IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-KA-01426-COA

GREGORY DEON JONES — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

REPLY BRIEF BY APPELLANT

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I. The trial court erred when it dismissed the *pro se* Motion to Dismiss for Failure to Grant a Speedy Trial of Mr. Jones, as he suffered the prejudice of inability to locate a critical witness who could establish his innocence.

Respectfully, Mr. Jones disagrees with the State *Response* that the delay was less than the presumptively prejudicial period of 270 days. Mr. Jones also disagrees with the State's application of the factors *Barker v. Wingo*, 407 U.S. 514, 521 (1972), requires courts to consider when deciding whether the right of the accused to a speedy trial under the Sixth and Fourteenth Amendments was violated.

In *Barker*, the accused alleged a five-year delay in his murder trial deprived him of his constitutionally guaranteed right to a speedy trial. The state of Kentucky sought during that period to bring to trial and convict Barker's co-defendant so prosecutors could then have him testify against Barker. Barker initially agreed to the prosecutor's request for continuances, but began resisting prosecutor's requests after about three and a half years. Upon his conviction, more than five years after he was charged, Barker sought relief from the U.S. Supreme Court on the basis that his right to a speedy trial was violated. Ultimately, however, the Court found Barker was not denied due process by violation of his Sixth Amendment right to a speedy trial for three reasons. In outlining and applying the now familiar, four-prong test, the Court found that Barker suffered only minimal prejudice because no defense witnesses became unavailable nor did the existing defense witnesses suffer lapse or loss of memory of the relevant events. Finally, the Court found that Barker had not wanted a speedy trial.

The *Barker v. Wingo* test requires state courts evaluate claims of denial of the right to a speedy trial by considering, including (1) length of delay; (2) reason for delay; (3) the defendant's assertion of his right and (4) prejudice to the defendant. *Barker,* 407 U.S. at 530.

The State would have this Court believe Mr. Jones suffered a delay of "only" 199 days rather than the 270 days presumed prejudicial under Mississippi law. *Jenkins v. State*, 607 U.S. 1137 at 1139 (Miss. 1992) [additional citations omitted]. Mr. Jones humbly argues the delay was 342 days, attributable to the state, not necessarily an overcrowded docket.

Mr. Jones submits that in the *Brief of the Appellee,* the fallacy is with the State's application of the *Barker v. Wingo* factors. Esteemed counsel for the State writes "... continuances due to crowded dockets and setting of older cases is not attributable to delay by the State..." *Brief of the Appellee,* pgs. 3-4. With all due respect to counsel for the State, the United States Supreme Court says otherwise. "A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but *nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather* than with the defendant. *Barker,* at 531. [emphasis added].

A time line may be of assistance to this Court.

Feb. 6, 2005	...	...	Mr. Jones arrested
April 12, 2005	...	...	Mr. Jones indicted
May 13, 2005	...	...	Mr. Jones arraigned.
Aug. 25, 2005	...	...	Agreed Order of continuance to Feb. 6, 2006 [164 days]
Feb. 6, 2006	...	...	Mr. Jones' trial delayed to permit trial of older case [Eric Moffett v. State] T. 24.
May 8, 2006	...	...	Mr. Jones' trial delayed to permit trial of more Recent case, *Jeffrey Jackson v. State.* T. 29-30.
July 24, 2006	...	...	Trial finally held.

As this record indicates, the trial of Mr. Jones was delayed May 8, 2006 for trial of a more recent case solely for the convenience of the complaining witness, *Jeffrey Jackson v. State*. T. 29-30. This record demonstrates the prosecution's recalcitrance in bringing Mr. Jones to trial; defense counsel was even forced to file a "Motion to Elect" to compel the prosecution to inform Mr. Jones of the charge upon which the State planned to try him. CP 22.

Only one agreed continuance is in the file, covering the period from Aug. 25, 2005 to Feb. 6, 2006, or 164 days. Under *Barker v. Wingo*, when the record is silent as the reason for the continuances, the delay is counted against the state. Contrary to the interpretation of the State, continuances granted due to overcrowded dockets still weigh against the prosecution and here, only one older case bumped the Feb. 6, 2006 scheduled trial of Mr. Jones. Therefore, the trial of Mr. Jones was delayed 342 days due to the prosecution's willful neglect, including the trial of one more recent case of *Jeffrey Jackson* solely for the convenience of the complaining witness in that case. T. 30.

The state belittles efforts by defense counsel to reach a witness critical to the defense of Mr. Jones, LaVerne Williams, whom Mr. Jones claimed could corroborate his assertion that he was no where near the Super Saver the morning it was robbed. *Brief of Appellee*, P. 5. As the record indicates, Mr. Jones was represented by three different public defenders. Mary Helen Wall resigned as public defender in July 2006 in order to assume a federal position; Frank McWilliams, trial counsel, was assigned to the case approximately one week prior to trial, the same time he began attempting to reach Ms. Williams. T. 17-19.

As for assertion of his right, Mr. Jones acknowledges that a Motion to Dismiss for failure to provide a speedy trial is not necessarily assertion of the demand for a speedy trial. Nevertheless, Mr. Jones argues that this omission does not amount to a forfeiture or waiver of his fundamental right to a speedy trial. As *Barker* makes clear, assertion of his right is one among

several factors courts consider in inquiring into whether or not the accused was deprived of his or her right to a speedy trial. *Barker* at 531-532. Furthermore, numerous U.S. Supreme Court cases emphatically require courts to indulge every reasonable presumption against waiver of a fundamental constitutional right, with no waiver or forfeiture of a fundamental right presumed from silence. Courts should 'indulge every reasonable presumption against waiver,' *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393, (1937); *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307, (1937).

Finally, learned counsel for the state attempts to denigrate the value of Ms. Williams' testimony by declaring Ms. Williams' initial statement to Jackson police failed to corroborate Mr. Jones' version of events. Mr. Jones insisted otherwise. *Brief of the Appellee*, p. 4. Whether Ms. Williams would have testified differently at trial will never be known as the prosecution delayed his case so long that Ms. Williams moved from the state and defense counsel could no longer reach her. The record shows counsel for Mr. Jones began trying to reach Ms. Williams as soon as he received assignment to the case, about one week before trial. T. 17-19. It is the job of the jury, not the police or prosecutors, to assign weight and worth to the testimony of witnesses, a duty it cannot fulfill if witnesses are absent.

As *Barker* declared and *Jenkins* reiterates, prejudice in the form of a missing defense witness is a serious factor weighing heavily against the state. Ms. Williams left the Jackson area for Florida in March 2006, the same month Mr. Jones filed his *pro se* Motion to Dismiss with supporting memorandum. Her departure essentially deprived Mr. Jones of his ability to counter the accusations of the state, inuring to his extreme prejudice. In analyzing the prejudice to the accused prong, the Supreme Court identified three separate interests involved: "... (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Barker* at 532.

"Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. *If witnesses die or disappear during a delay, the prejudice is obvious.*" *Id.*

In closing, Mr. Jones has demonstrated a presumptively prejudicial delay of 342 days, attributable to the State due to at least one more recent case tried for the convenience of the complaining witness. While Mr. Jones did not demand a speedy trial, he filed a *pro se* motion to dismiss his charge the same month his sole, corroborating witness, LaVerne Williams, left the state. His inability to have Ms. Williams testify at trial essentially deprived Mr. Jones of his ability and "meaningful opportunity to mount a complete defense," another fundamental right. *Crane v. Kentucky*, 476 U.S. 683 (1986).

Having thus demonstrated violation of his fundamental rights, guaranteed under both state and federal constitutions, Mr. Jones thus humbly beseeches this honorable Court to vacate his conviction and dismiss the indictment against him.

CONCLUSION

For the foregoing reasons and supporting authority recited here, Mr. Jones respectfully requests this Court reverse and vacate his conviction due to denial of his right to a speedy trial.

Respectfully submitted,

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Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be delivered via hand delivery a true and correct copy of the foregoing REPLY BRIEF BY APPELLANT, to the following:

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So certified, this the 12th day of January, 2009.

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