further. He gave statements claiming that the weapon had fired accidentally while he was cleaning it. The following Tuesday, 17 August 2004, he was again interrogated. He changed his story to a far more incriminating one and included the admission "she begged me not to do it." He had an initial appearance the next day, 18 August 2004.

The State had failed to provide him with a timely initial appearance and had failed to provide him with counsel during this entire 6-day period of his incarceration.

His confession was not voluntarily, intelligently, and knowingly given. It was a result of his extended interrogation, the absence of counsel or advice of independent judicial officer, and his limited intellectual capacity and lack of understanding. For the same reasons his waivers of rights were of no effect; they were unconstitutionally obtained.

The trial court's denial of his motion to suppress was an abuse of discretion.

Issue II **Whether Smith was denied his guaranteed rights to a speedy trial where continuances were granted without good cause and appointed attorneys forfeited his right without his knowledge or agreement.**

Smith was arrested on 12 August 2004. He was tried on 26 June 2006. Attorneys were first appointed for him in January 2005. Numerous changes of attorneys were made and continuances were granted.

Smith never had any difficulty with his attorneys. He never requested that any attorney be discharged. He was in no way responsible for the changes in appointed counsel. He was in no way responsible for the various personal reasons presented by his attorneys when seeking continuances.

Continuances were granted without good cause.

Smith never requested a continuance until the continuance from a 1 May 2006 trial setting to a 26 June 2006 trial setting. His signature does not appear on any request or order. The record does not show that he was present in court when any continuance was requested or granted.

His constitutional rights were violated when he was not granted a speedy trial. These rights could not be given away without his knowing and intelligent agreement to do so. They could not be forfeited by his counsel acting without his agreement.

Smith lacked the educational and intellectual capacity to waive his rights without special attention and explanation that he never received.

The court in denying his motion abused its discretion.

Issue III **Whether the court committed an abuse of discretion when it denied Smith's motion for a sequestered voir dire on the limited issues of race and intimate interracial relationships.**

Smith was a 20-year-old black male accused of killing a 19-year-old white female with whom he had been having an intimate romantic and sexual relationship for some months.

Trial counsel sought a sequestered voir dire of the panel limited to the issues raised by this racial/sexual situation.

The court announced that it was "cognizant of the nature of the case and that there are emotions on both sides." Nonetheless its response to Smith's motion was: "What can you show me that says that people will be more truthful privately than in a group?" It denied the motion.

Smith argues that questioning on these matters would, as it did, lead almost nowhere; that only in a sequestered voir dire could he have successfully discovered the true nature of attitudes and antipathies of the panelists to allow him to intelligently exercise his strikes.

Smith did not get a fairly chosen jury. He did not get a fair trial.

The court's denial of his motion was an abuse of discretion.

ARGUMENT

Introduction

This appeal challenges three separate rulings of the trial court. Each one followed a motion hearing, thus in each the Judge was the trier of fact. The issue presented in each situation is highly fact-specific.

The rulings were that Smith's motion to suppress his statements is denied; Smith's motion to dismiss for failure to provide a speedy trial is denied; and Smith's motion for a sequestered voir dire on the limited issue of race and intimate interracial relationships is denied.

All three of these rulings were challenged again in Smith's motion for a new trial. The motion for a new trial was, of course, denied.

Smith argues here that in each instance the court's ruling was an abuse of discretion. It was manifestly wrong. Each of these rulings by the trial court should result in a reversal. *Abram v. State*, 606 So. 2d 1015 (Miss.1992); *Sanders v. State*, 835 So. 45, 50 (¶ 15) (Miss.2003) citing *Hunt v. State*, 687 So.2d 1154, 1160 (Miss.1996).

Issue I **Whether the admissions or confession of Smith were properly admitted despite failure to timely provide an initial appearance, failure to provide counsel, and inability of Smith to understand his rights and understand and agree to waivers.**

The appellant Smith was arrested on 12 August 2004 when he turned himself in. The shooting had occurred on 11 August 2004.

On the evening of 12 August 2004 law enforcement officials took two statements from Smith. He was interrogated for 1 hour and 1 minute that evening regarding this crime, after which a 9-minute tape was made of what he had to say. He was then allowed to listen to that tape, was questioned again for 1 hour and 17 minutes and then recorded what was referred to as his second statement lasting 6 minutes. Both of the recorded sessions were in the form of interrogations. Thus, a total of 2 hours and 33 minutes of interrogation that evening resulted in taped conversations totaling 15 minutes.

At Smith's suggestion the officers accompanied him to the scene the next morning, 13 August, where Smith again gave incriminating statements (T. 462-63).

On 17 August the officers initiated another interrogation, which lasted a full 1 hour and 46 minutes and resulted in a tape of 13 minutes' duration at the end of the interrogation.

These tapes were later transcribed and both the tapes and the transcriptions were introduced in evidence at the trial.[1]

In the 12 August statements Smith claimed that the shooting was an accident. On 17 August he first stated that it happened while they were playing what we might call Russian

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[1] State Exhibit 12 (8-12-04 Audiotape); State Exhibit 11 (Transcript of "first" 8-12-04 interview); State Exhibit 10 (Transcript of "second" 8-12-04 interview); State Exhibit 13 (8-17-04 Audiotape); State Exhibit 9 (Transcript of 8-17-04 interview).

roulette. He had first pulled the trigger with the gun pointed to his own head. The second time, with the gun now aimed at Eubanks, it fired. In this last or 17 August statement the damning admission "she [inaudible] not to shoot" (State Exhibit 9 to trial) or "then she was (inaudible) me not to shoot" (Defense Exhibit 1 to 6-26-06 suppression hearing) appears for the first and only time. In testimony at trial Investigator John Keel fills it in: "She begged him not to do it" (T. 469).

Due to poor recording quality of the tape and of the equipment used by both the State and Appellant to play back the tape the phrase "begged me" was not rendered audible until first played at the trial, outside the presence of the jury.

Smith was not taken before a magistrate nor did he see an attorney until 18 August 2004, six days after his arrest and one day after the law enforcement officers were finally satisfied with his statement.

It is the contention of Smith here that his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution and under Article 3, Section 26 of the Mississippi Constitution were violated when statements were taken from him and later used in evidence against him following ineffective waivers of his *Miranda* rights. The waivers were ineffective because they were not knowingly, intelligently, and voluntarily given.

Smith also contends that his incriminating statements should not have been admitted in evidence for the further reason that they were taken in violation of his Sixth Amendment right to counsel made applicable to the states through the Fourteenth Amendment and also guaranteed by Article 3, Section 26 of the Mississippi Constitution.

On 12 August 2004 at approximately 8:55 p.m. Investigator Keel and Chief Deputy J. D. Mitchell met Smith at the Lucedale County Courthouse (T. 113). This is the same time shown on

the *Miranda* warning (State Exhibit 1 to hearing, State Exhibit 18 to trial). The form was filled out entirely by Keel (T. 114). Smith's name appears in the two appropriate places on the form where he was told to sign. It is not a cursive signature. It is printed.

The interrogation started at approximately 8:55 p.m. No simultaneous record was made of what was said or done until 9:57 p.m., an hour later, when the first taped statement begins. It concludes at 10:06 p.m. according to the tape transcript (State Exhibit 3 to hearing, State Exhibit 11 to trial).

Smith was allowed to listen to what was on the tape, and after another 1 hour and 17 minutes of unrecorded interrogation the tape recorder was again turned on and a second statement was taped lasting 6 minutes and ending finally at 11:29 p.m. See the transcript of the tape for these times (State Exhibit 4 to hearing, State Exhibit 10 to trial). There is no *Miranda* form to accompany this second statement but Keel testified that Smith's rights were again read to him before this statement was taken.

At the outset of the testimony regarding the first 12 August statement, Keel says that Smith had "surrendered himself" (T. 113) on 12 August or he was "taken into custody" (T. 113) and that he had some outstanding warrants. Thereupon the next 2 hours and 33 minutes were spent questioning Smith regarding the killing of Eubanks. Smith, in his 17 August statement *passim*, makes it clear that he turned himself in because of the shooting of Eubanks.

The next day, 13 August, five law enforcement officers investigated this shooting, searching the mobile home where it took place and then, with two other officers assisting, Smith was transported to the scene and once again interrogated. Keel's Supplemental Report, from which this account is taken, states that he "verbally advised" Smith of his *Miranda* rights

(T. 122, 462) and that Smith then made further statements describing and demonstrating what had happened (State Exhibit 5 to hearing).

The report is entirely centered on Smith's possible guilt of the murder charge. There is no mention of any investigation or even suspicion directed elsewhere. There is also no mention of any concern with the "outstanding warrants" Keel was to mention during the trial (T. 113).

Four days later on 17 August 2004 Smith again printed his name on a *Miranda* warning form (State Exhibit 6 to hearing, State Exhibit 24 to trial) and was again interrogated (State Exhibit 8 to hearing, State Exhibit 9 to trial).

The transcript of the tape recording of Smith's statement made on 17 August 2004 shows that it ran for 13 minutes, from 2:49 p.m. until 3:02 p.m. (State Exhibit 9 to trial). However, Keel testified that the interview itself began at 1:16 p.m. and lasted without interruption until the recording began at 2:49. Thus 1 hour and 33 minutes was spent preparing Smith for his 13-minute statement (T. 156).

Keel was the only law enforcement officer to testify regarding any of Smith's statements and he was the sole interrogator, although Mitchell was a second witness on both of the *Miranda* warning forms and was present during the questioning.

Keel read Smith the Waiver of Rights form (T. 133).[2] Smith was not asked to read them himself. He did not have a copy of the document in front of him at that time (T. 134).

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[2] We have been referring to this as the *Miranda* form. It is a one-page document labeled at the top: George County Sheriff's Department, Miranda Warning, (Your Rights). The bottom third of the page is subtitled Waiver of Rights.

Reading the rights from the document itself was Keel's standard practice (T. 134). He read them verbatim and never explained anything to Smith (T. 136). He assumed that Smith understood based on the general conversation and on Smith's "yes, sir" answer to the question, "do you understand." Keel made no further inquiry of Smith regarding the rights or his waiver although he acknowledged that Smith's printed (not cursive) signature "could raise a little bit" of suspicion regarding his education or mental abilities (T. 135).

Keel testified that he signed an affidavit charging Smith with murder on 18 August 2004 in the Justice Court (T. 161).

On that date Smith was brought before Connie G. Wilkerson, Justice Court Judge in George County, for an initial appearance on the charge of murder (T. 159, RE. 36, Defense Exhibit 3 to hearing). Keel does not remember if he was at that hearing (T. 158). Smith printed his name indicating that he had been advised of certain rights which were spelled out on the initial appearance form. These included the right to remain silent and the right to counsel. Of course, by this time, the harm to Smith's status before the law and the breach of his constitutional protections had been done.

On the same date, 18 August, an Order Appointing Counsel for Indigent Defendant (T. 160, RE. 35, Defense Exhibit 2 to hearing) was signed by Judge Wilkerson. The order found that Smith was indigent and in need of an attorney. It further found that representation (by an attorney) was required by law and appointed Sidney Barnett to represent Smith "in this court."

By his signature Barnett acknowledged receipt of this notification of appointment, as did Smith by printing his name, both dated 18 August 2004. Shawn Strahan, Clerk, certified that she served a copy of the Order Appointing Counsel the "18 day of Aug, 2004." The same hand wrote the date "8/18/04" under both Barnett's and Smith's signatures and dated Strahan's signature.

Since this is a form document prepared in advance for Barnett's Justice Court public defender appointments, he could have signed it at any time. We are not sure that Barnett even attended the initial appearance of Smith. He stated on 1 November 2004 at the arraignment that he had not talked to Smith (T. 7).

No attorney's name appears on the line provided for one (or elsewhere) on the Initial Appearance form (RE. 36, Defense Exhibit 3 to hearing). At the arraignment Barnett was appointed for "only arraignment" (CP. 7, RE. 37, p. 2 of State Exhibit 2 to hearing).

At the suppression hearing held immediately before the trial on 26 June 2006, Smith's mother, Joanne Spivery, testified that her son had repeated several grades in school, completing only the 5th grade before he left (T. 165-66).

The school officials made him leave the school after he completed the 5th grade because he was too old to be with the other kids. They put him in the alternative school (T. 166). He was a slow student. From about the 3rd grade he started going to "Mental Health" at Singing River for counseling. They put him on Ritalin (T. 166).

After he completed school he went to jail and Mental Health gave him Seroquel (T. 167).

He started going to the training center to get his GED. He did not get it. He worked at Church's (fried chicken?) a month or two. He has worked on cars. That's about it for employment. (T. 168.)

He has problems understanding detailed or complicated concepts (T. 168).

She thinks he can read and write a little (T. 168-69).

She does not think he can understand what he reads. He has more problems understanding than the average child (T. 169).

She does not think he filled out the employment application at Church's. The witness's sister worked there. He never got a driver's license (T. 170). "Some of the things he understands, some of the things he don't understand" (T. 173).

Mrs. Spivery herself displayed a limited awareness or understanding of dates and times. And yet she is genuine in her concern for telling the truth as best she can. Not one thing she said about her son's background and capacities is refuted by other witnesses. Her testimony goes unchallenged.

Counsel urges that these facts regarding Smith's intellectual capacity and educational background indicate that he was not able to understand his rights and was not capable of waiving them. However, still other facts in the record point to this conclusion.

Near the end of the trial Smith's attorneys informed the court that their client wished to participate in the closing argument (T. 549). Then in language that any lawyer and probably any educated citizen would have understood, the court asked Smith eleven consecutive leading questions (T. 549-51) regarding his understanding or lack of it with reference to the procedural requirements if he were to argue. Almost all of the questions ended with "do you understand that." To each question Smith dutifully and automatically answered, "Yes, sir."

Only once did the court give Smith an open-ended opportunity, asking if he had any questions. But that opportunity was followed, before Smith could answer, by another do-you-understand question which was answered, "Yes, sir" (T. 550).

Concluding, the court said: "I have tried to track the language as I find it in the case law, gentlemen" (T. 551). Lawyers themselves sometimes have trouble understanding that.

We comment on the facts here to add that while these questions put by the court to Smith were an accurate and thorough statement of the law they were certainly not an effective way to determine the extent of Smith's understanding of anything.

Shortly before that when the defense rested, the court attempted to inform Smith of his right to testify or not testify, whichever he chose. The following colloquy took place between the court and the defendant (T. 535-36):

> [THE COURT:] I'd like your client to stand, please. Mr. Smith, as a defendant in this case, you have a right, pursuant to the Mississippi Constitution, to testify in this case. If you state you do not wish to testify, no one can force you to take the stand. If you want to testify, you can be permitted to do so. Do you understand that?
>
> MR. SMITH: Yes, sir.
>
> THE COURT: And you are waiving your right to testify; is that correct, sir?
>
> MR. SMITH: I don't understand.
>
> THE COURT: You choose not to testify; is that correct? You choose not to testify; is that correct?
>
> MR. SMITH: Yes, sir.
>
> THE COURT: Thank you very much. You can have a seat.

We suggest that there could be no clearer proof that whatever Smith answered "yes, sir" to when that was the expected answer, he did not even understand the meaning of the phrase "waiving your right" . . . or waived . . . or waiver.

As stated earlier, it is Smith's contention that the admission of his statements into evidence violated his constitutional rights not to incriminate himself and to have counsel on his behalf.

We look serially at the several aspects of the situation considering both the law and the facts germane to each.

The Initial Appearance

Smith turned himself in to answer to the death of Eubanks on 12 August 2004. This was a Thursday. He was questioned extensively about the killing that evening and made two recorded statements. The next day he made another statement (which he had initiated). In each he was claiming that the gun had fired accidentally while he was cleaning it.

Saturday and Sunday passed, as did Monday. On Tuesday, 17 August 2004, he was again interrogated[3] and at this time stated that the gun fired while he was (or they were) playing what we might call Russian roulette. It was also in this statement that he said that she begged me not to shoot. He was given an initial appearance on 18 August (RE. 36).

Rule 6.03 of the Uniform Rules of Circuit and County Court Practice, adopted effective 1 May 1995 and still in effect, provides in part: "Every person in custody shall be taken, without unnecessary delay and within 48 hours of arrest, before a judicial officer or other person authorized by statute for an initial appearance."

Mississippi Code Annotated § 99-3-17 provides [brackets added]:

> Offender must be taken before proper officer without delay.
> Every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case, except as otherwise provided in Section 99-3-18 [regarding misdemeanors].

The *Abram* case (*Abram v. State*, 606 So.2d 1015 (Miss.1992)) should be dispositive of this issue. The failure of the State to provide Smith with an initial appearance for some 5½ or 6 days after his arrest is reversible error.

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[3] We have no explanation for why, during the 17 August statement, Investigator Keel twice referred to the 12 August statements as being two days ago (State Exhibit 9 to trial). There is no comment on this in the record.

Abram, like Smith, was arrested without a warrant on a Thursday, 12 August. That day was in 1982. The *Abram* Opinion was rendered 29 July 1992. Smith, like Abram, was not given his initial appearance until after he had confessed, specifically not until after he had changed his earlier less incriminating statements and had given the law enforcement officers what they wanted. The time between Abram's arrest and his statement was approximately 72 hours.

Abram reemphasizes what is meant by "unnecessary delay," the phrase used in the statute and in the rule. The rule, 6.03, added after *Abram* the phrase "and within 48 hours of arrest" which can be seen to perhaps clarify but not extend the critical period.

Quoting primarily from *Nicholson v. State*, 523 So.2d 523-68 (Miss.1988) (Robertson, J. concurring) Justice Sullivan in *Abram, supra*, at 1029, said:

> [F]our justices joined in the concurring opinion of Justice Robertson to give meaning and effect to the phrase "without unnecessary delay." *See also Coleman v. State*, 592 So.2d 517, 520 (Miss.1991). In N*icholson*, the defendant had been taken into custody on the evening of September 3, 1985, though not officially arrested. He remained in police custody, not free to leave, for some 40 hours prior to the voice line-up which was conducted sometime on September 5, 1985. At no time during this period of restraint was Nicholson given an initial appearance and access to counsel.
>
> Because the "major purpose" of the initial appearance "is to secure to the accused prompt . . . advice of his right to counsel by a judicial officer . . . who [presumably] has no professional duty nor personal inclination to try to exact a waiver of that right," it is imperative that the initial appearance be given "without unnecessary delay" as the rule commands. *Id.* at 77. "Without unnecessary delay" means as soon as "custody, booking, administrative and security needs have been met." *Id.* at 76.

It is important to note here that Abram had been "*Mirandized*" and had signed waivers of his rights before he confessed.

> The failure to provide Abram [Smith] with an initial appearance sooner had devastating consequences for the defense, clearly derogating from his right to a fair trial. Common sense suggests that law enforcement authorities would never have obtained an uncounseled confession from Abram [Smith] had he been given

> an initial appearance, and consequently, access to counsel, without unnecessary delay. *See cf., Nicholson*, 532 So.2d at 77. We hold the failure to provide the initial appearance reversible since, as a consequence, Abram gave a confession in the absence of, and in violation of, his right to counsel. Such an error could hardly be deemed harmless since the conviction of Abram [Smith] for ~~capital~~ murder was based entirely on his confession.

Abram, *supra*, at 1029 (brackets and strike-out added).

The devastating consequence to Smith was the confession itself. While he had previously given incriminating statements (which we argue elsewhere were inadmissible) the 17 August statement was a change of story as to what happened – never a welcomed occurrence to a defense counsel – and most significantly it contained the sentence "she begged me not to do it." With counsel after an initial appearance this statement would not have been made – as "common sense suggests."

The Right to Counsel

Apparently Smith did not see counsel at his initial appearance on 18 August 2004, 6 days after he was first interrogated while in custody regarding the death of Eubanks and gave two statements claiming the shooting was an accident (T.7). He had not seen an attorney before 18 August. He saw an attorney on 1 November 2004 at his arraignment. On 17 August 2004 after further interrogation and while still confined he gave a highly incriminating statement which included the sentence "she begged me not to shoot" (T. 471).

> ¶ 32. An accused's Sixth Amendment right to counsel accrues once the accused is in custody. *Brink v. State*, 888 So.2d 437, 447 (¶ 28) (Miss.Ct.App. 2004) (citing *Balfour v. State*, 598 So.2d 731, 743 (Miss.1992)). "Specifically, the right attaches at the point in time when the initial appearance ought to have been held." *Brink*, 888 So.2d at 447 (¶ 28) (citing *McGilberry v. State*, 741 So.2d 894, 904 (¶ 17) (Miss.1999)).

Savell v. State, 928 So.2d 961 (Miss.Ct.App.2006).

An initial appearance for Smith ought to have been held "without unnecessary delay and within 48 hours" (URCCCP 6.03) (emphasis added).

Ordinarily the right attaches under state law once the accused has been taken into custody and at least functionally arrested and all reasonable security measures have been taken. Jackson, Jeffrey. *Encyclopedia of Mississippi Law,* § 19:71, citing *Abram* and *Balfour*, *supra*, at 743.

The right to counsel (as well as the right to remain silent) is guaranteed by Article 3, Section 26 of the Mississippi Constitution (as well as by the Sixth and Fourteenth Amendments of the United States Constitution). Under our constitution it attaches sooner than under the United States Constitution where formal accusatory procedures must first be initiated. "Once the right attaches, the State may deal with the accused in the absence of the accused's lawyer only upon an 'express waiver . . . of the right to counsel' that must be both knowing and voluntary and proven beyond a reasonable doubt." *Cannaday v. State*, 453 So.2d 713, 722 (Miss.1984).

Smith was entitled to counsel at each critical stage of the proceedings against him. Interrogation is a critical stage.

However, "the denial of the entitlement to timely appointed counsel 'will result in reversal of a subsequent conviction . . . only where it is shown that the accused experienced some untoward consequence flowing directly from denial of counsel.'" *Johnson v. State*, 631 So.2d 185, 188 (Miss.1994) citing *Wright v. State*, 512 So.2d 679, 681 (Miss.1987). This case is quoted with approval in *Jones v. State*, No. 2005-CP-00196-COA, decided May 16, 2006.

The interrogation to which Smith was subjected on 17 August was particularly critical in that it resulted in a statement which was an admission of guilt and included the sentence, "she begged me not to shoot." It cannot be seriously argued that Smith experienced no "untoward consequence flowing directly from denial of counsel." *Johnson*, *supra*, at 188.

Smith's waivers of his rights were not knowingly and voluntarily made and they were made without benefit of counsel to which he was entitled. The confession or confessions which followed from them should not have been admitted into evidence.

The Right to Remain Silent

The right to remain silent, not to give evidence against oneself, is guaranteed by Article 3, Section 26 of the Mississippi Constitution as well as by the Fifth and Fourteenth Amendments of the United States Constitution. This right extends to certain statements given outside of court as well as to direct sworn testimony. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), establishes certain warnings which must be given to an accused when he is in custody before any statement he might make can be admitted into evidence in the state's case-in-chief. Admissions, or confessions, to be admissible must be voluntary as well as preceded by *Miranda* warnings.

The presence of *Miranda* warnings does not, of itself, establish voluntariness. Voluntariness is a due-process right implicating the Fourteenth Amendment to the United States Constitution and Article 3, Section 14 of the Mississippi Constitution. It is based on the totality of the circumstances. A statement may be involuntary even though *Miranda* warnings were given and even though a waiver was signed. The burden is on the State to prove voluntariness beyond a reasonable doubt. *Abram*, *supra*, at 1031. Otherwise the challenged statement should be excluded. *Lee v. State*, 112 So.2d 254 (Miss.1959); *Burnside v. State*, 544 So.2d 1352 (Miss.1988).

Voluntariness is determined by a consideration of such factors as the accused's age, weariness, amount of force used by the interrogating officers, the educational level of the defendant, the defendant's mental competence, whether the defendant has been allowed to talk to

anyone such as his attorney or family members, the length of the interrogation, and whether the accused previously refused to give voluntary statements. McGuire, Jimmy D., *Mississippi Criminal Trial Practice*, Rev. Ed., § 5-3, citing *West v. U.S.*, 399 F.2d 467 (5th Cir.1968) cert. denied, 393 U.S. 1102, 89 S.Ct. 903, 21 L.Ed. 795 (1969).

The facts establishing that Smith's statements were not voluntary are presented in detail throughout this Issue of his Brief. We make here only an abbreviated reference to those which seem most germane to the factors listed in the preceding paragraph:

- age: Smith was 20 years of age

- weariness: this is uncertain

- force used on him: no physical force is alleged. The psychological pressures and fear that he experienced were surely exacerbated by the fact that he was a black man accused of killing a white woman with whom he had been having sex, fears that he would have tried to keep hidden.

- educational level: quit school during 6th grade after repeating several grades and being transferred to alternative school

- mental competence: did not understand, among other things, the meaning of the phrase "waiving your rights" (T. 536)

- contact with family members: unknown

- contact with attorney: none (T.7)

- length of interrogation: 4 hours, 19 minutes over 6 days

- previous statements: Smith made statements on 12 August and 13 August. They put him in the wrong place at the wrong time; however, he claimed the shooting was an accident that occurred while he was cleaning his gun. The 17 August statement described an entirely different scenario in which his actions were much closer to actual guilt of depraved-heart murder and far more likely to motivate a jury to convict. This statement also included "she begged me not to shoot."

A statement or confession can be made knowingly and intelligently without being voluntary. *Abram, supra.* It could be the result of threats or promises. It must also be knowingly

and intelligently given. In analysis and discussion the concepts of knowingly and intelligently are sometimes subsumed under the title voluntariness. One cannot truly volunteer what one does not know and understand. This explains the broad scope of the factors listed immediately above.

Regardless of nomenclature, a confession to be admitted must be "knowingly, intelligently, and voluntarily" given and this must also be proven to the court (the trier of fact) beyond a reasonable doubt. *Abram, supra.*

The same is true of a waiver of that right to remain silent and a waiver of the right to counsel.

The Waivers

Smith printed his name on a waiver form prior to the recording of his 12 August statements and again prior to the recording of his 17 August statement. Officer Keel testified that in each instance he had read the *Miranda* warnings to Smith (T. 115, 123, State Exhibits 1 & 6 to hearing; T. 451, 467, State Exhibits 18 &24 to trial).

Smith argues that these waivers were of no effect – they were taken in violation of his constitutional rights – for the same reasons, and based on the same facts, that his statements themselves were unconstitutionally obtained and should not have been admitted against him. A waiver too, must be knowingly, intelligently, and voluntarily given.

The signing of a printed waiver form does not automatically establish a valid waiver. *North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).

Our Supreme Court in *Cannaday, supra*, surveyed the requirements of a valid waiver of the right to counsel. Right to counsel under either the Fifth or Sixth Amendments is not distinguished.

It is "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege', *Cannaday, supra*, at 722-23, citing *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461, at 464 (1938).

Cannaday (at 723) continued: "[C]ourts indulge in every reasonable presumption against waiver," *e.g., Brookhart v. Janis*, 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314, at 4.

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'

Cannaday citing *Edwards v. Arizona*, 45 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) citing *Johnson v. Zerbst*, at 464.

The facts documenting Smith's incapacity to knowingly and intelligently waive his constitutional rights are presented primarily on pages 14, 15, and 22 of this Brief for Appellant.

Smith could not and did not knowingly abandon a known right. The statements he gave were inadmissible.

Issue II **Whether Smith was denied his guaranteed rights to a speedy trial where continuances were granted without good cause and appointed attorneys forfeited his right without his knowledge or agreement.**

Smith was denied his rights to a speedy trial under both the Mississippi Constitution and the United States Constitution as well as under the statute, Miss. Code Ann. § 99-17-1. Continuances were granted without a showing of good cause; Smith's constitutional rights were forfeited by his appointed counsels without his knowledge or agreement.

The Legal Framework

The clock begins to run for the purpose of calculating a constitutional delay when the accused is arrested. *Hersick v. State*, 904 So.2d 116 (Miss. 2004); *Beavers v. State*, 498 So.2d 788, 790 (Miss.1986). For purposes of calculating whether the statutory allowance of 270 days has passed, the count begins on the date of the arraignment. *Handley v. State*, 574 So.2d 671, 674 (Miss.1990).

In constitutional analysis, length of delay is a threshold consideration. However, no one factor is dispositive of the question of whether a delay in providing a trial is constitutionally fatal. *McGhee v. State*, 657 So.2d 799, 802 (Miss.1995). Alleged violations of speedy trial rights are examined on a case-by-case basis as they are intensely fact-specific. *Sharp v. State*, 786 So.2d 372, 377 (Miss.2001). The court must examine the unique circumstances in each case.

The right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 3, Section 26 of the Mississippi Constitution. *Beavers, supra*, at 789; *Watts v. State*, 733 So.2d 214, 235 (Miss.1999).

Our Court has not established a definite length of time as being unconstitutional *per se*. Instead, we have adopted the four-part balancing test articulated by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *Taylor v. State*,

672 So.2d 1246, 1258 (Miss.1996). The factors to be examined are (i) length of the delay, (ii) reason for the delay, (iii) defendant's assertion of his right, and (iv) prejudice to the defendant.

The Length of Delay

The following timeline provides a broad overview:

11 August 2004	Date of the crime	
12 August 2004	Smith is arrested	
1 November 2004	Smith is arraigned	
31 January 2005	First attorneys are appointed to represent Smith	
18 April 2005	First date on which trial was set after appointment of counsel	
27 April 2005	Smith files motion for speedy trial (CP. 24, RE. 22)	
1 May 2006	First motion filed by Smith to which he had agreed	
26 June 2006	Smith is tried	
18 April 2005 - 1 May 2006	Period in which all delays are attributable to the State	
Time from arrest to trial		683 days
Time from arraignment to trial		603 days
18 April 2005 - 1 May 2006	Time from first trial date after counsels are appointed until Smith's first knowing waiver of his right	378 days

The balancing of the *Barker* factors begins when the delay exceeds eight months. At this point the delay is considered to be presumptively prejudicial. *Smith v. State*, 550 So.2d 406, 408 (Miss.1989). In the case *sub judice* the delay of 683 days was clearly presumptively prejudicial. Thus analysis of the three remaining factors of *Barker* has been "triggered."

Reasons for the Delay

Failure to show good cause for continuance

Smith acknowledges that the period from 1 May 2006 to the commencement of the trial of 26 June 2006, a total of 57 days, is chargeable to the defendant and must be excluded from the count of days. It is chargeable to Smith due to his motion for continuance (CP. 276-78, RE. 56-58). The case had been set for trial on 1 May 2006 and his trial counsel, Honorable Ross Parker Simons, moved for a continuance the granting of which rescheduled the case to 26 June 2006. At the hearing Simons informed the court (T. 84) that his client, Smith, was fully informed of the motion and expressed his willingness to request this continuance. (We find no other instances in which Smith personally agreed to, or even knew about, a continuance request.) This 57 days from 1 May to 26 June must be charged against Smith, reducing the time from arrest to trial from 683 days to 626 days.

At the other end of the period of delay, the beginning, we find that Smith's mother first represented to the court that he was obtaining his own attorney (T. 10). A total of 174 days lapsed between arrest and the appointment of two attorneys to represent him on 31 January 2005. Subtracting the 174 from the 626 computed immediately above, the remainder – that is the time to be explained – is 452 days[4] in which the State should have taken him to trial.

Because the arraignment occurred before Smith's counsels were appointed on 31 January 2005, and arguably none of the delay prior to that date is charged against the State, the counting of the 270 days under the statute also begins on 31 January 2005.

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[4] Trial counsel calculated this amount as "something like 449 days that the State should have taken him to trial" (T. 69).

Between 31 January 2005 and 1 May 2006 the case was repeatedly delayed. The State bears the burden of proving good cause for delay and must bear the risk of non-persuasion. *Flores v. State*, 574 So.2d 1314, 1318 (Miss.1990). It must persuade the trier of fact of the legitimacy of its reasons for delay. *DeLoach v. State*, 722 So.2d 512, 517 (¶ 17) (Miss.1998).

The finding by the court as to the nature of each delay, the cause of each continuance, is a finding of fact. That finding should be upheld if supported by substantial, credible evidence (*Flora v. State*, 925 So.2d 797, 814 (¶ 58) (Miss.2006) (citing *Folk v. State*, 576 So.2d 1243, 1247 (Miss.1991)) identified from the record *(McGhee, supra*, at 803). The finding here (T. 87, RE. 10) – where such evidence was not present – that good cause was shown and the time lapsed should not run against the State – is an abuse of discretion. The trial court's finding should be reversed.

The burden is upon the prosecutor to articulate the reason for the delay by showing either that the delay was caused by the defendant or was caused by what the courts have identified as "good cause." *Stark v. State*, 911 So.2d 447, 450 (¶ 11) (Miss.2005), quoting *Hersick v. State*, 904 So.2d 116, 121 (¶ 7) (Miss.2004).

During the period in question, the period of 452 days from 31 January 2005 to 1 May 2006, George County held terms of court four times a year, beginning on the third Monday of February, May, August, and November.[5]

The Compilation Report, State Exhibit 2 introduced at the hearing on the motion to dismiss held on 15 June 2006 (T. 83), contains the various orders and pleadings or motions

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[5] Trials out of term were also not unheard of. The trial of the instant case itself, when it finally occurred, was an out-of-term scheduling.

entered during those 452 days. An examination of the various items in this exhibit reveals that at no time did Smith himself ever personally agree to a continuance motion being filed nor agree that any of his constitutional rights to a speedy trial be waived during that period. His signature or initial does not appear on any motion or order. Further, there is no proof that he was present in the courtroom at any time when a continuance motion or order was before the court. At no time did he personally seek a postponement of his trial.

Five continuances were granted between January 2005 and January 2006, both inclusive. In three of them the reason given is that counsel for Smith had newly or recently been appointed and needed time to prepare (orders dated 24 January 2005, 19 April 2005, and 17 January 2006) (CP. 10, 21, 116; RE. 39, 43, 54). Barnett remained as appointed counsel from January 2005 until January 2006 when he was allowed to withdraw and later was replaced by Simons (CP. 129, RE. 55).

The other two continuances, both sought by defense counsel Honorable Daphne L. Pattison, resulted in orders granting them. One order recited "circumstances merit" (7-19-05 Agreed Order: CP. 31, RE. 48) and the second one, "Daphne Pattison . . . unavailable (10-28-05 Order of Continuance: CP. 92, RE. 49). By the time of the second order she had voluntarily removed herself to Houston, Texas, shortly after Hurricane Katrina made landfall on 29 August 2005 and she had no plans to return.

Simons was one of the two appointed counsel who actually went to trial with Smith. The other trial counsel, Honorable Christopher F. Dobbins, had been appointed to replace Pattison (CP. 107, RE. 53). As we learn from the prosecutor's argument opposing the motion to dismiss for want of a speedy trial, Barnett had been sick for some seven months before he sought and got permission to withdraw on 2 February 2006 (T. 76). The court in its order (T. 86-87, RE. 9-10)

acknowledges that it had known for an unspecified amount of time that Barnett was "beginning to have numerous health problems" that might render him ineffective or unable to go forward (T. 87). Yet Barnett was not replaced until 2 February 2006.

While we commend the trial court's recognition that newly appointed attorneys usually need time in which to prepare we cannot overlook the fact that substitute counsel could well have been appointed with much less delay than was allowed to occur. Likewise, attorneys less likely to seek to withdraw due to intrusive personal handicaps could have been appointed early on, especially in view of the court's knowledge of the extremely tenuous availability of both Pattison and Barnett. The court as well as the prosecutor has the duty to provide the defendant with a speedy trial. "It saves the state nothing if the error was the court's [and not the prosecution's] for our courts are equally charged by the Constitution of the United States with the responsibility of affording a speedy trial." *United States v. Loud Hawk*, 474 U.S. 302, 325, 106 S.Ct. 648, 661, 88 L.Ed.2d 640 (1986) (Marshall, J. Dissenting) quoted with approval in *Adams v. State*, 583 So.2d 165, at 168 (Miss.1991) (brackets added). Smith, the defendant locked up during all of this time, never sought a change of counsel. He did not contribute to the delay.

There is no record that Smith ever expressed any displeasure with his attorneys or had any conflict with any of them. He is in no way responsible for the personal conflicts his appointed attorneys had or the delays occasioned by those conflicts and withdrawals (*Hersick, supra*, at ¶13).

The first trial date set simultaneous with the January 2005 appointment of two attorneys was 18 April 2005 (CP. 10, RE. 39). Allowing, at least *arguendo*, that this period up to 18 April 2005 should be charged against the defendant, there still remained 378 days until 1 May 2006, days which Smith argues should have been charged against the State – more than enough days of

delay to violate his statutory rights to a speedy trial and more than enough to violate his constitutional rights.

The argument for the above conclusion urged by Smith is in no sense made less persuasive by the various statements found among the motions for continuance and orders regarding cause for continuance or to the effect that constitutional and statutory rights to speedy trial are waived.

On 15 April 2005 Barnett moved for a continuance (CP. 20, RE. 42). The motion did not mention waiver of rights. The order entered on 19 April 2005 continues the case (which had been set in January 2005 for 18 April 2005) to 1 August 2005 for trial (CP. 21, RE. 43). That order, which Barnett signed as attorney for Smith, states that all speedy trial rights, constitutional, statutory, or otherwise are waived.

The proceedings in court on 24 March 2005 at a status call (T. 14-15) consist of a brief reference to appointment of new associate counsel for Barnett. No mention is made of speedy trial rights. There is no indication that Smith was present. In fact when Mr. Miller (another attorney seemingly appointed as defense counsel, who soon disappeared) said he didn't think Smith had any money, Smith was not asked to corroborate (T. 14-15). Smith was not there.

On 19 July 2005 an Agreed Order was entered continuing the case, which had been set for 1 August 2005, to 24 October 2005 (CP. 31, RE. 48). Written by hand on the order there appears "Defendant will waive Constitutional and Statutory right to speedy trial for the period of August 3, 2005, until October 24, 2005" (CP. 31, RE. 48). Beside the handwritten portion is what appears to be the initials of Pattison and Lawrence (district attorney). Under the word "Agreed" Pattison has signed as attorney of defendant. Again neither signature nor initials of Smith appears on the order.

The trial transcript (T. 17) shows: "(July 19, 2005) (Order of Continuance filed in Jackson County, Mississippi, setting the case to October 25, 2005 for trial.)".

This is the Agreed Order, 19 July 2005, mentioned above, in which "circumstances merit" is all that is offered as reason or good cause. (We remind the Court here that Hurricane Katrina made landfall on 29 August 2005.) "[A] continuance which merely states that it has been granted for 'good cause' is not sufficient to bear the burden of showing that the continuance was in fact granted for good cause." *Herring v. State*, 691 So.2d 948, 953 (Miss.1997) citing *Vickery v. State*, 535 So.2d 1371, 1375 (Miss.1988). We can see no difference between "good cause" and "circumstances merit." Neither should be sufficient.

On 28 October 2005 an Order of Continuance was filed stating as reason that co-counsel Pattison was unavailable for trial due to Hurricane Katrina (CP. 92, RE. 49). This order set the case for status/motions on 6 December 2005 and for trial on 17 January 2006. This order includes the usual language that "all speedy trial rights, constitutional, statutory or otherwise" are waived. Barnett signed it as counsel for the defendant. Once again Smith's signature does not appear.

On 24 October 2005, the date on which, back in July, the case had been set for trial, the court and the prosecutor agreed that the case was now set for trial on 17 January 2006 (T. 17). Neither Smith nor any of his attorneys was present in court. The prosecutor expressed some doubt as to whether defense counsel Pattison would stay on the case (T. 17).

On 4 December 2005 a motion for continuance was filed for the defendant by Pattison (CP. 270-72, RE. 50-52). The reasons stated for the continuance should be examined. They consist of allegations: one, that the prosecution failed to notify defense counsel that it would insist on trial so that defendant now lacked sufficient time to retain experts (defense counsel had not retained experts in an effort to save the county that expense, this being a *forma pauperis*

case) (¶ 2a & 2b) (There is no record that defendant Smith was concerned with saving the county any expense incurred for his adequate defense.); two, that Barnett is hospitalized with ulcers complicated by preexisting diabetes (¶ 2c); three, that undersigned counsel (Pattison) lost her home and client base in Hurricane Katrina and has relocated to Houston, Texas (¶ 2d).

It is impossible to see how these misfortunes can be blamed on Michael Latavin Smith. He is in no way responsible. His signature does not appear on the continuance motion.

On 6 December 2005, at the status hearing (T. 17-18) which had been set by the court's Order of Continuance of 28 October 2005, the district attorney, Lawrence, informed the court that Dobbins would be willing to accept appointment in this case (replacing Pattison). The court announced that Pattison had personal and professional matters that prevented her from going forward on the case and appointed Dobbins. The district attorney announced that Dobbins would need a continuance and that he (Lawrence) would prepare the order.

Nothing was said regarding waiver of rights and there is no indication that Smith was present.

On 17 January 2006 the assistant district attorney, Honorable Kevin Bradley, presented an Order of Continuance to the court (T. 18-19, CP. 116, RE. 54). The reason stated was that newly appointed assistant counsel needed time to prepare. The order continues the case to 1 May 2006 and contains the usual boilerplate regarding speedy trial rights. No signature of any counsel for defendant appears and, of course, neither does the signature of Smith himself. There is again no indication in the record that Smith was present requesting, agreeing to, or even being aware of, what was going on.

Smith argues here that these various continuances were not given for good cause, that this Court should examine the substance of this matter as disclosed in the record and not be controlled by the rubric.

Thus we have four consecutive continuances that should be charged against the State:

- on 15 April 2005, to 1 August 2005 (CP. 21, RE. 43)

- on 19 July 2005, to 24 October 2005 (CP. 31, RE. 48)

- on 28 October 2005, to 17 January 2006 (CP. 92, RE. 49)

- on 17 January 2006, to 1 May 2006 (CP. 116, RE. 54)

A total of approximately 378 days. Reasons stated in the orders are: 15 April 2005, newly appointed attorney needs time to prepare; 19 July 2005, "circumstances merit"; 28 October 2005, counsel unavailable due to Katrina; and 17 January 2006, newly appointed attorney needs time to prepare.

We point out again that Smith at no time sought a change of attorneys nor was he responsible either for the changes or for the personal conflicts that embroiled his appointed counsel.

Hurricane Katrina was more than an inconvenience to many, but we urge here that it did not blow away the responsibility of the trial court to appoint *reliable* counsel for the accused. The *Hersick* case is so clearly analogous as to be compelling: "Although the State alleges Hersick caused the delay by switching attorneys, there is nothing in the record to indicate that he is at fault for this delay. Hersick certainly can not be faulted for Barnett's conflict of interest." *Hersick, supra*, at ¶13.

The lower court's finding of fact that the continuances were for good cause was an abuse of discretion.

Unauthorized, and ineffective, waiver of constitutional rights

Counsel has demonstrated in this argument not only that Smith was not personally responsible for any of the delays occurring in this case but also that Smith never personally indicated any desire for continuance or delay of his case. There is no proof in the record that he was ever even made aware of scheduled trial dates or of continuance hearings.

Of the six actual appearances before the court for either status/motion hearings or trials that were continued as recorded in the transcript beginning 24 March 2005 and concluding 17 January 2006, there is no indication in the transcript that Smith was even in court to observe, and there is no reference by defense counsel that he had spoken to Smith about anything. Barnett is present at four of them, Honorable David C. Futch and Attorney Miller are also present at the first of those (to withdraw and to be appointed) but at no other. Pattison does not personally appear at any time, and Smith has no counsel present on either 24 October 2005 or 6 December 2005.

Smith now urges that the repeated statements in the record (trial transcript and clerk's papers) that all speedy trial rights were being waived were of no effect. Only the accused can personally waive his or her fundamental constitutional rights. This speedy-trial issue was preserved by trial counsel in the motion for new trial (CP. 248-51, RE. 14-17, T. 616-17), and the issue that the defendant must personally waive his fundamental constitutional right is touched on in the argument on the new trial motion (T. 621, ll. 21-25).

It is beyond question that the right to a speedy trial is a fundamental guarantee to the accused. It is specifically and directly guaranteed in both the United States and the Mississippi Constitutions: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . ." (U.S. Const., Amd. VI); "In all criminal prosecutions the accused shall have the

right . . . in all prosecutions by indictment or information, a speedy and public trial . . ." (Miss. Const. Art. 3 § 26).

Our Court of Appeals has spoken on the question of waiver of constitutional rights as recently as 1 May 2007 in a case involving the Article 3, Section 26 (the same section that guarantees a speedy trial) right to testify:

> [K]nown constitutional rights may be waived 'by an intentional relinquishment or abandonment.'" *Minnick v. Mississippi*, 498 US 146, 160 (1990) (quoting *Johnson v. Zerbst*, 304 US 458, 464 (1938)). This high standard of proof for waiving a constitutional right is applied to each case "upon the particular facts and circumstances surrounding that case. . . ."

McCain v. State, No. 2005-KA-01892-COA, decided May 1, 2007.

Minnick involved, as did *Johnson v. Zerbst*, waiver of counsel, the right to counsel being guaranteed by the Sixth Amendment to the United States Constitution and Mississippi's Article 3, Section 26, and also found in the United States Fifth Amendment.

Our Court in *Conn v. State*, 170 So.2d 20, 251 Miss. 488, at 494-95 (1964), adopted the language of *Johnson v. Zerbst, supra*, quoting from it:

> There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case. . . .

The presumption against waiver of these rights is inclusive, not exclusive. It is fundamental constitutional rights, by implication all of them, which are protected – not just one or some.

The "high standard" mentioned in *McCain* is not met in the instant case. The "intentional relinquishment . . . of a known right" cannot be shown. Smith's attorneys could not have given

away his fundamental constitutional right to a speedy trial *in toto* at the outset of the case or at any other time without his "intentional relinquishment or abandonment" of his "known" constitutional right. Nor should they be allowed to give it away piece by piece in the ritual boilerplate tacked on to unauthorized motions for continuance or made part of orders for continuance.

The *Barker* factors of length of delay and reasons for delay weigh overwhelmingly in Smith's favor.

Defendant's Assertion of His Right

The accused has no obligation to bring himself to trial; the State bears that burden. *Ross v. State*, 605 So.2d 17, 24 (Miss.1992); *Flores*, *supra*, at 1321. The defendant's position with reference to the asserted denial of a speedy trial is enhanced, however, when he has filed a formal demand for a speedy trial. ". . . [H]e gains far more points under this prong of the Barker test where he has demanded a speedy trial." *Jaco v. State*, 574 So.2d 625, 632 (Miss.1990) quoted with approval in *Brengettcy v. State*, 794 So.2d 987, 994 (Miss.2001). See also *Stevens v. State*, 808 So.2d 908, at ¶22 (Miss.2002).

Smith in the instant case included a demand for a speedy trial in the composite motion, styled "Motions", filed on 25 April 2005 (CP. 23-26, RE. 21-24), a full year and a week before he was for the first time a knowing party to a motion for a continuance. The motion was for discovery and other matters but under the bold heading, Speedy Trial Demand, (CP. 24, RE. 22) it asserted his constitutional and statutory rights. This is a sufficient manner in which to make the demand. See *Williams v. State*, 747 So.2d 276, 280 (Miss.Ct.App.1999) ("[We] note, however, that Williams timely asserted his right to a speedy trial when he filed his motion entitled 'Motion for Discovery/Speedy Trial Demand'").

"Under *Barker*, the defendant's assertion of his speedy trial right is entitled to strong evidentiary weight. Failure to assert the right will make it difficult for a defendant to prove denial of a speedy trial." *Barker v. Wingo*, *supra*, at 531-32, cited in *Hersick*, *supra*, at ¶16.

Timely assertion of the right, as here, should make it difficult after balancing all of the factors together to uphold the trial court's finding against Smith.

Prejudice to the Defendant

The last factor in the *Barker* analysis is "prejudice to the defendant". Our Supreme Court has stated that "an affirmative showing of prejudice is not absolutely necessary to prove a denial of the constitutional right to a speedy trial." *Wiley v. State*, 582 So.2d 1008, 1013 (Miss.1991) citing *Flores*, *supra*, at 1323; *Trotter v. State*, 554 So.2d 313 (Miss.1989).

A showing of prejudice adds weight to a claim of a denial of the right to a speedy trial. *Wiley*, *supra*, at 1013. Nonetheless no one factor (under the *Barker* decision) is outcome determinative. *Fleming v. State*, 604 So.2d 280, 299 (Miss.1992).

> ¶. Prejudice to a defendant may manifest itself in two ways. First a defendant may suffer prejudice because of the restraints to his liberty, whether by "loss of his physical freedom, loss of a job, loss of friends or family, damage to his reputation, or anxiety." *Stevens v. State*, 808 So.2d 908, 917 (¶23) (Miss. 2000) (citing *Duplantis v. State*, 708 So.2d 1327, 1336 (Miss.1998)). Secondly, the delay may impair the accused's defense.

Barker, *supra*, at 532-33, quoted with approval in *Bonds v. State*, 938 So.2d 352, at 359 (Miss.Ct.App. 2006).

Here the defendant, Smith, was incarcerated for the entire 683 days from arrest to trial and even though some of that time was the result of his own single motion for continuance and some of the time immediately following his arrest cannot be charged against the State,

nonetheless the measure of cumulative anxiety must surely taken into account the entire 683 days' duration of his confinement.

The unexcused portion of that confinement of approximately 378 days, from 18 April 2005 to 1 May 2006, is of its essence oppressive.

> The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. . . . [E]ven if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion and often hostility.

Bonds, *supra*, citing *Barker*, at 532-33.

This last *Barker* factor should also be weighed in favor of Smith. The abuse of discretion and error of the trial court in overruling Smith's motion to dismiss for failure to grant a speedy trial should be corrected by this Court.

Remedy

Smith was denied his speedy trial through no fault of his own for a period of approximately 378 days from 18 April 2005 to 1 May 2006, that is, from the first trial date set after his first attorneys were appointed to the last scheduled trial date before he knowingly waived his rights in seeking a continuance.

Should this Court determine, as we have urged, that Smith's constitutional speedy trial rights were thus violated it must reverse with prejudice and render.

Should this Court determine that only his statutory speedy trial rights were violated it should also reverse the conviction without prejudice to re-indict (the trial court having found that Smith suffered no prejudice from the delay). See *Williams v. State*, *supra*.

Issue III **Whether the court committed an abuse of discretion when it denied Smith's motion for a sequestered voir dire on the limited issues of race and intimate interracial relationships.**

Prior to trial Smith filed a motion seeking individual sequestered voir dire on the limited issue of attitudes toward race and intimate interracial relationships (CP. 167-70, RE. 29-32). The motion was denied (T. 92-93, RE. 11-12).

In his motion Smith included several sample questions of the type he hoped to ask a sequestered potential juror. The questions follow (CP. 168-69, RE. 30-31):

> Do you hold prejudiced views against black persons?
>
> Are there any mixed-race relationships in your family?
>
> Do you have social friends who are mixed race couples?
>
> Do you think that black persons are morally inferior to white persons?
>
> Do you feel it is race mixing or prohibited by your religious beliefs for people of different races to date, live together, have relations, or marry?
>
> What, if any, effect would the fact that Mr. Smith is a black person who was having relations with a white teenaged girl?
>
> If there is a conflict in the evidence in what a witness who is white testifies to and a witness who is black testifies to, will this in any way affect your ability to serve in this case?
>
> Do you live in an all-white neighborhood?
>
> Do you have any friends who are black?
>
> How would you feel if your son or daughter dated married or had intimate relations with a member of a different race?

His argument on that motion (T. 87-93), which is adopted here, is that the issues raised by these questions are so sensitive that a venireperson would be reluctant, would in fact be

unwilling, to discuss them in the presence of others. The "others" being some 50 or more fellow citizens of George County.

Further, it was and is urged that without a full and candid discussion in the form of questions and follow-up questions by defense counsel and answers, shielded from overview and knowledge of other members of the community, and freely given – without this the defense could not acquire adequate information with which to prudently urge its challenges for cause and exercise its peremptories. A fair and impartial jury could not be obtained.

As a result, and necessarily so, Smith would be and was denied his constitutional guarantees of a fair trial.

The trial took place in George County, Mississippi, a small county where "everybody knows everybody" according to the judge (T. 328).

The deceased, Eubanks, was, at the time of her death a 19-year-old blue-eyed blonde. The accused, Smith, was then 20 years old. He is black, obviously and undeniably. The jury, as did the venire, got a good look at him.

At the hearing on the motion for sequestered voir dire (T. 87-93) the State's attorney took the position that this case was no more sensitive or racially charged than any murder (T. 90) (ignoring the fact that black-on-white killings – for reasons that might be explored elsewhere – result in a higher conviction rate than do white-on-black killings).

But the sensitivity quotient was exponentially greater here than in any "mere" killing or mere racial killing because this case involved, before the killing, an "intimate relationship" of some months' duration between the black male accused and the white female deceased. Eschewing the euphemism, or at least the over-polite term, used repeatedly in the record, this

case involved a couple who had been having consensual sexual connections, sexual relations, with one another.

Yet the prosecutor said (T. 90):

> Your Honor, this case is a murder case. This case is not – it doesn't state in the indictment that it's a black defendant versus a white victim. Race is not an issue in this case, and I don't know why counsel opposite thinks it's different from any other case. This is a murder case.

The above statements were made at the hearing on the motion held on 15 June 2006.

Thirteen days later the prosecutor began his opening remarks to the jury as they sat looking at the black defendant with the following (T. 336):

> Good morning, members of the jury. If I can't have you, no one can. That defines the State's case. On August the 11th, 2004, Joanna Eubanks was 19 years old, blonde hair, blue eyes, full of life and energy.

Counsel does not insist that the statement quoted first above was a fraud upon the court, but we recognize that perhaps it was.

The prosecutor, at the motion hearing, urged that the regular practice would be sufficient: allow members of the venire who wished to do so, after hearing a question, to approach the bench and make their responses privately.

The trial judge agreed with the prosecutor and, after a brief colloquy with defense counsel (T. 91-93), overruled the motion (T. 92-93, RE. 11-12).

With all due respect to the trial court, the overruling of this motion was an abuse of discretion by the judge. It deprived Smith of an opportunity to have a fair and impartial jury, violating his Constitutional rights. It should result in reversal and remand of this case.

In that colloquy before making his ruling the judge said, "What can you show me that says that people will be more truthful privately than in a group?" (T. 92, RE. 11).

Counsel suggests that those people who are as truthful (and as forthcoming) in a group as they are in private when a delicate social question is posed are those people only who have no fear and no shame even though they have cause for one or the other. They are rare indeed.

In this situation, the operative motivating factor would be fear – fear of social disapproval or worse, fear of the response of those who found nothing to criticize in a racially mixed union and fear of those who found everything to criticize. Those who held firm opinions in either direction would, and did, have reason to remain silent.

Allowing those venirepersons who felt uncomfortable speaking aloud to approach the bench at their own initiative would not work. The reasons are twofold. First, the act of simply asking the court for permission to approach is a signal to the community that the person asking is suspect. That person holds an opinion which, whether for or against, is unwelcomed by some faction of the community. We are not speaking of some past incident of infamy or misfortune that one would like to forget and not inform or remind the community of. We are speaking of a present and continuing attitude which one would wisely wish to reserve for an audience of his or her careful choosing, perhaps an audience of only one.

The second reason the standard procedure of voluntary sequestration would not work applies only after a venireperson answers counsel's question from his seat in the audience. Simply put, if that person is then confronted with the type of follow-up questions he or she should face, arms will go down much faster than they went up. No one else will speak.

Later, at the trial, Smith's attorney asked the single question of the panel, what did they feel "about dating between the races" (T. 289). Only one person responded. He did not approve of it. His reasons were not religious, but personal (T. 289-90). No one else spoke.

And yet there are numerous instances throughout the trial where race as an issue can be seen asserting its subtle presence, where attitudes toward race seem to influence behavior or at least language, and where language is used to play upon racial attitudes.

We have already mentioned the prosecutor's haste to get the racial differences before the jury. Don't leave them in doubt on an issue this important a minute longer than necessary. A page and a half later, in that same opening statement (T. 238) he tells them again that the female on the floor bleeding from the head was a blonde.

On the day of the trial the court conducted a sequestered voir dire of those members of the venire who had responded positively to his question "How many of you have read the newspaper about this case" (T. 199). The newspaper accounts had not mentioned the race of either Smith or Eubanks. They had not mentioned that there was any kind of "relationship" between the two of them (Court Exhibits 2 & 3). In this sequestered voir dire it became apparent that several of the panel had accumulated additional information regarding the case.

One mentioned that he had read that the case involved "a white girl and a black boy" (T. 230) and another venireperson stated (T. 222-23) that she strongly disagreed with interracial dating and it would be a problem for her. In neither situation had race been mentioned by the questioners.

In addition to the above, a statement was made by one panel member to Mr. Cochran that he had overheard two female panel members say that the victim probably got what she deserved. This was said to have happened when the two panel members saw a white female sitting with a group of black females. The two were questioned and swore they had not made the comment. T. 315-23.

The record raises some confusion or doubt as to just what had transpired. There is no doubt, however, that racial identity was a volatile component of the atmosphere in that courtroom.

The court itself, while investigating this matter, acknowledged "the emotions in a case like this" (T. 321). Earlier (T. 190-91), shortly before voir dire began, and while announcing "a few house rules," the court stated that it was "cognizant of the nature of the case involving two young people" and again "cognizant of the nature of the case and that there are emotions on both sides." We will not read more into the phrase "nature of the case" than was intended. Nonetheless it is clear that emotions in this particular murder case are felt by the judge to be extraordinarily high.

The importance of a thorough and, in particular cases, penetrating voir dire cannot be overemphasized. "Voir dire examination is often the most crucial crucible in forging our primary instrument of justice: a fair and impartial jury" (*Myers v. State*, 565 So.2d 554, 558-59 (Miss. 1990).

It has long since been recognized as such, thus:

> It was [the defendant's] right to make such examination as would enable him to decide if there was ground for exercising his great right to peremptorily challenge. This right, conferred upon him by law, could only be intelligently exercised after a full and fair inquiry of each juror as to the exact state of his mind and feeling, not only as affecting the defendant personally and primarily, but as likely to affect his action as a juror even, and perhaps unconsciously to himself. The office of the peremptory challenge is to protect the defendant against those legally competent, but morally or otherwise unfit or unreliable, to try the particular case, and to deny a full and fair examination of a juror in order to wisely exercise the peremptory challenge would be practically to nullify the right; for of what avail would a peremptory challenge be if exercised at random or blindly and without reason?

Hale v. State, 72 Miss. 140, 16 So. 387, 389 (1894).

A full voir dire, appropriate to the situation, is equally, indeed even more, important in preparing challenges for cause.

> It is therefore perfectly proper for counsel to ask further questions beyond the court's inquiries reasonably necessary to assure himself and the court that the jurors selected will give his client the benefit of every right to which he is entitled under the law, as well as to reveal or signify particular antipathies that could prejudice his client before any proposed juror.
> . . .
> . . . a wide latitude should be allowed counsel to gain knowledge of jurors' attitudes towards the issues to be tried, and also toward special matters which likely will come up in a trial which reasonably could unduly influence some of the jurors, or indicate bias or hostility". . . . Such questions should be permitted not only to challenge prospective jurors for cause, but to give trial counsel clues from which they will exercise peremptory challenges.

Harris v. State, 532 So.2d 602, 606 (Miss.1988).

There is no question but that the trial court may within its discretion allow individual sequestered voir dire (*Russell v. State*, 607 So.2d 1107, 1110 (Miss.1992), where the lower court denied the motion but allowed voir dire in panels of no more than 12 jurors). See also *Carr v. State*, 655 So.2d 824, 842-843 (Miss.1995); *Davis v. State*, 660 So.2d 1228 (Miss.1995), *cert. denied* 517 U.S. 192, 116 S.Ct. 1684,134 L.Ed.2d 785 (1996); *Simon v. State*, 688 So.2d 791, 804-805 (Miss.1997).

Usually the situation has arisen when members of the panel have answered affirmatively to a general question directed to the panel such as "have you read pretrial publicity?". Individual sequestered voir dire might then be had, as it was in the instant case, to avoid comments or answers by the panelist that could prejudice or taint the entire panel hearing them. At other times (see *Eakes v. State*, 665 So.2d 852, 864 (Miss.1995)) when the answer to follow-up questions might disclose an unfortunate or embarrassing event in the panelist's past, a private sequestered voir dire has been permitted once an affirmative answer was given to the threshold question.

Smith argues that it is in answering the first general or threshold question itself that the potential juror exposes himself to public obloquy; that while the possibility that a comment in open court would somehow taint the panel should not be ignored, nevertheless it is the panelist victimizing himself or herself which was far more likely to happen. That this was avoided – as far as is known – might have been attributed to a sequestered voir dire on the limited issue without the practice of first addressing the threshold question to, and expecting an answer in the presence of, the entire panel. However, it must be attributable here to the natural reluctance and absence of candor of the panelists in this situation. We cannot with reliance say that a fair and impartial jury had been selected.

The nature of this case, the fact that certain prejudices are so deep-seated that one cannot safely assume that they have been overcome or abandoned, the fact that in a time of changing social (and sexual) mores those who resist change often become more resisting and often more circumspect – all these factors cry out for vigorous inquiry to "reveal . . . particular antipathies that could prejudice" the client (*Harris*, *supra*, at 606).

It would appear that we are in a time of changing social (and sexual) mores; however, the relationship that existed between Michael Latavin Smith and Joanna Eubanks was not a new idea. In fact it had for centuries been an example of that other love that dare not speak its name – at least not without knowing the listeners.

Despite scattered evidence of its disappearance, the trial court should not have determined that the innate resistance to such change, to the acceptance of such relationships, has been purged from our society, and that court should not have determined that those who continue to resist would freely admit to it in public. This determination, manifested in the denial of Smith's motion, was an abuse of discretion. Smith was entitled to the full protection of the law in

selecting his jury. He did not receive it. His trial was flawed. This Court should reverse and remand.

CONCLUSION

For the reasons stated in Issue I this Court should reverse and remand.

For the reasons stated in Issue II if this Court finds that Smith's constitutional rights to a speedy trial were violated, it should reverse and render.

If this Court finds that only the statutory speedy trial rights were violated, it should reverse and remand without prejudice to re-indict (the trial court having found that Smith suffered no prejudice from the delay).

For the reasons stated in Issue III this Court should reverse and remand.

Respectfully submitted,

Michael Latavin Smith, Appellant

By: 

Bernard Gautier
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CERTIFICATE OF SERVICE

I hereby certify that I have this date sent by United States mail, first-class postage prepaid, to Honorable Betty W. Sephton, Clerk, the Supreme Court of the State of Mississippi, Post Office Box 249, Jackson, Mississippi 39205-0249, 1 floppy disk plus the original and 3 copies of the foregoing BRIEF FOR APPELLANT in Cause No. 2006-KA-01946-COA, Michael Latavin Smith, versus State of Mississippi, and a true and correct copy of said Brief to the following persons:

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WITNESS my signature, this the 15th day of JUNE, 2007.

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