IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDDIE PUGH, IV — APPELLANT

VS. — NO. 2010-KA-1902-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LISA L. BLOUNT
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EDDIE PUGH, IV — APPELLANT

VS. — NO. 2010-KA-1902-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Jackson County, Mississippi, wherein a jury convicted Eddie Pugh of one count of capital murder, one count of aggravated assault and one count of third degree arson. The honorable Dale Harkey, Circuit Judge, presiding, sentenced Pugh to three life sentences in the custody of the Mississippi Department of Corrections. After denial of post-trial issues Pugh appeals raising the following issues.

STATEMENT OF THE ISSUES

ISSUE I: **Whether Pugh's indictment was fatally defective for failing to contain any aiding and abetting language. Or, in the alternative, allowing the jury to be instructed on aiding and abetting constituted a constructive amendment of the indictment.**

ISSUE II: **Whether the State presented insufficient evidence to convict pugh of third degree arson.**

ISSUE III: **Whether Pugh's speedy trial right under the United States Constitution was violated by a 481 day delay which prejudiced his defense at trial.**

ISSUE IV: **Whether the trial court misapplied the inevitable discovery doctrine in allowing the State to admit physical evidence obtained in violation of Pugh's constitutional rights.**

ISSUE V: **The violation of Uniform Rule of Circuit and County Court Practice 6.03 warrants suppression of all evidence obtained as a result of the violation.**

ISSUE VI: **Whether any of the above errors concerning violation of Pugh's fair trial rights may be considered harmless.**

ISSUE VII: **Whether cumulative error deprived Pugh of his fundamental right to a fair trial.**

STATEMENT OF THE FACTS

On October 2008, while driving south on LaRue Road in Jackson County, Elliot Jones saw an SUV off the side of the road with three black males behind it. (T. 467). One of those males, wearing what Jones believed to be a white shirt, shot one of the other men. (T. 468). Jones testified to hearing two to three shots. (T. 469). Jones subsequently stopped his vehicle, turned around, returned to his home and called 911. (T 469). Approximately five minutes after he got home, he saw a silver Scion turn around in the driveway across the street. (T 470). Jones and his mother subsequently followed the Scion back to the scene, where deputies had already arrived. (T 471). Deputy Tyrone Nelson, a deputy with the Jackson County Sheriff's department was dispatched to LaRue Road. (T 458). Once he arrived, he noticed a Toyota Sequoia engulfed in flames. (T. 460). While on the scene, Deputy Nelson stopped a vehicle driven by Torrenda Whitmore. (T. 460). Whitmore was eventually taken into custody. (T. 462). Deputy Leo Allen was also dispatched to the scene. (T. 475). When Deputy Allen arrived, he and other officers attempted to extinguish the Sequoia. (T. 476). While doing so, he observed what appeared to be a person in the back seat of the vehicle with his hands bound. (T. 476). This body would later be identified as Byron McCoy. Deputy Allen left the scene after receiving a call for assistance at the Costapia Bridge, which was approximately a quarter of a mile from the SUV. (T. 478). The call indicated that there were possibly two men under the bridge. (T. 478). Deputy Allen waded into the water and handcuffed the two men

into the water, one of whom was the Appellant, Eddie Pugh. (T. 481). As Pugh was transported to the Jackson County Sheriff's department substation, he noticed Pugh had what appeared to be injuries to his arm. (T. 484). While Deputy Allen awaited the arrival of investigators, he heard the commode flushing in Pugh's holding cell. (T. 485). Pugh had his clothes in the commode, apparently, washing them in the commode. (T. 486). The clothes were subsequently taken into evidence. (T. 486).

When Deputy Joseph Windham, the shift captain on the day of the incident, responded to the call on LaRue road, he saw a school bus. (T. 492-94). The driver of the bus was pointing to the ditch, where Deputy Windham found a man who had been shot in the back. (T. 494). This man would later be identified as Rahman Mogilles. Deputy Windham saw an ambulance and radioed them for assistance. (T. 498).

Lieutenant Curtis Spiers, with the Jackson County Narcotics task force arrived on LaRue Road near Deputy Windham's location, and learned that there was a possibility of two suspects in the shooting being in the woods in the area. (T. 507-08). Spiers dispatched his agents to look for those individuals. (T. 508). When the two individuals were located under the Costapia Bridge, Commander Spiers was one of the individuals who entered the water to take them into custody. (T. 510). Spiers testified that Pugh had burns on his hands which were wrapped in a white T-shirt. (T. 510, 513). Pugh did not have on a shirt when he was found under the bridge. (T. 513).When found Pugh had on multiple layers of shorts, one pair being blue. (T. 521). The other individual, identified as Barron Borden, appeared to have a gunshot wound to his leg. (T. 510).

Rahman Mogilles testified to living in New Orleans all of his life. (T. 524). Mogilles and McCoy had known each other from attending college together in Atlanta, Georgia. (T. 525). During October of 2008, McCoy had come down to New Orleans seeking employment with Mogilles. (T 526). Mogilles and his parents owned one restaurant and were considering opening another. (T. 526).

Mogilles had known Eddie Pugh his entire life. (T, 528).

Mogilles and McCoy went to Pugh's house in New Orleans in order to buy marijuana. (T. 533). The two were in Pugh's SUV, a Toyota Sequoia, which he was making the final payment (T.532-33). McCoy stayed in the car, and Mogilles went inside. (T. 533). Mogilles walked in, informed Pugh of his desire to purchase marijuana, and Pugh told Mogilles that he was going to have to go get it. (T. 534). From Mogilles' testimony, Pugh apparently thought that McCoy was a Department of Corrections agent. (T. 534).

Mogilles and McCoy left to go to McDonalds, and then returned to Pugh's home. (T. 534-35). Mogilles parked the car in the driveway of the house. (T. 535). When Pugh arrived, Mogilles and Pugh went inside the house and proceeded to the patio area outside. (T. 537). Pugh gave Mogilles marijuana, and Mogilles proceeded to roll it up. (T. 550). Then, Mogilles saw Borden walking through the house carrying a bag with a baseball bat hanging out of it. (T. 551-52). Mogilles testified he was hit in the back of the head with an object. (T. 552). Mogilles collapsed to the ground. (T. 553). He testified he was not knocked unconscious, but was simply laying there. (T. 553). Pugh picked up Mogilles and him dragged inside to the den. (T. 553). Mogilles heard sounds of an altercation, and then McCoy was brought and placed on the ground next to him. (T 555). Mogilles testified that he and McCoy had their hands pulled behind their backs and were tied up with either electrical wire or a phone cord of some type. (T. 556). Mogilles testified Pugh dragged out of the house and placed in the SUV. (T. 558). McCoy was also dragged out into the vehicle. (T. 559).

Mogilles saw Torrenda Whitmore, Pugh's girlfriend as they were being dragged out of the house. (T. 559-60). Pugh drove the Sequoia, while Borden sat in the back of the vehicle, with the gun pressed up against McCoy's head. (T. 560). The group drove on I-10 and crossed into Mississippi. (T. 561-62). Mogilles testified to seeing a Scion that was parked in front of Pugh's house

follow them to a gas station. (T. 561). While stopped a the gas station, Whitmore got out of the Scion, and Pugh got out of the Sequoia and appeared agitated. (T. 563). Mogilles knew he could not escape through the SUV doors because they were locked with child locks. They brought a gas can into the SUV at the gas station.(Tr. 580).

The cars eventually exited the interstate and ended up on Larue road, an isolated two lane road. (T 564). Mogilles testified that Pugh made a hand gesture in the shape of a gun, and seconds later, Mogilles heard a "pow." (T 564; 577). Mogilles looked over, saw blood coming from McCoy's head, and got free from his restraints. (T. 564). Mogilles attempted to wrestle the gun from Borden's hands. (T. 564). Pugh stopped the SUV, and, according to Mogilles, Pugh ran and opened the back hatch of the Sequoia. (T. 566).

Mogilles and Borden rolled out the back of the vehicle struggling over the gun. (T. 566). Mogilles eventually let go of the gun and began running. (T. 566). Mogilles heard gunshots but kept running. (T. 566). Mogilles was then hit twice, once in the buttocks and once in the back and subsequently fell to the ground. (T. 566-67). Mogilles heard someone say "F- it he's dead." Mogilles, unable to move, waited until he heard his vehicle drive off, and looked up – both vehicles were gone. (T. 571). Mogilles made a tourniquet with his clothing and "struggled back through the briar patch to the other side of the highway." (T. 571). Mogilles got the attention of a school bus driver, and collapsed. (T. 572).

Mogilles was eventually transported to a medical facility, had several surgeries, and stayed a total of seven days in the hospital. (T. 573). At the hospital, Mogilles spoke with the FBI. Mogilles admitted that the first time he talked to the FBI he lied about what happened because he was scared. (T. 574). After learning that Pugh, Borden and Whitmore were in custody, Mogilles told the FBI what really happened. (T. 574; 579).

Dr. Paul McGarry testified to his autopsy findings on McCoy's body. (T 643). McCoy's hands had been bound with telephone cord wrapped around both wrists. (T. 647). McCoy had burns over his arms and legs. (T. 647). There were also two holes going into McCoy's skull that "had the characteristics of a gunshot wound of tight contact type." (T. 647). McCoy had some cut wounds to the left ear, a broken bone in his nose and some scrape marks across his right forearm. (T. 662). Dr. McGarry determined the cause of death to be a double gunshot wound to the head. (T. 662).

Pascagoula Police Department Officer Louis Miller, assigned to the FBI task force, recovered a .40 caliber live round, as well as some .40 caliber shell casings at the scene of the shooting. (T. 686, 690). Miller observed damage to the front right bumper of the Sequoia as well as paint chips that were knocked off of the front of the vehicle when it supposedly hit an embankment. (T. 698). Officer Miller also obtained a DNA swab from Mogilles. (T 699). Officer Miller recovered a receipt dated October 8th, 2008, from a Chevron gas station in Whitmore's purse. (T. 703-04).

Joseph Nicholson, another officer with the FBI task and Agent Jerome Lorraine went to Pugh's house in New Orleans, after obtaining a search warrant. (T. 712-13). Nicholson noticed a piece of cut up telephone cord laying on the bar in Pugh's house. (T 715). Officer Nicholson took swabs of reddish-colored dried spots on the floor in the dining room area of the house. (T. 720-21). In the patio area of the house, he discovered more reddish stains. (T. 722-23). The next day, Nicholson and others went back to the scene on LaRue Road in order to search the surrounding area. (T. 729). Various agencies also searched the LaRue Road scene on Saturday, October 11th. On this date, two cell phones, one of them being shot, a set of keys to a Toyota, and a .40 caliber handgun were recovered. (T. 737).

Brandon Giroux a forensic firearm and tool mark examiner formerly employed at the FBI Crime Lab in Quantico, Virginia tested various evidence in the instance case. (T. 762). Giroux tested

the firearm recovered near LaRue Road and determined that the firearm would not cycle properly. (T. 774). There was debris and rust on the firearm causing it to jam every time he attempted to perform a second fire test. (T. 774). Giroux fired two test shell casings to use in comparison to the recovered shell casings submitted for analysis. (T. 778). Giroux was able to determine that the bullet fragments recovered during McCoy's autopsy as well the fragments taken from Mogilles were fired from the firearm recovered at the scene on LaRue Road. (T. 778-81). Giroux also determined that the shell casings recovered from the LaRue Road matched the firearm as well. (T. 782-83). Giroux determined that the live round fired inside the Sequoia was extracted from the submitted firearm. (T. 784).

Machelle Reid, a shoe print and tire tread examiner for the FBI Crime Lab, also analyzed evidence in the instant case. (T. 793). Reid received a shoe impression from the scene and analyzed it. (T. 796). Reid compared footwear impression on a cast to shoes submitted in the case and concluded that the footwear impression matched shoes recovered from Pugh. (T. 800-01).

Tamyra Moretti, a forensic examiner with the nuclear DNA unit at the FBI laboratory tested DNA involved in the instant case. (T. 808). Moretti was able to detect the presence of blood on Borden's clothing, but was unable to get a DNA profile from the clothes. (T. 819). Moretti confirmed the blood on the outside of the Sequoia was McCoy's . (T. 822-83). A second swab taken from the back door handle on the driver's side also matched McCoy's DNA. (T. 824). Moretti did analysis on the blood stains inside Pugh's residence in New Orleans and determined that they contained McCoy's DNA. (T. 827-28). The swab of the blood from the patio area of the house contained Mogilles's DNA.(T. 830). Moretti performed a swab on the gun and was able to make a determination that the major contributor for DNA on the gun was McCoy. (T. 832-33). The minor contributor of DNA found on the gun was inconclusive, but Moretti was able to exclude both Pugh and Borden as contributors. (T. 833).

After Moretti's testimony, the State rested. (T. 838). The defense moved for a directed verdict, which was denied by the trial court. (T. 840-41). After deliberations, the jury returned a verdict of guilty of capital murder, aggravated assault and third-degree arson. (C.P. 229-31, R.E.14-16). In a subsequent sentencing phase, the jury unanimously returned a sentence of life without eligibility of parole in the custody of the Mississippi Department of Corrections. (C.P. 231, R.E. 16). The trial court sentenced Pugh to an additional twenty years for the aggravated assault conviction, as well as an additional three years for the third degree arson. (C.P. 231, R.E. 16). Pugh was sentenced to serve all three sentences consecutively. (C.P. 231, R.E. 16).

After denial of a Motion for New Trial, or, in the Alternative, for, (C.P. 232-34, 240). Aggrieved by the verdict and sentence, Pugh filed his timely notice of appeal on November 15, 2010. (C.P. 241).

SUMMARY OF THE ARGUMENT

Allowing the jury to be instructed on aiding and abetting did not constitute a constructive amendment of Pugh's indictment. An aider and abettor may be properly indicted and tried as a principal. When a defendant is indicted as a principal he may also be convicted if the evidence shows he was aiding and abetting the commission of the crime, provided the jury is properly instructed.

The State presented sufficient evidence that the jury could have reasonably and properly inferred that the value of the Sequoia SUV was more than $25.00 before being burned.

Where the delay of trial is neither intentional nor egregiously protracted, and there is an absence of actual prejudice to the defense, the balance is struck in favor of rejecting a speedy trial claim. *Duplantis v. State*, 708 So.2d 1327 (Miss.1998) (citing *Perry v. State*, 637 So.2d 871, 876 (Miss.1994)). Upon examination of the four *Barker* factors and in consideration of the totality of the circumstances, the balance in this case supports the State's contention that Pugh was not denied his

constitutional right to a speedy trial. The trial court did not abuse its discretion in rejecting Pugh's motion to dismiss.

The trial court did not misapply the inevitable discovery doctrine and err in admitting certain evidence discovered at the crime scene. Several agencies had been conducting a search of the area for the murder weapon for the two days prior to the discovery. Knowing that the murder weapon was in the area, both state and federal officers testified the agencies would have continued searching the area until they found it.

The trial court did not err in denying Pugh's motion to suppress evidence based on a violation of Uniform Rule of Circuit and County Court Practice 6.03. Pugh's issues were without merit. Pugh has failed to show error on the part of the trial court, reversible or harmless. Therefore, without the finding of error, either harmless or harmful, there can be no finding of error worthy of reversal or a new trial.

ARGUMENT

PROPOSITION I The evidence supported the jury receiving an aiding and abetting instruction.

In this initial assignment of error Pugh asserts the jury should not have been instructed on "aiding and abetting" as he was not so charged in the indictment. The Mississippi Supreme Court held in *Magee v. State* 542 So.2d 228 (Miss.1989) that an instruction on aiding and abetting was proper based on testimony of witnesses, even though defendant was charged as a principal.

Pugh, Barron Lecour Borden and Torenda Andrea Whitmore were indicted in a multi count indictment for capital murder, aggravated assault and third degree murder. (CP 9). At Pugh's trial, the court gave separate elements instructions and also gave an instruction on aiding and abetting. (CP 187). The granting on the aiding and abetting instruction did not amend Pugh's indictment.

The aiding and abetting instruction given by the trial court was a proper statement of the law. Jury Instruction 4 is identical to the aiding and abetting instruction given in *Milano v. State*, 790 So.2d 179, 185 (Miss. 2001) and approved by the Mississippi Supreme Court. Jury Instruction 4 reads as follows:

> The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by that person through the direction of another person as his or her agent, by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.
>
> If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.
>
> Before any defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.
>
> Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.
>
> In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

(CP 187).

In *Scales v. State*, 289 So.2d 905 (Miss. 1974), the defendant was indicted as a principal to murder. It was the theory of the state in the presentation of its case, that defendant actually fired the fatal shot that killed the victim, but after the defendant testified and denied that he fired the shots, the state then requested, and the court granted an aiding and abetting instruction. From the defendant's testimony and the details of his confessions, it became clear that he agreed to take the blame for killing the victim, and also carried out the preliminary instructions by procuring the gun used in the

killing and by placing it where it would be accessible to the slayer, the victim's wife. On appeal the Supreme Court held the trial court properly instructed the jury on conviction as an aider and abettor even though he was indicted as a principal.

In *Brassfield v. State* 905 So.2d 754 (Miss. App. 2004), this Court held the giving of a jury instruction on aiding and abetting was warranted, even though the defendant was not indicted for aiding and abetting, but rather for carjacking, kidnaping, and armed robbery. Evidence was presented at trial creating doubt as to whether the defendant actually completed the crimes himself, and the aiding and abetting charge served to remind jury that they could render guilty verdict regardless of who completed actual crimes.

In *Hollins v. State*, 799 So.2d 118, 123(¶ 14) (Miss. App. 2001), this Court held that an aiding and abetting instruction was proper where the evidence showed the defendant, Hollins, was present and assisted others in the commission of the drug sale. Even though aiding and abetting was not officially part of Hollins' indictment, this Court found no error in the trial court's granting an aiding and abetting instruction because the evidence presented clearly supported such an instruction.

The purpose of an indictment is to satisfy the constitutional requirement that a "defendant be informed of the nature and cause of the accusation." U.S. Const. amend. VI; Miss. Const. art. 3, § 26. See also URCCC. 7.06 (Indictment must include a "plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation."). *Taylor v. State* 2011 WL 1549239, 3 (Miss. App.) (Miss.App. 2011). In the case *sub judice,* Pugh's indictment did just that, it placed him on notice of the charges against him and the facts underlying such charges. There was ample evidence presented from which the jury could find Pugh aided and abetted in the murder, aggravated assault and arson. The aiding and abetting instruction given was a proper statement of the law. As such, there is no merit to this

allegation of error and no relief should be granted.

PROPOSITION II: The State presented sufficient evidence to convict Pugh of third degree arson.

In his second assignment of error, Pugh claims the State failed to present sufficient evidence that the value of the vehicle was $25.00. When reviewing a challenge to the sufficiency of the evidence, "the critical inquiry is whether the evidence shows 'beyond a reasonable doubt that accused committed the act charged, and that he did so under such circumstances that every element of the offense existed; and where the evidence fails to meet this test it is insufficient to meet a conviction." Miss. Code Ann. Section 97-17-7 (Rev. 2006) sets out the felony of third degree arson.

> Any person who wilfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any personal property of whatever class or character; (sic) (such property being of the value of twenty - five dollars and the property of another person), shall be guilty of arson in the third degree and upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than three years.

When there is a question whether the evidence was sufficient to support the verdict, the State is given "the benefit of all favorable inferences that may reasonably be drawn from objective facts established by the evidence." *Irby v. State* 49 So.3d 94, 103 (Miss. 2010) (quoting *Edwards v. State*, 469 So.2d 68, 70 (Miss.1985) (citing *Glass v. State*, 278 So.2d 384, 386 (Miss.1973)). The basis of Pugh's argument is that the State failed to provide any evidence regarding the value of the item that was burned. According to section 97–17–7 of the Mississippi Code Annotated (Rev.2006), a person can only be found guilty of third-degree arson if he burns property worth at least $25. The State provided over a dozen photographs of the SUV that were admitted into evidence. While there was no appraisal of the vehicle offered at trial, Mogilles identified the Sequoia SUV in the photographs as being his. Mogilles also testified that prior to the crime in question, "My vehicle was pretty much

flawless." (T. 589). Based on the photographs of the SUV admitted, and Mogilles's testimony about the condition of the vehicle, the jury could have reasonably concluded that the Toyota Sequoia SUV was worth at least $25.

Given the nature of the property before it was set on fire, an obviously working Toyota Sequoia Sports Utility Vehicle in flawless condition, the jury could have reasonably and properly inferred that the value of the vehicle at the time it was burned was $25 or more. The evidence is such that, giving the State the benefit of all reasonable inferences therefrom, reasonable jurors could find that each element of the crime was proved beyond a reasonable doubt. See *Jackson v. State* 2011 WL 692916, 11 (Miss. App.) (Miss.App. 2011); *Stevens v. State*, 808 So.2d 908, 922 (Miss. 2002). This issue is without merit.

PROPOSITION III: Pugh's speedy trial right under the United States Constitution was not violated by a 481 day delay.

The Sixth Amendment to the United States Constitution provides an accused "the right to a speedy and public trial...." U.S. Const. amend. VI. That right applies to the states through the Due Process Clause of the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 222–23, 87 S.Ct. 988, 993–94, 18 L.Ed.2d 1 (1967). The Supreme Court of the United States has set forth four factors to consider whenever a defendant alleges that his constitutional right to a speedy trial has been violated: (1) the length of delay; (2) the reason for the delay; (3) whether the defendant asserted his right; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). None of these four factors is necessary or sufficient on its own to find a deprivation of the right to a speedy trial. Id. at 533, 92 S.Ct. 2182. All are related and must be considered alongside other relevant circumstances. Id. The analysis thus entails "a difficult and sensitive balancing process." Id.

Length of the delay.

A full Barker analysis is warranted only if the delay was presumptively prejudicial. *Stark v. State*, 911 So.2d 447, 450 (Miss.2005) (citing *Barker,* 407 U.S. at 530, 92 S.Ct. 2182). In Mississippi, a delay of more than eight months is presumptively prejudicial. *Stark,* 911 So.2d at 450 (citing *Smith* v. State, 550 So.2d 406, 408 (Miss.1989)).

A formal indictment, information or arrest, whichever occurs first, triggers the constitutional right to a speedy trial. *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, 30 L.Ed.2d 468 (1971); *Smith*, 550 So.2d at 408 (citing *Perry v. State*, 419 So.2d 194, 198 (Miss.1982)). Therefore, Pugh's constitutional right to a speedy trial attached when he was arrested on October 8, 2008. In this case, more than eight months elapsed between Pugh's arrest and his state trial. Therefore, the length of the delay is presumptively prejudicial and the remaining *Barker* factors must be considered.

Reason for the delay.

The second factor considers the reason for the delay. *Barker*, 407 U.S. at 530–32, 92 S.Ct. 2182. Once the delay is found presumptively prejudicial, "the burden of proof shifts to the State to show cause for the delay." Id. at (¶ 11) (citing *Price v. State*, 898 So.2d 641, 647 (¶ 10) (Miss.2005)). Not all reasons for a delay in trial are cause for dismissal of the charge on the speedy-trial grounds. Different reasons for the delay are given different weights. *Birkley v. State*, 750 So.2d 1245, 1250 (¶ 16) (Miss.1999) (citing *Barker*, 407 U.S. at 531, 92 S.Ct. 2182). If the State deliberately attempts to delay the trial in order to hamper the defense, it should be weighed against the State. Neutral reasons for delay such "as negligence or overcrowded dockets" are weighed less heavily against the State, but will be considered. *Bonds v. State*, 938 So.2d 352, 357 (¶ 11) (Miss.Ct.App.2006) (citing *Barker*, 407 U.S. at 531, 92 S.Ct. 2182).

In the instant case, delay was attributed to several reasons, none of which could be weighed

heavily against the State. Reasons given were there was the federal investigation and prosecution. Pugh was arrested by state authorities on October 8, 2008. He was arrested by federal authorities on October 14, 2008, and was indicted on federal charges related to the incident at issue here on November 6, 2008. On May 15, 2009, Pugh was convicted in federal court. After receiving the federal trial transcript, the State quickly presented the case to the grand jury on August 20th, 2009. The State indicted Pugh on September 10, 2009 and arraigned him on October 6, 2009. His trial date was originally set for February 1, 2010. On February 1, 2010, the trial court entered an order continuing the case until April 12, 2010 having been advised that defense counsel needed additional time to prepare for a death penalty case and numerous pre-trial motions needed to be heard. (CP 111). On March 12, 2010, defense counsel filed a motion for continuance for additional time to conduct a thorough and complete mitigation investigation. (CP 146). Trial was then set for July 26, 2010, (CP 149). On June 25, 2010, defense counsel made an *ore tenus* motion for a continuance waiving all constitutional and statutory rights to a speedy trial; the trial court continued the trial from July 26, 2010 to October 18, 2010.(CP 151). 481 days past from his arrest on October 8, 2008 to the order of continuance on February 1, 2010.

Here, the first delay, from October 14, 2008 until May 15, 2009, was caused by the federal investigation and prosecution. Therefore, this delay was for good cause and should not weigh against the State. Pugh waived all constitutional and statutory rights to a speedy trial when the defense was granted a continuance. Although two years elapsed from Pugh's arrest on state charges until his trial in the Circuit Court of Jackson County, this factor does not weigh strongly in favor of either Pugh or the State.

Assertion of the right.

Pugh first asserted his right to a speedy trial on October 5th, 2009 in his motion for discovery.

(CP 12,13). An accused has no duty to bring himself to trial. *Jaco v. State*, 574 So.2d 625, 632 (Miss.1990) (citing *Barker,* 407 U.S. at 527, 92 S.Ct. 2182). But he does have some responsibility to assert his right to a speedy trial. *Barker,* 407 U.S. at 528–29, 92 S.Ct. 2182. However, as previously argued, several continuances were granted at the request of defense counsel thereby waiving Pugh's constitutional and statutory rights to a speedy trial. This Court held in *Summers v. State* 914 So.2d 245, (Miss. App. 2005) "The United States Supreme Court has previously stated that such a waiver may occur if there is a "showing of record that the defendant or his attorney freely acquiesced in a trial date beyond the speedy trial period." *New York v. Hill*, 528 U.S. 110, 114, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000). Further, the court stated " '[a]lthough there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has-and must have-full authority to manage the conduct of the trial.' " Id. at 114-15, 120 S.Ct. 659 (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988))." Id. at 254. As such, defense counsel was responsible for aspects of timing with Pugh's trial, and Pugh's right to contest an alleged speedy trial violation was fully waived by defense counsel's requested and subsequently granted continuances. This factor does not weigh strongly in favor of either Pugh or the State.

Prejudice to the defendant.

Pugh does not bear the burden of proving actual prejudice in this case. "[W]hen the length of delay is presumptively prejudicial, the burden of persuasion is on the State to show that the delay did not prejudice the defendant. *State v. Ferguson*, 576 So.2d 1252, 1254 (Miss.1991). However, if the defendant fails to make a showing of actual prejudice to his defense, this prong of the balancing test cannot weigh heavily in his favor. *Polk v. State*, 612 So.2d 381, 387 (Miss.1992)."*Stevens v. State,* 808 So.2d 908, 917 -918 (Miss.,2002). The Supreme Court explained in *Duplantis v. State,* 708

So.2d 1327 (Miss.1998) that prejudice to the defendant may manifest itself in two ways. First, the defendant may suffer because of the restraints to his liberty, whether it be the loss of his physical freedom, loss of a job, loss of friends or family, damage to his reputation, or anxiety. Second, the delay may actually impair the accused's ability to defend himself. Id. at 1336.

Pugh did not suffer unreasonable restraints to his liberty as a result of the delay. On October 14, 2008, a week following his arrest on state charges, the federal government arrested Pugh, effectively placing Pugh in the custody of the federal authorities. On May 12, 2009, Pugh was convicted on the federal kidnaping charges and received two life sentences in federal prison. The State submits Pugh had been, in effect, a federal prisoner since October 14, 2008. "[A] defendant cannot complain of restrictions on his liberty interests which occur during the time in which he was serving another sentence." *Id.* at 1336.

Pugh contends on appeal that the delay of knowing whether he would face the death penalty caused him anxiety. While the Supreme Court has never stated that such concern and anxiety are to be dismissed without consideration, it has held that "anxiety alone does not amount to prejudice worthy of reversal." *Stevens.* 808 So.2d at 918 (quoting *Kolberg v. State*, 704 So.2d 1307, 1319 (Miss.1997).

The delay did not actually impair Pugh's ability to defend himself. The *Barker* court stated that the possibility that the defense will be impaired is the most important of the interests named above. *Barker*, 407 U.S. at 532, 92 S.Ct. at 2182. On appeal, Pugh does not claim that because of the delay witnesses scheduled to testify for the defense disappeared or that any evidence was lost or destroyed or any actual prejudice was incurred. There is no showing of Pugh being prejudiced to an extent that he could not defend against the charge, nor is there any indication that the State engaged in oppressive conduct.

Considering Pugh's failure to allege any impairment to his defense and the fact that all of Pugh's incarceration, with the exception of one week, could be attributed to his federal charges and conviction, this factor weighs in favor of the State. Upon examination of the *Barker* factors and in consideration of the totality of the circumstances, the balance in this case supports the State's contention that Pugh was not denied his constitutional right to a speedy trial. The trial court did not abuse its discretion in rejecting Pugh's motion to dismiss. Accordingly, this assignment of error is without merit.

PROPOSITION IV: The trial court did not misapply the inevitable discovery doctrine.

Pugh contends the trial court misapplied the inevitable discovery doctrine when it allowed the murder weapon, cells phones and keys located in the area of the crime scene to be admitted into evidence. The gun used to murder McCoy and shoot Mogilles was found approximately 200 feet from where the SUV was stopped and the cell phones and SUV keys were found approximately 50 feet from the SUV. (Tr. 742-46). The trial court, on motion of the defense, suppressed statements Pugh gave to officers on October 10th and October 11th as being involuntary. (C.P. 169-74). Pugh argued the evidence was also inadmissible as "fruit of the poisonous tree." However, the trial court ruled the evidence admissible under the inevitable discovery doctrine. (T. 434-36).

According to Pascagoula Police Officer Joseph Nicholson with the FBI Safe Streets Task Force, four to five separate agencies were involved in searching four different locations and interviewing witnesses or suspects. An ATF search team with dogs trained to detect powder residue from a gun, planned on coming to search the area each day until the Sheriff's Department "called and told them they didn't have to come back." (T. 424). According to Nicholson they would have eventually found the gun, cell phones and keys. In addition to the gun being evidence in a murder, there was also a public safety issue with children traveling the area and finding a loaded gun. (T. 421;

426). In conducting a search, they start with what is logical, it they believed the defendants stayed on the same side of the road, then they would start their search on that side and focus the most manpower at that location. If they didn't find the gun in an area then they would expand their search.

On October 11th Pugh was at the crime scene on Larue Road with officers showing them the path he and Borden took after fleeing the burning SUV. At the suppression hearing, FBI Agent Lorrain testified:

> as we were walking through the woods, I was kind of asking [Pugh], you know, which direction to look in or which direction did [Pugh and Borden] run in, and [Pugh] was telling me to his best of his knowledge where they had went.

(Tr. 429)

According to Agent Lorrain he had every intention of going to the crime scene at Larue Road and searching for the weapon, or directing someone else to search.

> [F]inding the gun was paramount in our minds of something that we needed to do. And, you know, we knew the location where the incident had taken place and we knew the location where Eddie Pugh and Barron Borden had been arrested, so we knew that it was somewhere from point A to point B. We just didn't know the exact spot.

(Tr. 430).

. . . .

> The .... sheriff's department deputies, the ATF agents, the FBI Safe Streets Task Force people. And we weren't all bunched up in one particular area. Basically, we kind of fanned out and was kind of walking the general area, because Eddie couldn't tell us exactly where he, where the gun was thrown. He wasn't even so specific where he could say, we definitely went in the woods here and, you know, this location right here. He was just trying to remember generally about where they were at. And then once we got in the woods, we doubled back a few times, kind of looking, because he wasn't specific about where they were at. He was just trying to recollect the direction they were going, so we kind of all spanned out and was looking in all different areas, just hoping to come across the gun.

(Tr. 433).

The evidence is admissible under the inevitable discovery doctrine as outlined by the Supreme

Court in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). Where evidence obtained by illegal means would ultimately or inevitably have been discovered by lawful means, the evidence is admissible, regardless of whether the police acted in good faith. Under the so-called "inevitable discovery doctrine. Id. The inevitable discovery exception is grounded on being reasonable.

In order for evidence to be admitted under the inevitable discovery exception, the government must demonstrate (1) a reasonable probability that the evidence would have been discovered by lawful means but for the police misconduct; (2) that the police possessed the leads making the discovery inevitable at the time of the misconduct; and (3) that the police were actively pursuing the alternate line of investigation prior to the misconduct. Id.; *United States v. Cherry*, 759 F.2d 1196, 1204 (5th Cir.1985).

By a preponderance of the evidence the State showed that given the numerous state and federal agencies searching the area of the crime scene surrounding Larue Road, the police would have inevitably discovered the gun, keys and cell phones. Prior to October 11th, the police had already commenced a search of the area with manpower from four different agencies, ATF dogs and a dive team. As previously stated, Officer Nicholson and FBI Agent Lorrain both testified they would not have ended the search until they found the murder weapon. Clearly, with the on-going methodical search as described by Lorrain, the evidence would have eventually been discovered, regardless of whether Pugh had been taken to the scene and told authorities the area where he and Borden ran. The officers wanted the gun for evidentiary purposes in the criminal prosecution and also for public safety, they would have continued looking for the gun until they found it. The "necessity" of finding the weapon would have led to police searching the area until the weapon was eventually located. This issue lacks merit.

PROPOSITION V: The trial court did not err in denying Pugh's motion to suppress evidence based on a violation of Uniform Rule of Circuit and County Court Practice 6.03.

Pugh also argues the State's violation of Uniform Rule of Circuit and County Court Practice 6.03 warrants suppressing the gun, cell phones and keys. Rule 6.03 provides that persons in custody shall be taken without unnecessary delay and within forty-eight hours of arrest before a judicial officer or another authorized person for an initial appearance. At the initial appearance, the judicial officer or other authorized person shall, among other tasks, advise the accused of his rights, amend the formal charge if necessary, inform the defendant of the formal charge, and ascertain that probable cause existed for an arrest made without a warrant. URCCC 6.03

In the case at hand, the trial court ruled Pugh's statements on October 9, 10 and the 11th were inadmissible. Pugh contends if Rule 6.03 had been followed, Pugh would have been afforded an attorney and in turn would not have led officers to the evidence. (Appellant's brief p.24).

The State's alleged violation of Rule 6.03 does not warrant suppression of all evidence obtained as a result of the violation. Under the inevitable discovery doctrine, as discussed in the previous issue, the evidence was admissible. *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984).

Failure to provide an initial appearance within 48 hours is not, in itself, a reason to suppress a confession, much less to dismiss a case. See *Stewart vs. State*, 881So.2d 919 (Miss. App. 2004). At the suppression hearing, the trial judge ruled did not find a violation of Rule 6.03:

> What I'm hearing, an individual with a lengthy criminal history is on probation from another state, in custody under questionable circumstances, and certainly no formal charges being filed, whether Rule 6.03 in fact has been violated is in serious doubt, and I do not understand any remedy for a 6.03 violation to be a dismissal, complete dismissal. So, for that reason, at this time I will deny your Motion to Dismiss in regard to the request to dismiss as a result of the violation of Rule 6.03, at this point in time. I'm not entirely satisfied that Rule 6.03 has been violated. What I've been informed, what I've heard here, the situation involving

nonresidents of the State of Mississippi apparently traveling to Mississippi, having circumstances obviously first encountered by law enforcement of such a nature as a number of individuals involved, rendering the proper procedure to be somewhat in doubt, I mean, you know, given the circumstances of law enforcement's involvement, a defendant who is on probation from another state. (Tr. 63, 64).

Pugh relies on *Abram v. State*, 606 So.2d 1015, 1029 (Miss.1992), where the Supreme Court found reversible error in part due to failure to provide an initial appearance according to Rule 6.03. In *Abram*, the Supreme Court found that the confession was coerced, and that the State would not have obtained the uncounseled confession if the defendant had been provided a timely initial appearance and access to counsel. *Abram*, 606 So.2d at 1029. However, in *Abram*, the defendant's conviction relied solely upon his confession. In contrast to *Abram*, Pugh's conviction did not rely solely upon admission of the weapon, cell phones and keys. In fact, there was overwhelming evidence of Pugh's guilt. Two eye witnesses, the physical evidence found in the SUV, the burns on his arms, in addition to the DNA evidence found at Larue Road and at his house in New Orleans prove beyond a reasonable doubt that Pugh was in fact guilty of arson, aggravated assault and capital murder.

However, should this Court find error in the admission of the evidence, the State contends that such error was harmless. Without admitting error, the State contends that "In order for a violation of a constitutional right to be held harmless, this Court must determine that the violation was harmless beyond a reasonable doubt." *Haynes v. State*, 934 So.2d 983 (Miss. 2006) (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). "Similarly, our supreme court has held 'errors involving a violation of an accused's constitutional rights may be deemed harmless beyond a reasonable doubt where the weight of the evidence against the accused is overwhelming.' " Id. (quoting *Clark v. State*, 891 So.2d 136, 142(¶ 29) (Miss.2004)). The Supreme Court recently stated the basic, harmless-error test in instances of constitutional error is " 'whether it appears

'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Brown v. State*, 995 So.2d 698, 704 (Miss. 2008) (quoting *Thomas v. State*, 711 So.2d 867, 872 (Miss.1998))." *Goforth v. State* 2011 WL 4089967, 11(Miss. 2011). As previously stated, the overwhelming weight of the evidence supports Pugh's conviction.

PROPOSITION VI: The trial court did not commit reversible or harmless error, therefore, no cumulative error deprived Pugh of his fundamental right to a fair trial.

The State combines it response to Pugh's last two issues. The issues raised by Pugh on appeal do not show the trial court committed any reversible error, or harmless error. However, the State respectfully submits the trial court did not err.

In Pugh's final issue he argues that he is entitled to have his conviction reversed and rendered or remanded for a new trial because the cumulative effect of the trial court's errors he has raised warrants such a holding. Individual errors, not reversible in themselves, may combine with other errors to make up reversible error. *Wilburn v. State*, 608 So.2d 702, 705 (Miss.1992). However, if there are no reversible individual errors, it stands to reason that there can be no cumulative error. *Gibson v. State*, 731 So.2d 1087, 1098(¶ 31) (Miss.1998). The State submits that Pugh's issues were without merit. Therefore, without the finding of error, either harmless or harmful, there can be no finding of error worthy of remand for a new trial in the whole.

CONCLUSION

The State submits that after a careful review of the record in this case this Court will find that Pugh received a fair trial, wherein he was represented by able counsel, the properly admitted evidence upon which he was convicted leaves no room for reasonable doubt that he was guilty of murder, arson and aggravated assault. Based upon these arguments presented herein as supported by

the rulings of the trial court and record on appeal, the State would ask this reviewing Court to affirm the jury's verdict.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: Lisa L. Blount

LISA L. BLOUNT
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR N[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, Lisa L. Blount, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Dale Harkey
Circuit Court Judge
Post Office Box 998
Pascagoula, MS 39568-1959

Honorable Anthony Lawrence
District Attorney
Post Office Box 1756
Pascagoula, MS 39568-1756

Justin T. Cook, Esquire
MS Office of the State Public Defender
Indigent Appeals Division
P.O. Box 3510
Jackson, MS 39207-351

This the 23rd day of September, 2011.

Lisa L. Blount
LISA L. BLOUNT
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680