IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

KEVIN DALE MCCAIN — APPELLANT

V. — NO. 2009-KA-1865-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Kevin Dale McCain, Appellant
3. Honorable Richard Smith, District Attorney
4. Honorable Isadore W. Patrick, Circuit Court Judge

This the 7th day of May, 2010.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

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STATEMENT OF THE ISSUES

I. **THE STATE FAILED TO ESTABLISH THAT McCAIN WAS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED SECTION 99-19-83.**

II. **THE TRIAL COURT ERRED IN FAILING TO DISMISS McCAIN'S CHARGE FOR THE STATE'S VIOLATION OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO A SPEEDY TRIAL.**

III. **THE TRIAL COURT ERRED IN ADMITTING EXHIBIT S-24.**

IV. **THE TRIAL COURT ERRED IN DENYING McCAIN'S MOTION TO QUASH THE INDICTMENT.**

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Warren County, Mississippi, and a judgment of conviction for robbery entered against Kevin Dale McCain. (C.P. 107, 124-25, R.E. 3-5). The trial court adjudged McCain a habitual offender under Mississippi Code Annotated Section 99-19-83 and sentenced him life imprisonment in the custody of the Mississippi Department of Corrections. (Tr.441, C.P. 124-25, R.E. 4-5). The trial court denied McCain's motion for JNOV or, in the alternative, motion for a new trial. (C.P. 129-30, Supp. Record, Ex-A, and B, R.E. 6-10). McCain is presently incarcerated and now appeals to this Honorable Court for relief.

STATEMENT OF THE FACTS

Trial

On January 30, 2008, Cheryl Jenkins was working as a teller at Trustmark Bank on Halls Ferry Road in Vicksburg, Mississippi. (Tr. 243-44). Jenkins testified that, at about 9:20 a.m., a man walked up to her window and handed her a note that stated "I want 20,000 in hundreds, fifties, and twenties or all will die." (Tr. 245-47, Ex. S-1). Jenkins briefly turned away, and the man told her to "get back over here." (Tr. 247). As Jenkins opened her drawer to get the money, she triggered the silent alarm, and the man told her to hurry up. (Tr. 247). She took out some of the money–about $2,100–and handed it to the man, who then turned around and walked out. (Tr. 247, 249). Jenkins testified that she believed the man "was capable of completing the threat" contained in the note, and she was nervous and scared. (Tr. 248).

Investigators Robert Stewart and Troy Kimble of the Vicksburg Police Department responded to Trustmark. (Tr. 297, 308). Investigator Stewart obtained video surveillance and still images from Doug Winstead, a regional security officer for Trustmark Bank. (Tr. 264-76, 297, Ex. S-3, through S-10). The surveillance video shows a man wearing an orange Texas Longhorn cap, a grey/blue windbreaker jacket, blue jeans, and boots walk up to the teller's counter, hand the teller a paper,

stand there for about a minute, and put something in his pocket as he walks out of the bank. (Ex. S-3). Investigator Stewart released surveillance images to the local news media. (Tr. 297).

A couple of hours later–around 11:30 a.m.–Rita McNair of the Mendenhall Police Department was blocking the southbound-lane of traffic on Highway 13 in Mendenhall while a bulldozer/tractor was working on the road. (Tr. 279, 283). As she had the several vehicles stopped, a car operated by McCain drove around the road block and proceeded on. (Tr. 279-80). Officer McNair stopped the car, asked for McCain's licence, and learned that his licence was suspended. (Tr. 280). Officer McNair arrested McCain for "driving with a suspended licence, failure to yield to blue lights, improper passing, [and] reckless driving." (Tr. 280). McCain paid $1,450 cash to bond out, and he was released; however, the vehicle he was driving remained impounded at T&T Towing in or near Mendenhall. (Tr. 281, 283-84).

That evening, Officer McNair was watching the local news and recognized McCain by the clothes he was wearing, mainly, the Texas Longhorn cap. (Tr. 281, 298). She then called Deputy Chief Bruce Barlow of the Mendenhall Police Department and told him that she had arrested McCain earlier that day, and Chief Barlow contacted Investigator Stewart and reported McCain's earlier arrest. (Tr. 285, 297).

The following day, McCain went to T&T Towing to pick up the car, and he was arrested by Chief Barlow and Officer McNair; Officer McNair testified that he was wearing an orange Texas Longhorns cap. (Tr. 285). Meanwhile, Investigator Stewart obtained a search warrant for the car McCain was driving from Vicksburg Municipal Court Judge Allen Dervauex. (Tr. 298, Ex. S-4). Investigator Stewart, Investigator Kimble and Investigator Jeff Merritt went to T&T Towing in Mendenhall to execute the search warrant. (Tr. 298). On the front passenger seat of the car, the investigators found a note that read "I want $20,000 in one hundreds, fifties, and twenties, or all die."

(Tr. 311-13, Ex. S-13, S-14). Another note reading "100's 50's & 20's" was also found in the car. (Tr. 314-17, Ex. S-15).

Investigators Stewart and Kimble then obtained a search warrant for McCain's residence in Petal, Mississippi, from Forrest County Justice Court Judge Guy Causey. (Tr. 304, 317, Ex. S-5). Investigator Stewart testified that he then contacted the Petal Police Department and had an officer accompany him to McCain's residence while the warrant was executed. (Tr. 304). The search of the house yielded a pair of brown leather work boots, a pair of blue jeans, and a grey jacket. (Tr. 304-05, 318-25, Ex. S-17, S-19, S-21, and S-22).

Investigator Kimble testified that he then went to the Simpson County Jail to get McCain and transport him back to Vicksburg, and he obtained an orange Texas Longhorn cap from "the Simpson County Jail." (Tr. 327-33). Over objection on the grounds of authentication/chain-of-custody, the State was allowed to admit the Texas Longhorn cap into evidence at trial. (Tr. 327-34, Ex. S-24).

About one week after the incident, on February 7, 2008, Jenkins (the bank teller) identified McCain from a photo lineup presented to her by Investigator Jeff Merritt of the Vicksburg Police Department. (Tr. 250-52, 341-43, Ex. S-2 for ID). Jenkins admitted at trial that she had seen the bank surveillance video/images before she picked McCain out of the photo lineup. (Tr. 255-56).

The case proceeded to trial, at the conclusion of which, the jury found McCain guilty of robbery. (Tr. 380, C.P. 107, R.E. 3).

Sentencing

At the sentencing hearing, the State sought to establish that McCain was a habitual offender under Mississippi Code Annotated Section 99-19-83; to this end, the State introduced certified copies of McCain's two prior convictions. (Tr. 396-405, Hearing Ex. S-1, S-2). These documents indicate that McCain plead guilty on both counts and was ordered to serve concurrent sentences of

seventy-two (72) months.[1] *Id.*

In attempt to establish that McCain actually served one year or more on the prior convictions, the State called as a witness O'Neal Brown, a United States Probation Officer for the Southern District of Mississippi. (Tr. 396-427). On direct examination, the State asked Brown: "Do you have any record of when the Defendant was released from incarceration?" (Tr. 411). This question was aimed at an uncertified, unauthenticated report from Vincent E. Shaw of the Federal Bureau of Prisons that purportedly indicated that McCain had served one year or more on each of his prior convictions. (C.P. 111-20). Defense counsel objected, arguing that Shaw's document from the Federal Bureau of Prisons was not certified and could not be authenticated by Brown, who worked for a separate agency; however, the trial court overruled the objection. (Tr. 411-13, 416).[2]

Brown claimed that McCain "did serve more than a year and a day." (Tr. 415). However, he admitted that his only knowledge of the time McCain actually served for his prior convictions came from Shaw's document from the Federal Bureau of Prison:

> Q. And you have no personal knowledge of how long Mr. McCain may have served in the Federal Penitentiary or in the Federal Prison, would you?
>
> A. Other than - -
>
> Q. Of personal knowledge?
>
> A. No, other than [that] documentation, no, I would not.

---

[1] The judgments of conviction show that the offenses on both counts arose out of separate incidents occurring on April 12, 2002, and April 19, 2002. (Hearing Ex. S-1, S-2).

[2] The transcript of the sentencing hearing indicates that two documents, Ex. S-3 and S-4, were admitted into evidence at this point. (Tr. 413). Shaw's report is later referred to as State's Exhibit 4. (Tr. 429). However, the court reporter's official transcript lists Ex. S-4 as a "Copy of Indictment." (Tr. 386). Also, Shaw's report was not included in the record as an exhibit; it is contained only in the clerk's papers, and it is not marked as an exhibit. (C.P. 111-20).

. . .

Q. You do not have any documentation as to what date he reported to the Bureau of Prisons, do you?

A. No, I do not.

Q. And you don't have any documentation saying what date he was released by the Bureau of Prisons?

A. I have the document we discussed previously [Shaw's report], showing, the public document showing where he was released and I have the document where Mr. McCain, himself signed in my presence saying that we went over the conditions of his release.

Q. Right, it doesn't say how much time he served?

A. No.

(Tr. 415-16).

Brown could not even testify as to which penal institution McCain was incarcerated for the prior convictions. (Tr. 421-22). Defense counsel also pointed out, and Brown agreed, that the document did not reveal when McCain began his incarceration. (Tr. 416).

At the conclusion of the October 2, 2009 sentencing hearing, the trial court, apparently concerned by the tenuous proof as to McCain's habitual status, continued the matter for a week in order to give the State an opportunity to provide documentation from the Federal Bureau of Prisons, stating:

> Now, I'm concerned with what is called State Exhibit 4. This gentleman . . . is facing life in prison. This Court does not take that lightly therefore if there are some records certifying that he was, in fact, that is the certified records from the Federal Bureau of Prisons certifying that he did, in fact, serve such time as State Exhibit 4 allegedly supports, I need those records and therefore, I am going to continue this hearing for one week and those records be provided to the Court, if not, then the motion to dismiss this will be ruled.
>
> . . .

> There are some cases that talk about certified documents. This is not certified. If there are some records to that effect from the Federal Bureau of Prisons I need that documentation. . . .
>
> If those records are available, lets get them up here. Okay, I'm going to give the State until next Friday to produce those records certifying from the Federal Bureau of Prisons that this person did, in fact, stay in that prison for the time that you say he did, for a year and a half.

(Tr. 429-30).

According to the clerk's papers, seven days later, on October 9, 2009, the State filed the report from Vincent E. Shaw of the Federal Bureau of Prisons. (C.P. 111-20). This document was not marked as an exhibit and was not entered into evidence; it is not referenced in the clerk's official transcript and was not included as an exhibit in the appellate record; the only place this document appears is in the clerk's papers as a filing. (C.P. 111-20).

On October 30, 2009, the sentencing hearing was resumed, and the trial court granted the State's motion to amend the indictment to charge McCain as a habitual under Section 99-19-83, adjudged McCain a habitual under Section 99-19-83, and sentenced him as such to life imprisonment. (Tr. 432-41). In so doing, the trial court relied on the uncertified report from Vincent E. Shaw of the Federal Bureau of Prisons. (Tr. 435-36, 437-38).

The trial court denied McCain's motion for JNOV or, in the alternative, motion for a new trial. (C.P. 129-30, Supp. Record, R.E. 6-10). McCain now appeals to this Honorable Court for relief.

SUMMARY OF THE ARGUMENT

The State failed to prove beyond a reasonable doubt that McCain was a habitual offender under Mississippi Code Annotated Section 99-19-83. The source of proof by which the State attempted to prove that McCain actually served one year or more on each of his prior convictions

was an uncertified, unauthenticated document from the Federal Bureau of Prisons that was not entered into evidence as an exhibit; it is not listed as an exhibit in the clerk's official transcript; and it was not included as an exhibit in the appellate record; the only place this document appears is in the clerk's papers as a filing, and it is not even marked as an exhibit. (C.P. 111-20). Further, Brown's testimony was insufficient, as he admitted that his testimony was based on the Federal Bureau of Prison's report.

Under the Mississippi Supreme Court's decisions in *Armstrong v. State*, 618 So. 2d 88, 89 (Miss. 1993), *Ellis v. State*, 485 So. 2d 1062, 1063-64 (Miss. 1986), as well as this Court's holding in *Vince v. State*, 844 So. 2d 510, 517-18 (¶¶22-26) (Miss. Ct. App. 2003), the State presented insufficient evidence to establish McCain's habitual status under Section 99-19-83. Accordingly, McCain is entitled to have his sentence vacated, the judgment finding him a habitual offender reversed and rendered, and his case remanded for re-sentencing.

The trial court also erred in denying McCain's motion to dismiss for the State's violation of McCain's Constitutional and statutory rights to a speedy trial. At the time of the hearing on McCain's motion to dismiss for failure to provide a speedy trial (which occurred outside of the Constitutional and Statutory time limits), the trial court had not even entered an order setting a date for McCain's trial. As explained in more detail in the argument section, the delay was not attributable to McCain but instead to dilatory conduct of the trial court and/or State. Accordingly, McCain's Constitutional and statutory speedy trial rights were violated, and this Court should conviction and sentence entered against McCain.

Additionally, the trial court erred in admitting Exhibit S-24–an orange Texas Longhorns cap allegedly worn by McCain at the time of the incident and his later arrest(s). The State failed to sufficiently authenticate the cap. Because the cap was pivotal to McCain's identification, the error

in admitting the cap severely prejudiced his case. Accordingly, McCain is entitled to a new trial.

The trial court further erred in denying McCain's motion to quash the indictment against him. The indictment was not marked/stamped "filed," and the State, therefore, failed to satisfy the statutory requirements for the presentment of an indictment pursuant to Mississippi Code Annotated Section 99-7-9. Under *Stanford v. State*, 76 Miss. 257, 24 So. 536 (Miss. 1899), McCain's motion to quash the indictment should have been sustained, and he is entitled to have the judgment entered against him revered and remanded.

I. THE STATE FAILED TO ESTABLISH THAT McCAIN WAS A HABITUAL OFFENDER UNDER MISSISSIPPI CODE ANNOTATED SECTION 99-19-83.

At sentencing, the trial court granted the State's motion to amend the indictment to charge McCain as a habitual offender under Mississippi Code Annotated Section 99-19-83, and adjudged and sentenced McCain as such. In so doing, the trial court relied on an uncertified, unauthenticated report from Vincent E. Shaw of the Federal Bureau of Prisons which purportedly showed that McCain had served one year or more on each of his prior conviction. (C.P. 111-20, Tr. 435-41). As explained in more detail below, the State failed to present sufficient evidence to establish McCain's habitual status under Section 99-19-83.

Mississippi Code Annotated Section 99-19-83 provides as follows:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Miss. Code Ann. § 99-19-83 (Rev. 2007).

In order to convict and/or sentence an accused as a habitual offender under Mississippi Code Annotated Section 99-19-83, the State bears the burden of proving all of the essential elements of that Section beyond a reasonable doubt, including "that the defendant shall have served at least one year under each sentence." *Ellis v. State*, 485 So. 2d 1062, 1063-64 (Miss. 1986) (citing *Wilson v. State*, 395 So. 2d 957, 960 (Miss. 1981)). Accordingly, the Mississippi Supreme Court and this Court have held that a defendant's sentence as a habitual offender pursuant to Section 99-19-83 must be vacated where the State fails to prove beyond a reasonable doubt that the defendant was convicted of *and actually served* separate terms of one year of more. *See, e.g., Armstrong v. State*, 618 So. 2d 88, 89 (Miss. 1993); *Ellis*, 485 So.2d at 1063-64; *Vince v. State*, 844 So. 2d 510 (Miss. Ct. App. 2003).

In *Vince v. State*, this Court reversed a trial court's determination of the defendant's habitual status, where the State attempted to prove the defendant's prior convictions by offering "an NCIC compilation of a defendant's criminal history" at the sentencing hearing. *Vince v. State*, 844 So. 2d. 510, 517 (¶¶21-22) (Miss. Ct. App. 2003). This Court found that the State presented insufficient evidence to establish Vince's habitual status beyond a reasonable doubt because the NCIC document did not appear as an exhibit, was not listed as such in the court reporter's official transcript, and was not a part of the record. *Id.* Accordingly, this Court vacated Vince's sentence, reversed and rendered the judgment finding him a habitual offender, and remanded the case for re-sentencing as a non-habitual. *Id.* at 517 (¶22), 519 (¶30).

The instant case is very similar *Vince*. Although the report from Vincent E. Shaw of the Federal Bureau of Prisons, is referred to as an exhibit, (Tr. 429), it was not admitted as an exhibit; it is not listed as an exhibit in the clerk's papers; and it only appears in the record as a filing in the clerk's papers, which is not marked as an exhibit. (C.P. 111-20). Accordingly, Shaw's report was

insufficient to establish that McCain actually served one year or more on each of his prior convictions.

Further, the State's witness, Brown, did not work for the Federal Bureau of Prisons, and admitted that his only knowledge of the time McCain actually served for his prior convictions came from Shaw's report from the Federal Bureau of Prisons. (Tr. 415-16). In fact, Brown could not even identify which penal institution McCain was incarcerated in for the prior convictions. (Tr. 421-22). Defense counsel also pointed out, and Brown agreed, that the document did not reveal when McCain was incarcerated. (Tr. 416). Brown claimed that McCain served over one year on the prior convictions because he knew what date McCain reported to his office to be paroled. (Tr. 420-21).

In this regard, the instant case is closely analogous to *Armstrong v. State*, 618 So. 2d 88, 89 (Miss. 1993). In *Armstrong*, the State's witness admitted that MDOC records did not indicate how much time the defendant served on his prior convictions; he could only testify as to when the defendant was paroled and, thus, only speculate as to how much time the defendant actually served. *Armstrong*, 618 So. 2d at 89-90. Similarly, Brown's testimony was insufficient to prove beyond a reasonable doubt that McCain actually served one year or more on his prior convictions, as he admitted that the Federal Bureau of Prisons record did not indicate how much time McCain served, and, he could only surmise that McCain served one year or more based on the date McCain came to his office to be paroled.[3]

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[3] It is also noteworthy the trial court's reliance on Shaw's report infringed upon the interests protected by McCain's Sixth Amendment right to confront the witnesses against him under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), and *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). In *Wilson v. State*, 395 So. 2d 957, 960 (Miss. 1981), the court instructed:

> Of course, at the second stage of the trial when the habitual criminal issue is tried the defendant must be afforded ample opportunity to dispute the truth of the assertion made by the state that he is an habitual offender. The defendant must be accorded his

Accordingly, under *Armstrong*, *Ellis*, and *Vince*, the State failed to present sufficient evidence to establish McCain's habitual status under Section 99-19-83 beyond a reasonable doubt, and the trial court erred in granting the State's motion to amend the indictment and in adjudging and sentencing McCain as a habitual under Section 99-19-83. Consequently, McCain is entitled to have this Court reverse and render the judgment finding him a habitual offender under Section 99-19-83 and remand this case for re-sentencing.

II. THE TRIAL COURT ERRED IN FAILING TO DISMISS McCAIN'S CHARGE FOR THE STATE'S VIOLATION OF HIS CONSTITUTIONAL AND STATUTORY RIGHTS TO A SPEEDY TRIAL.

In reviewing a speedy trial claim, the critical inquiry is "whether the trial delay arose from good cause." *Flora v. State*, 925 So. 2d 797, 814 (¶58) (Miss. 2006) (citing *Deloach v. State*, 722 So. 2d 512, 516 (¶12) (Miss. 1998)). A trial court's finding will be upheld only if it is supported by substantial credible evidence. *Id.* (citing *Folk v. State*, 576 So.2d 1243, 1247 (Miss.1991)). "If no probative evidence supports the trial court's finding of good cause, this Court will ordinarily reverse." *Deloach v. State*, 722 So. 2d 512, 516 (¶12) (Miss. 1998) (citation omitted). "The state bears the burden of proving good cause for a speedy trial delay, and thus bears the risk of non-persuasion." *Id.* (citing *Flores v. State*, 574 So. 2d 1314, 1318 (Miss. 1990)).

McCain was arrested on January 31, 2008. (Tr. 27, 285). He was indicted on May 8, 2008, and arraigned the following day on May 9, 2008. (Tr. 18). On July 25, 2008, the trial court held an omnibus hearing during which defense counsel advised the court that the District Attorney's office advised him that it would not be prosecuting McCain because it appeared that Federal charges were

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right to be confronted with witnesses and cross examine them when appropriate in the conduct of the second stage of the trial.

being pursued against McCain for the incident in Federal Court. (Tr. 10-11). At this hearing, Assistant District Attorney, Angela Carpenter, advised the court that District Attorney Richard Smith was working McCain's case, and she had no knowledge of the issue. (Tr. 10). The trial court then continued the matter pending Mr. Smith's decision stating, "If the FEDS are going to be trying him then tell Mr. Smith that he needs to go on and dismiss this so that the FEDS can come get him and it will be on the Federal [sic?]." (Tr. 11).

The following day–July 26, 2008–McCain filed a letter with court expressing his concern about his trial date; the trial court considered this letter a demand for a speedy trial. (Tr. 23-24, 37-38, 44, Ex. D-2). And, on February 24, 2009, McCain filed a motion to dismiss for failure to provide a speedy trial. (C.P. 23-25).

On February 24, 2009, the trial court conducted a pre-trial motion hearing addressing McCain's motion to dismiss for failure to provide a speedy trial. (Tr. 17 *et seq.*). At the hearing, District Attorney Smith recalled that McCain was indicted on May 8, 2008, and arraigned the following day on May 9, 2008. (Tr. 18). The State represented that McCain's trial was initially set for September 10, 2008, but, McCain was not tried that day because the State tried a murder case against Jason Davis before a different Judge on that day. (Tr. 18-20, 39-40). The record contains no notice or order concerning the initial trial date of September 10, 2008; the record does contain a November 20, 2008, notice of trial setting filed by the State to set trial for March 23, 2009, and a December 8, 2008, motion to set the trial date for March 23, 2009, also filed by the State (C.P. 10, 14-15, Tr. 18-19, 34). At the time of the February 24th hearing, the trial court had not yet entered an order setting the trial date. (Tr. 18-19).

At the time of the hearing, 291 days had passed since McCain's arraignment, and 390 days had passed since his arrest; 27 days remained until the March 23, 2009 trial date requested by the

State. (Tr. 19-21). Therefore, at the time of the hearing on McCain's motion to dismiss, the trial court had not even set a date for McCain's trial.

A. Constitutional Speedy Trial Right

A defendant's constitutional right to a speedy trial "is protected by the Sixth and Fourteenth Amendments to the United States Constitution and Article 3, Section 26 of the Mississippi Constitution of 1890." *Thorson v. State*, 653 So. 2d 876, 889 (Miss. 1994). The United States Supreme Court has provided the following four factors to be considered in judging the merits of a constitutional speedy trial claim: (1) length of the delay; (2) reason for the delay; (3) defendant's timely assertion of his right to a speedy trial; and (4) resulting prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972). In evaluating a speedy trial claim, the proper approach "is a balancing test, in which the conduct of both the prosecution and the defendant are weighed." *Id.* None of the four factors are "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker*, 92 U.S. at 533, 92 S.Ct. at 2193; "*No one factor is dispositive*, and the balancing test is not restricted to the *Barker* factors, so other factors may be considered." *Poole v. State*, 826 So. 2d 1222, 129-29 (¶18) (Miss. 2002) (emphasis added).

1. Length of the delay

McCain's constitutional right to a speedy trial began to run on January 31, 2008, the date of his arrest. *See Johnson v. State*, 855 So. 2d 72, 77 (¶16) (Miss. Ct. App. 2004) (constitutional right to a speedy trial attaches immediately upon arrest.) (citation omitted). At the time of the February 24, 2009, hearing, 390 days had passed since McCain's arrest and 27 days remained until the March 23, 2009 trial date requested by the State. (Tr. 19-21). Thus, the delay is presumptively

prejudicial and triggers the balancing test of the other three *Barker* factors. *See State v. Woodall*, 801 So. 2d 679, 681-82 (¶¶11-13) (Miss. 2001) (Any delay of over eight months is presumptively prejudicial and triggers the *Barker* balancing test). Accordingly, this factor weighs in McCain's favor.

2. Reason for the delay

Once a delay is determined to be presumptively prejudicial, "the burden shifts to the prosecution to produce evidence justifying the delay and to persuade the trier of fact of the legitimacy of these reasons." *State v. Ferguson*, 576 So. 2d 1252, 1254 (Miss. 1991). The State represented that McCain's trial was initially set for September 10, 2008, but, McCain was not tried that day because the State tried a murder case against Jason Davis before Circuit Judge Vollor on that day. (Tr. 18-20, 39-40). Significantly, the record contains no notice or order concerning the initial trial date of September 10, 2008; the record does contain a November 20, 2008, notice of trial setting filed by the State to set trial for March 23, 2009, and a December 8, 2008, motion to set the trial date for March 23, 2009, also filed by the State (C.P. 10, 14-15, Tr. 18-19, 34). At the time of the February 24th hearing, the trial court had not yet entered an order setting the trial date. (Tr. 18-19).

The State argued that the delay between McCain's initial trial date–September 10, 2008–and the time of the hearing should "not weight heavily against the State" because the State tried a murder case against Jason Davis before a different Judge (Circuit Judge Vollor) on McCain's initial trial date, and "it is barely over" the time limits for a speedy trial. (Tr. 18-22, 39-40).

Also, the defense pointed out that the delay was arguably caused by the State's indecision as to whether it or the federal authorities would prosecute McCain. (Tr. 34-35).

"[The Mississippi Supreme Court] has clearly stated that a crowded docket will not

automatically suffice to establish good cause." *Walton v. State*, 678 So. 2d 645, 648 (Miss. 1996) (citing *McGee v. State*, 608 So. 2d 1129, 1132 (Miss. 1992)). Under *Barker*, "different weights should be given to different reasons for delay." *Bonds v. State*, 938 So. 2d 352, 356 (¶11) (Miss. Ct. App. 2006) (citing *Barker*, 407 U.S. at 531, 92 S.Ct. 2182). A deliberate attempt on the State's part to delay a case is weighed heavily against the State[;]" whereas, "a more neutral reason for the delay such as negligence or overcrowded dockets should be weighed less heavily but should, nevertheless, be considered because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.*

Therefore, although the delay–if caused by overcrowded dockets or the State's negligence or uncertainty as to whether it would prosecute McCain–is weighed "less heavily" against the State, it is, nonetheless, weighed against the State and not against McCain. Accordingly, this factor weighs in McCain's favor.

3. Defendant's assertion of the right

Although the State bears the burden to bring a defendant to trial, the defendant "has some responsibility to assert his right to a speedy trial." *Wiley v. State*, 582 So. 2d 1008, 1012 (Miss. 1991) (citing *Flores v. State*, 574 So.2d 1314, 1323 (Miss.1990)). On July 26, 2008, (the day after the July 25, 2008, omnibus hearing concerning whether the State would prosecute McCain) McCain filed a letter with court expressing his concern about his trial date; the State claimed that McCain failed to make a demand for a speedy trial, filing only a motion to dismiss; however, the trial court found that McCain did make a demand for a speedy trial by virtue of his July 26, 2008 letter. (Tr. 23-24, 37-38, 44, Ex. D-2). Accordingly, McCain made a demand for a speedy trial, and this factor weighs in his favor as well.

4. Prejudice

"[P]rejudice is assessed in the speedy trial context (1) to protect against oppressive pretrial incarceration, (2) for the minimization of anxiety and concern of the accused, and (3) for the limitation of the possibility of impairment of the defense." *Johnson*, 885 So. 2d at 80 (¶30) (quotation omitted). As alluded to above, "a delay of more than eight months before trial is presumptively prejudicial to the defendant, and violative of his right to a speedy trial." *Johnson*, 855 So. 2d at 77 (¶16) (citation omitted).

"Where the delay has been presumptively prejudicial, the burden [of proving a lack of prejudice] falls upon the prosecution." *Ferguson*, 576 So. 2d at 1255. The Mississippi Supreme Court has explained that "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." *Id.* (quoting *Moore v. Arizona*, 414 U.S. 25, 26, 94 S.Ct. 188, 189 (1973)). "Moreover, it is clear that an affirmative showing of prejudice is not necessary in order to prove a denial of the constitutional right to a speedy trial." *Flores v. State*, 574 So. 2d 1314, 1323 (Miss. 1990) (citing *Trotter v. State*, 554 So. 2d 313, 318 (Miss. 1989)).

As to the impairment of an accused's defense, the United States Supreme Court has instructed that "the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice." *Doggett v. United States*, 505 U.S. 647, 655, (1992).

Of the three interests sought to be protected under the prejudice factor, two clearly weigh in McCain's favor; namely, protection against oppressive pretrial incarceration and the minimization of anxiety and concern of the accused. *See Jasso v. State*, 655 So. 2d 30, 35 (Miss. 1995) (a defendant is presumed to have suffered anxiety, which is "inevitably present.") (citing *Jaco v. State*, 574 So. 2d 625, 632 (Miss. 1990)). McCain's defense was inherently prejudiced, at least to some extent, by the fact that he was incarcerated. *See Barker*, 92 U.S. at 533, 92 S.Ct. at 2193 ("[I]f 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.")

Balancing the four *Barker* factors, it is clear that McCain's constitutional right to a speedy trial was violated. The first three factors (length of the delay, reason for the delay, and defendant's timely assertion of the right) weigh in McCain's favor. It is veery telling that, at the time of the February 24, 2009 hearing on McCains motion to dismiss, the trial court had not even set a trial date. As to prejudice, two of the three sub-factors weigh in McCain's favor, and his defense was inherently impaired, to some extent, by his incarceration. "*No one factor is dispositive . . .*" *Poole*, 826 So. 2d at 129-29 (¶18) (emphasis added). In sum, three and two-thirds of the four *Barker* factors weigh in McCain's favor. Therefore, his constitutional right to a speedy trial was violated, and this Court should reverse the judgment and sentence entered against him.

B. Statutory Speedy Trial Right

A defendant's statutory speedy trial right is addressed by Mississippi Code Annotated Section 99-17-1, which provides: "Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned." Miss. Code Ann. § 99-17-1 (Rev. 2007). Thus, the statutory speedy trial right attaches at arraignment, as opposed to arrest.

McCain was arraigned on May 9, 2008. (Tr. 18). At the time of the hearing, 291 days had passed since McCain's arraignment, and 27 days remained until the March 23, 2009 trial date requested by the State. (Tr. 19-21). "Where the accused is not tried within 270 days of his arraignment, the State has the burden of establishing good cause for the delay since the accused is under no duty to bring himself to trial." *Frazier v. State*, 739 So. 2d 443, 446 (¶9) (Miss. Ct. App.

1999) (citing *Nations v. State*, 481 So. 2d 760, 761 (Miss. 1985)).

As explained above, the State argued that the delay between McCain's initial trial date (September 10, 2008) and the time of the hearing should "not weight heavily against the State" because the State tried a murder case against Jason Davis before a different Judge (Circuit Judge Vollor) on McCain's initial trial date, and "it is barely over" the time limits for a speedy trial. (Tr. 19-22).

The delay, whether due to an overcrowded docked or the State's indecision, should not weight against McCain. At the time of the hearing on McCain's motion to dismiss–which was already outside of the statutory speedy trial period–the trial court had not even entered an order setting a trial date for McCain. Therefore, the trial court was negligent in its delay to bring McCain's case before the court. "[T]he primary burden is on the courts and the prosecutors to assure that cases are brought to trial." *Flores*, 574 So. 2d at 1323 (citing *Trotter*, 554 So. 2d at 317). McCain respectfully submits that this Court should not sanction such dilatory conduct on the part of the trial court or the State.[4]

Accordingly, McCain submits that the trial court erred in failing to grant his motion to dismiss for failure to provide a speedy trial, and this Court should reverse and render the judgment and sentence entered against him.

III. THE TRIAL COURT ERRED IN ADMITTING EXHIBIT S-24.

At trial, the State attempted to admit into evidence Exhibit S-24–an orange Texas Longhorns hat allegedly worn by McCain–through the testimony of Officer Kimble. (Tr. 327-34). Officer

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[4] As Judge Roberts (joined by Judges Ishee and Griffis) very recently noted in his well-written, and well-reasoned dissenting opinion in *McBride v. State*: "A congested docket is totally irrelevant when the defendant's case was never set on the docket." *McBride v. State*, NO. 2008-KA-01347-COA (May 4, 2010).

Kimble testified that the hat was "actually recovered from the Simpson County jailer and . . . transferred over to my possession from there." (Tr. 327). Defense counsel then objected, and Officer Kimble stated that, after searching McCain's residence, he went to the Simpson County Jail, where McCain had recently been taken upon his arrest at T&T Towing. (Tr. 328-31). Officer Kimble testified only that he acquired the Texas hat "from the Simpson County Jail" when he picked up McCain to take him to Vicksburg. (Tr. 331-32).

Rule 901 of the Mississippi Rules of Evidence provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." Miss. R. Evid. 901(a). "Under M.R.E. 901, authentication and identification are conditions precedent to admissibility." *Jones v. State*, 798 So. 2d 592, 594 (¶5) (Miss. Ct. App. 2001) (quoting *Johnston v. State*, 567 So. 2d 237, 238 (Miss. 1990)). Rule 901(b) illustrates examples of authentication that are sufficient to satisfy the rule. The most relevant example is Rule 901(b)(1), which requires "testimony of witness with knowledge." M.R.E. 901(b)(1).

Although "Mississippi law has never required a proponent of evidence to produce every handler of evidence," *Ellis v. State*, 934 So. 2d 1000, 1005 (¶21) (Miss. 2006), under Rule 901(b)(1) the State was still required to offer a witness with personal knowledge to establish that "the matter in question [the hat] is what its proponent claims." M.R.E 901(a) and 901(b)(1); *See also Jones*, 798 So. 2d at 594-95 (¶9) ("In order for Tidwell to authenticate the two papers in question, the State should have proceeded under M.R.E. 901(b)(1)."

In the instant case, Officer Kimble was not present when McCain was booked at the Simpson County Jail. Officer Kimble's statement that he received the hat "from the Simpson County jailer" is insufficient to establish that he had personal knowledge that the hat he sought to introduce into

evidence was actually taken from McCain's person at the time he was booked at the Simpson County Jail. While there is evidence that Officer McNair was present at T&T Towing when McCain was arrested, it remains unclear whether she booked him or otherwise took the hat from his possession. In fact, the "Simpson County Jailer" is not positively identified in the record.

Accordingly, the State failed to authenticate Exhibit S-24, and the trial court erred in admitting it into evidence. Because Exhibit S-24–the Texas Longhorn hat–was a crucial factor in McCain's identification as the bank robber, the introduction of the hat severely prejudiced his case. Consequently, the trial court's error in admitting Exhibit S-24 warrants a new trial.

IV. THE TRIAL COURT ERRED IN DENYING McCAIN'S MOTION TO QUASH THE INDICTMENT.

McCain filed a motion to quash the indictment against him because the State failed to meet the statutory requirements for presentation of an indictment under Mississippi Code Annotated Section 99-7-9; specifically, McCain's indictment was not stamped "filed" as required by Section 99-7-9. (C.P. 85-86, Tr. 293-295).

However, the trial court rejected the motion, claiming:

> This Court [the trial court] can take judicial notice that they [the clerk's office] did receive that indictment in open court from the foreperson of the Grand Jury and I delivered that indictment to the Circuit Clerk of this Court. And the Court finds that is sufficient to be an official act, an acceptance of the official act of the Warren County Grand Jury for whatever month that was for whatever term that was.

(Tr. 294).

Section 99-7-9 states in pertinent part:

> All indictments and the report of the grand jury must be presented to the clerk of the circuit court by the foreman of the grand jury or by a member of such jury designated by the foreman, with the foreman's name endorsed thereon, accompanied by his affidavit that all indictments were concurred in by twelve (12) or more members of the jury and that at least fifteen (15) were present during all deliberations, *and must be marked "filed,"* and such entry be dated and signed by the clerk. It shall not be

> required that the body of the grand jury be present and the roll called. An entry on the minutes of the court of the finding or presenting of an indictment shall not be necessary or made, but the endorsement by the foreman, together with the marking, dating, and signing by the clerk shall be the legal evidence of the finding and presenting to the court of the indictment. . . .

Miss. Code Ann. § 99-7-9 (Rev. 2007) (emphasis added).

The Mississippi Supreme Court has held that the clerk's marking the indictment "Filed," dating it, and signing it "are made by [the predecessor to Section 99-7-9] the exclusive 'legal evidence of the finding and presentation of the indictment." *Stanford v. State*, 76 Miss. 257, 24 So. 536 (Miss. 1899). Where this is not done, a demurrer to the indictment should be sustained and the judgment reversed and remanded. *Id*; *see also*, *Williamson v. State*, 64 Miss. 229, 1 So. 171 (1887), ("What purports to be the indictment . . . wants the marking "filed," with the date thereof, signed by the clerk, which section 3006 of the Code [the predesessor to Section 99-7-9] makes the evidence of an indictment being found and presented to court.").

In *Jones v. State*, the Mississippi Supreme Court reaffirmed that it "has pointed out on previous occasions that if the statutory requirements of section 99-7-9 (and its predecessors) are not met, it is proper to demur to such an indictment and the demurrer should be sustained." *Jones v. State*, 356 So. 2d 1182, 1183 (Miss. 1978) (citing *Stanford*, 76 Miss. 257, 24 So. 536; *Williamson*, 64 Miss. 229, 1 So. 171)). The *Jones* court rejected the defendant's claim, not on the merits but due only to a procedural bar because the claim was raised for the first time on appeal. *See Jones*, 356 So. 2d at 1183-84 (citing *Wooten v. State*, 155 Miss. 726, 125 So. 103 (1929)); see also, *Wilson v. State*, 904 So. 2d 987, 995-96 (Miss. 2004) (rejecting challenge that the indictment was not marked "filed" as procedurally barred for failure to raise the issue at trial.).

However, in the instant case, McCain presented this claim to the trial court; thus, it is not procedurally barred.

The trial court's reasoning–that it could take judicial notice that the clerk's office received the indictment because the trial judge delivered the indictment to the clerk–is flawed, runs counter the dictates of Section 99-7-9. First, Section 99-7-9 expressly provides that indictments "must be presented to the clerk of the circuit court *by the foreman* of the grand jury *or by a member of such jury designated by the foreman*. . . ." Miss. Code Ann. §99-7-9 (emphasis added). Therefore, if the trial judge did, in fact, deliver the indictment to the clerk himself, this action constituted an additional defect/error in the indictment's presentation. Further, it is undisputed that the indictment was not marked "Filed," and the trial court cannot change that fact by taking judicial notice of the mere fact that the clerk received the indictment.

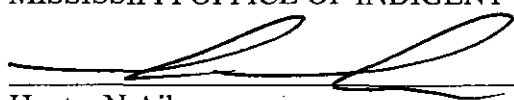
Accordingly, under the aforementioned statutory and case law, McCain respectfully contends that the trial court erred in failing to grant his motion to quash the indictment, and he is entitled to have his case reversed and remanded.

CONCLUSION

Based on the propositions briefed and the authorities cited above, together with any plain error noticed by the Court which has not been specifically raised, McCain respectfully requests this Court to reverse the trial court's judgment of conviction for robbery and render a judgment of acquittal. Alternatively, if this Court determines that acquittal is not proper, McCain requests that this Court reverse the judgement of conviction and sentence and remand this case for a new trial, or alternatively, for re-sentencing.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: 

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CERTIFICATE OF SERVICE

I, Hunter N Aikens, Counsel for Kevin Dale McCain, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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