

perfected his out-of-time appeal from this judgment to argue, first, that his conviction was based upon evidence which the State obtained in violation of his Sixth Amendment right against unreasonable search and, second, that he was denied his right to a constitutional speedy trial. Nevertheless, this Court affirms the trial court's judgment and sentence.

I. FACTS

In October 1988, Sam Owens, an agent for twelve years with the Mississippi Bureau of Narcotics (MBN), had twice purchased cocaine from Jerome Shaw. In the morning of December 17, 1988, Agent Owens picked up Shaw from whom he intended to purchase cocaine for a third time. Shaw directed Owens to a house at 500 Vicki Drive where his supplier lived. Agent Owens gave Shaw \$2000 in state funds with which to purchase the cocaine, left him near the house at 500 Vicki Drive, and drove away. Shaw entered the residence but shortly re-emerged without any cocaine. Agent Owens met Shaw down the street.

Mississippi Highway Patrol Major Philip M. Ladner, a twenty-three-year veteran with the patrol, was conducting surveillance from a vehicle parked in the St. Martin School yard approximately two-hundred to two-hundred-fifty feet east-northeast of the house. From his vantage, he saw the entire rear and north side of the house which Shaw had entered. As soon as Shaw departed, Major Ladner saw Nugent exit the sliding-glass door in the back of the house and walk to the air conditioning compressor unit, behind which he knelt. When Nugent stood, he had a small white packet in his hand. Nugent then re-entered the house. Major Ladner videotaped the entire episode.

MBN Agent Owens returned Shaw to the house again. This time, Shaw entered the residence, remained briefly inside, and then exited with a packet which contained approximately one ounce of cocaine. When Agent Owens picked up Shaw for the third time, Shaw informed Owens that he had purchased an ounce of cocaine with the \$2,000 in state funds which Owens had given him for that purpose. Officer Owens drove Shaw to a nearby Fast Lane gas station, where he revealed to an astonished Shaw that he was an undercover narcotics agent and, with the assistance of other officers who were involved in the operation, arrested Shaw.

While Major Ladner and other officers continued to watch the house, Agent Owens proceeded to Justice Court Judge Cecil Montgomery and presented him with an affidavit, to which he had attached the underlying facts and circumstances as an exhibit, to support his request that Judge Montgomery issue a search warrant for the house in which Shaw had just bought the ounce of cocaine. Judge Montgomery then issued a search warrant for the house located at 500 Vicki Drive.

Officer Owens and several other policemen and narcotics agents promptly returned to the house, where they executed the search warrant after they had served a copy of it on the appellant, Desmond Nugent. Nugent was alone in the house when the officers arrived to search it. Inside the house, Agent Owens and his associates found drug paraphernalia and recovered the \$2000 in state funds from the bottom of a dresser drawer in one of the bedrooms. Outside, the officers removed some dirt and grass from the space between the brick wall of the house and the air-conditioning compressor unit and discovered two small glass containers and a plastic bag which later proved to contain approximately ten ounces of cocaine. Agent Owens immediately arrested Nugent for the possession and sale of cocaine.

II. REVIEW, ANALYSIS, AND RESOLUTION OF THE ISSUES

Because Nugent challenges neither the sufficiency nor the weight of the evidence in this appeal, we proceed directly to our review, analysis, and resolution of his two issues, during which we will recite such additional facts, events, and testimony from the trial as are necessary to understand the basis for Nugent's two issues. We recite the two issues verbatim from Nugent's brief:

1. Should the indictment and conviction of Nugent, based as they were primarily upon incompetent evidence the product of a search and seizure authorized pursuant to an affidavit and search warrant not in evidence, and not subject to judicial scrutiny, be reversed and remanded for a new trial?

2. Should the ruling of the trial court denying Nugent's request for relief upon federal speedy trial grounds be reversed, and the case remanded, for findings of fact and conclusions of law in accordance with previous Mississippi authority applying speedy trial principles, and in the face of pretrial incarceration found, by precedent, to be excessive for Sixth Amendment purposes?

A. ADMISSION OF EVIDENCE FROM SEARCH AND SEIZURE

Nugent argues that his conviction should be overturned on the ground that the evidence upon which his conviction was based was derived from an affidavit for search warrant, underlying facts and circumstances, and a search warrant never placed into evidence. He argues, "Their absence prevents this court, as surely as it did the trial court, from measuring the evidence by the proper legal standards," and he cites *Carney v. State*, 525 So. 2d 776, 783 (Miss. 1988), to support that proposition.

However, on April 10 and 11, 1989, the trial court heard Nugent's motion to suppress all the evidence which the State had obtained by its search of the house located at 500 Vicki Drive. During this hearing on Nugent's motion to suppress, the State introduced into evidence a certified copy of the affidavit for search warrant and the underlying facts and circumstances and a certified copy of the search warrant and its return. To demonstrate that these documents were introduced into evidence, we have attached to this opinion an annex which consists of copies of (1) affidavit for search warrant executed by Samuel W. Adams before Justice Court Judge Cecil Montgomery at 12:22 p.m. on December 16, 1987, to which a photograph of the house was attached⁽¹⁾ (2) underlying facts and circumstances, (3) the search warrant which Justice Court Judge Cecil Montgomery issued contemporaneously with his execution of the affidavit for search warrant and one which Agent Owens completed his return under oath. The return includes "(2) glass bottles containing a white powder," "(1) plastic container containing a white powder," and "\$2,000 in official state funds."

During the hearing on Nugent's motion to suppress, Agent Owens testified that after he had arrested Jerome Shaw, Owens proceeded to the Justice Court in Biloxi, Mississippi, where he not only presented Justice Court Judge Cecil Montgomery with the affidavit for search warrant but also testified under oath to the underlying facts and circumstances which were attached to the affidavit. Owens also testified that he apprised Judge Montgomery of MHP Major Ladner's observation of the man who had recovered something white from behind the air-conditioning compressor located at the

rear of the house. Owens explained that he received this information from the officers who were involved in the surveillance of the house via radio transmission while he was in route to the office of the Justice Court of Harrison County.

The State also called Judge Cecil Montgomery, who testified that he had sworn Agent Owens before he questioned him about the underlying facts and circumstances which Owens maintained supported the judge's issuance of the search warrant. Judge Montgomery further explained that he never issued either an arrest warrant or a search warrant "until they took the oath" because he "didn't want to come up to circuit court . . . to testify in them [sic] cases [unless he] knew it was done properly." Judge Montgomery's testimony also established the procedure he used for issuing search warrants. The justice court judge also testified about the information relayed to him by Agent Owens upon which he decided to issue a search warrant for 500 Vicki Drive.

Moreover, Nugent's attorney at trial made sure that the affidavit for search warrant with the underlying facts and circumstances were admitted into evidence at Nugent's trial. The record reflects such, as follows:

MR. STEGALL: Judge, I believe that what I have here is [sic] copies of the things that were offered in evidence at the time of a prior hearing on motion to suppress and in that there is an affidavit for search warrants with underlying facts and circumstances marked 12, State's Exhibit 12 E and I assume that was in evidence at that time. If not, I'd like another copy of it made a part of the record for this hearing.

THE COURT: I don't even know what you're talking about.

MR. STEGALL: The affidavit for search warrant and the underlying facts and circumstances, I assume that it was in evidence at that time; if not, I would like to offer it at this point in time.

THE COURT: All right. You may do so.

The entire thrust of Nugent's argument on this issue is the State's alleged failure to introduce into evidence the documentation which authorized Agent Owens and his associates to search the house located at 500 Vicki Drive. For example, he cites *Boyd v. State*, 164 Miss. 613, 145 So. 618, 619 (1933) (holding that the affidavit and search warrant must be produced before evidence is received if objection is made to the evidence on that ground) and *Cuevas v. City of Gulfport*, 134 Miss. 644, 646, 99 So. 503, 504 (1924) (holding that evidence obtained by a search warrant cannot be admitted over the objection of the defendant until the affidavit for a search warrant and search warrant are produced in court, or their loss or destruction shown). Nugent does not argue that there was no probable cause for the issuance of the search warrant, that the premises to be searched was not adequately described, or that the issuance of the warrant was otherwise constitutionally or procedurally flawed. Indeed, the evidence which the State adduced during Nugent's motion to suppress, including the introduction of the affidavit for the search warrant, the underlying facts and circumstances, and the search warrant with its return, more than satisfies this Court that Nugent's first issue has no merit, and we affirm the trial court's denial of the appellant's motion to suppress.

B. CONSTITUTIONAL SPEEDY TRIAL

Nugent's second allegation of error was that he was denied a speedy trial to which the Sixth Amendment to the United States Constitution guarantees him. Although Nugent does not specifically invoke it, Section 26 of the Mississippi Constitution affords the same guarantee.⁽²⁾ Neither does Nugent invoke Section 99-17-1 of the Mississippi Code of 1972 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. 1994).**

1. Facts Pertaining to Speedy Trial Issue

Agent Owens arrested Nugent on December 16, 1987, and the Harrison County grand jury originally indicted Nugent on June 29, 1988. Nugent filed a motion for a speedy trial pro se on September 30, 1988. Although the record does not contain a motion to quash the indictment, there are indications in the record that in October 1988, Nugent's counsel proposed to move to quash the original indictment which the grand jury had returned against him on June 29, 1988, because no order to recall that grand jury had been entered. Rather than opposing this motion, the State chose to re-indict Nugent on the same charge on October 25, 1988. On October 26, 1988, Nugent waived the formal reading of the new indictment and entered his plea of "Not guilty" to the charge of possession of cocaine with intent to deliver as contained in the new indictment. The next day, October 27, 1988, the State moved for an order of nolle prosequi on the old indictment returned on June 29, 1988, which the trial court apparently sustained.

In response to the State's request that it set a trial date for the new indictment, the trial court set the matter for trial on December 5, 1988, behind a civil case already set for trial. However, the civil case lasted two days longer than planned. For whatever reason -- and the record reflects appreciable confusion about this reason -- Nugent's counsel did not appear after the trial of the civil case had ended to argue the motions to suppress and to dismiss for failure to provide a speedy trial. As a result, on December 13, 1988, the circuit judge ordered a continuance of the case. In its order, the judge recited that the State had "announced ready for motions and trial . . . and the [a]ttorney for the [d]efendant . . . and the [d]efendant having been on standby because of the court docket, and the Court having been informed that [defendant's counsel] had a conflict with the trial date and would be in Hattiesburg, Mississippi, on December 7th through December 9, 1988" Later, the case was scheduled to be heard on April 10, 1989.

On April 10, 1989, the parties appeared before the trial judge, and Nugent's counsel presented several pretrial motions, including his motion to dismiss for failure to grant a speedy trial and his motion to suppress, for the trial judge's adjudication. Nugent's first motion was for the court to order that the State provide a sample of the alleged cocaine for an independent laboratory to analyze to determine whether the substance was indeed cocaine. The trial judge granted that motion by an order dated April 11, 1989, and recorded among the clerk's papers in this case.

More than two months later, on June 16, 1989, the circuit court ordered that Nugent's counsel, Jimmy McGuire, be allowed to withdraw as Nugent's counsel of record. One week later on June 23, the circuit court entered a judgment nisi against Nugent and his bail bond surety, Biloxi Bonding Company. Four days later, the circuit court on its own motion entered an order which revoked Nugent's bond because of Nugent's failure "to appear at a previous Court hearing." On July 12,

Nugent's ultimate trial counsel, Earl B. Stegall, filed a motion to reinstate bond, pursuant to which the circuit judge who tried this case entered an order on July 28, 1989, by which he reinstated Nugent's bond and reduced its amount to \$25,000. Nugent's trial began on January 16, 1990, and concluded the next day with the jury's finding Nugent guilty of possession of cocaine with intent to deliver.

2. Discussion of Law

Both the Sixth and Fourteenth Amendments of the United States Constitution and Article 3, Section 26 of the Mississippi Constitution assure the criminally accused a speedy trial. *Skaggs v. State*, **676 So. 2d 897, 900 (Miss. 1996)**. This right attaches when the defendant is effectively accused of the crime, *Skaggs*, **676 So. 2d at 900**, and exists separate and apart from the right to a speedy trial guaranteed by Section 99-17-1. *Simmons v. State*, **678 So. 2d 683, 686 (Miss. 1996)**; **Miss. Code Ann. § 99-17-1 (Rev. 1994)**. Where a defendant asserts that his constitutionally protected right to a speedy trial has been infringed, the Court analyzes the facts and circumstances of his case under the four-factor balancing test established by the United States Supreme Court in *Barker v. Wingo*, **407 U.S. 514 (1972)**. *Skaggs*, **676 So. 2d at 900**; *Simmons*, **678 So. 2d at 686**.

"The four *Barker* factors are: 1) length of delay; 2) reason for delay; 3) defendant's assertion of the right to a speedy trial, and 4) prejudice to the defendant by the delay." *Skaggs*, **676 So. 2d at 900**. Under the Court's examination, no solitary factor is controlling. *Id.* Instead, "[t]he weight given each [factor] necessarily turns on the facts and circumstances of each case, the quality of evidence available on each factor, and, in the absence of evidence, identification of the party with the risk of nonpersuasion." *Id. See, e.g., Beavers v. State*, **498 So. 2d 788, 790 (Miss. 1986)**, *impliedly overruled on other grounds by State v. Ferguson*, **576 So. 2d 1252, 1255 (Miss. 1991)**. The Court is not strictly limited to the *Barker* factors, *State v. Magnusen*, **646 So. 2d 1275, 1278 (Miss. 1994)**, and must consider the "totality of the circumstances." *Beavers*, **498 So. 2d at 790**. Ultimately, appeals based upon allegations of violations of the right to a speedy trial are decided on a case by case basis. *McGhee v. State*, **657 So. 2d 799, 804 (Miss. 1995)**.

The circuit court denied Nugent's motion requesting a dismissal for lack of a constitutional speedy trial without articulating any findings of fact on the *Barker* factors. Therefore, this Court reviews de novo the facts and circumstances of the case *sub judice* in light of the four *Barker* factors. *State v. Ferguson*, **576 So. 2d 1252, 1255 (Miss. 1991)**.

a. Length of Delay

The right to a constitutional speedy trial attaches when the defendant is accused of a crime. *Skaggs*, **676 So. 2d at 900**. In the case *sub judice*, Nugent's right to a constitutional speedy trial attached when he was arrested on December 16, 1987. *Id.*; *Simmons*, **678 So. 2d at 686**. It is from Nugent's date of arrest that this Court must determine whether the State has violated Nugent's right to a speedy trial. The Mississippi Supreme Court has held that prejudice is presumed where there has been a delay of eight months or more between the date the right to a speedy trial attached and the date of the trial. *Simmons*, **678 So. 2d at 686**. However, this singular factor is not enough to warrant reversal of the defendant's conviction. *McGhee*, **657 So. 2d at 802**. When this presumption of prejudice rises, it triggers the Court's analysis of the other three *Barker* factors. *Skaggs*, **676 So. 2d at 900**. This does not mean that the length of the delay is inconsequential; it is a relevant factor which

increases in importance as the delay lengthens. *Magnusen*, 646 So. 2d at 1280 (quoting *Doggett v. United States*, 505 U.S. 647, 656 (1992)). In the case at hand, Nugent's trial was delayed seven hundred sixty-eight (768) days, well beyond the eight month presumption requirement. As a result, prejudice is presumed, and this Court must now also analyze the remaining *Barker* factors. *See also Skaggs*, 676 So. 2d at 900 (presuming prejudice for delay of five hundred fifty-four days).

b. Reason for Delay

The State is responsible for ensuring that the defendant is provided with a speedy trial as guaranteed by the United States and Mississippi Constitutions. *Skaggs*, 676 So. 2d at 901. Consequently, any delay not caused by the defendant will count against the State except where the State shows good cause existed for the delay. *Id.* It appears to this Court that both the State and Nugent were responsible for portions of the delay of 768 days between Nugent's arrest and his trial.

The first delay in Nugent's trial was the period of time between the date of his arrest, December 16, 1987, and the date of his first indictment, June 29, 1988, a period of 196 days. At the hearing which the trial judge conducted on April 10, 1989, on this issue, an assistant district attorney endeavored to justify this delay on the confusion which resulted in the change of district attorneys which apparently followed the elections in 1987. "It is error to assert that in the absence of intentional delay, the reason for delay does not weigh against the State. Negligence causing delay must also be weighed against the State, albeit not heavily." *Perry v. State*, 637 So. 2d 871, 875 (Miss. 1994). Accordingly, this delay is attributable to the State as it was caused by its negligence.

The second delay occurred between June 29, 1988, the date of the original indictment, and October 25, 1988, the date that another grand jury indicted Nugent for the same offense, a period of 87 days. We have recited that Nugent's re-indictment resulted from his having earlier been indicted by a grand jury which had not formally been re-convened by order of the circuit court. When Nugent's counsel moved to dismiss the original indictment returned June 29, 1988, the State then re-indicted Nugent, and Nugent was re-arraigned on the new indictment. After Nugent had been arraigned on the new indictment, the State then moved to dismiss the original indictment, all of which we have recited.

The record is opaque about the reason for reconvening the grand jury which originally indicted Nugent on June 29, 1988, without the circuit court's having entered an order to reconvene it. Nugent's only response to the State's maneuver of having a new grand jury re-indict him was to waive arraignment on the new indictment and plead "Not guilty" to the charge which it contained. Nugent did not object to the State's motion to nolle prosequi the old indictment. We analyze this delay as we did the first delay by finding that the State was negligent in first presenting the charge to a grand jury which may have been improperly re-convened, but the State cannot bear this responsibility alone. While we weigh this second delay caused by Nugent's re-indictment against the State, we cannot do so heavily because at most the State's act was negligent. Besides, Nugent did not object at the time to the State's maneuver.

The third period of delay occurred between Nugent's waiver of arraignment on the new indictment, October 26, 1988, and the date his case was set for trial, December 5, 1988, a period of approximately one-and-one-half months. This Court finds this period of delay to be neutral because the record contains nothing to demonstrate that the case might earlier have been set for trial but for the State's deliberate delay.

The fourth period of delay was from December 5, 1988, the date the case was first set for trial, and April 10, 1989, the date the case was next set for trial, a period of 126 days. As we previously recited, in its order of continuance which the trial court entered on December 13, 1988, the circuit judge found that the State had announced ready for trial but that because of a conflict in Nugent's counsel's schedule, it was necessary to continue the case "until a new trial date to be set at the mutual convenience of the parties or by [c]ourt order if the parties cannot agree." Where the defendant is responsible for any delay caused, that amount of time is counted against him. *Johnson v. State*, 666 So. 2d 784, 793 (Miss. 1995). Thus, we weigh this fourth period of continuance against Nugent.

The fifth and final period of delay was from April 10, 1989, until January 16, 1990, when Nugent's trial began, a period of 281 days. To be sure, this period may be further subdivided in accordance with our earlier discussion of them. Those events were (1) Nugent's motion for a sample of the white powder which had been retrieved from between the air-conditioning compressor and the wall of the house at 500 Vicki Drive on April 10, (2) the court-approved withdrawal of Nugent's counsel on June 16, 1989, and (3) the judgment nisi against Nugent and his bail bond surety on June 27. The consequence of all of these events could be nothing but additional delay, and since Nugent either initiated or was responsible for their initiation, we must weigh this fifth and final period entirely against Nugent.

Of the five periods of delay which this Court has delineated for its consideration of Nugent's second issue, we have weighed the first and second periods, a total of 283 days, against the State, and we have weighed the fourth and fifth periods, a total of 307 days, against Nugent. We did not calculate the number of days in the third period because we found it to be of neutral value. This Court can only conclude that the responsibility for the delays in this case must be evenly divided between the State and Nugent.

c. Assertion of Right to Speedy Trial

The third *Barker* factor to be considered by the Court is whether the defendant asserted his right to a speedy trial. *Skaggs*, 676 So. 2d at 901. While the predominant responsibility of ensuring that the defendant receives a speedy trial lies with the State and the Court, the defendant is expected to assert his right to a speedy trial. *Simmons*, 678 So. 2d at 686; *Perry*, 637 So. 2d at 875. *See also Spencer v. State*, 592 So. 2d 1382, 1388 (Miss. 1991) (holding that although silence does not waive the right to a speedy trial, this right must be asserted before it can be complained of on appeal). The Court reconciles these seemingly contradictory principles by weighing this factor more heavily in the defendant's favor when he has demanded a speedy trial as opposed to cases where he has not. *Atterberry v. State*, 667 So. 2d 622, 627 (Miss. 1995).

Nugent made more than one demand for a speedy trial. First, he filed a pro se motion for a speedy trial on September 30, 1988. Then, on November 29, 1988, he moved the court to dismiss the charges against him on the grounds that he had been denied a constitutional speedy trial. On April 10, 1989, oral arguments were heard on this motion, and an order denying Nugent's request was filed on January 16, 1990. During the trial upon the merits, his attorney asked the court to reconsider its decision denying Nugent's motion to dismiss for the lack of a constitutional speedy trial. The trial court indulged Nugent and allowed his attorney to reargue his points on the issue. Following his conviction, Nugent filed a motion for a new trial in which he asserted that he was denied a

constitutional speedy trial and perfected his appeal to this Court alleging the same issue. Nugent has properly preserved this argument for the purposes of this appeal. *See McGhee*, 657 So. 2d at 803-4; *Perry*, 637 So. 2d at 875. This third factor weighs in favor of Nugent and against the State.

d. Prejudice to the Defendant

The final factor the Court must consider in the *Barker* balancing test is whether the defendant was prejudiced by the delay of his trial. *Skaggs*, 676 So. 2d at 901. This Court recognizes that a defendant may be prejudiced in two different ways by a substantial delay. *Id.* First, a delay may render the accused's defense more difficult because "evidence may be lost, witnesses may die or become unavailable, and memories may fade." *United States v. Marion*, 404 U.S. 307, 326 (1971) (quoted in *Skaggs*, 676 So. 2d at 901). Secondly, the restraint of his liberty by his incarceration may be harmful and prejudicial to a defendant. *Skaggs*, 676 So. 2d at 901.

[O]ne of the major purposes of the provision (for a constitutional speedy trial) is to guard against inordinate delay between public charge and trial, which, to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320, 92 S. Ct. 455 [463], 30 L. Ed. 2d 468, 478 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial or on bail subject to substantial restrictions on his liberty.

Perry, 637 So. 2d at 876 (quoting *Barker*, 407 U.S. at 537 (White, J., concurring)). Where a defendant claims that his constitutional right to a speedy trial was violated, the Court evaluates this assertion by looking for prejudice in light of the interests that right was created to protect. *Perry*, 637 So. 2d at 876. Thus far, this Court has only recognized three interests as being protected by the constitutional right to a speedy trial: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Id.* (quoting *Barker*, 407 U.S. at 532).

Where prejudice has been presumed due to the length of the delay before trial, the prosecution bears the burden of proving that the defendant suffered no prejudice as a result of the delay. *Ferguson*, 576 So. 2d at 1255. In order to have this factor weighed in its favor, the State must actually demonstrate that the defendant suffered no real prejudice. *Jasso v. State*, 655 So. 2d 30, 35 (Miss. 1995). On the other hand, the Mississippi Supreme Court has also held that where the defendant is unable to show actual prejudice, this factor was weighed in favor of the State. *Magnusen*, 646 So. 2d at 1284. These contradictory holdings are best reconciled by the following:

Since the state bears the risk of non-persuasion, an affirmative demonstration of prejudice is not a necessary element in proving a denial of the constitutional right to a speedy trial. *Moore v. Arizona*, 414 U.S. 25, 26, 94 S. Ct. 188, 189, 38 L. Ed.2d 183 (1973), cited in *Adams*, 583 So.2d at 173 (Robertson, J., dissenting). Nevertheless, a failure on the part of the defendant to show positive prejudice prevents the fourth *Barker* factor from weighing independently against the state. Where the state does not show lack of prejudice, the presumption of prejudice arising under the first *Barker* factor remains unless overcome by the facts and circumstances pertinent

to the other two factors. *See Adams*, 583 So.2d at 170.

Fleming v. State, 604 So. 2d 280, 301 n.7 (Miss. 1992).

This Court deals first with the matter of Nugent's imprisonment between his arrest and his trial. In support of his motion to dismiss because the State had failed to provide him a speedy trial, Nugent testified that he had been in jail since the date of his arrest on December 16, 1987. Yet we noted a judgment nisi which the circuit court entered against him and his bail bond surety on June 27, 1988, because of Nugent's failure to appear at an earlier hearing and the circuit court's order which not only reinstated Nugent's bond following the judgment nisi but also reduced it from the original amount of \$50,000 to \$25,000. This Court cannot perceive the reason for the entry of the judgment nisi and the orders relating to Nugent's bond if he had remained incarcerated continually after his arrest and until his trial as he testified. From the state of the record in this case, we conclude that Nugent has shown no prejudice which resulted from the restraints placed upon his liberty which may have followed his arrest on December 16, 1987.

Nugent also asserts that the delay in his trial directly resulted in his loss of witnesses who were vital to his defense. In *Rhymes v. State*, 638 So. 2d 1270, 1274-5 (Miss. 1994), the defendant also claimed that he suffered prejudice in the form of lost witnesses because of the delay of his trial. The Mississippi Supreme Court, however, disagreed with his assertion of prejudice on the grounds that Rhymes was unable to demonstrate that he lost a witness because of delay and that he had never issued a subpoena for the allegedly lost witness. *Rhymes*, 638 So. 2d at 1274-5. The Court stated that those facts were "fatal to the claim of actual prejudice." *Id.* at 1274.

As did Rhymes, Nugent has failed to persuade this Court that the delay of his trial prejudiced his defense. The State demonstrated that Nugent never issued any subpoenas for any of the witnesses who, he claims, would testify in his behalf. Indeed, the clerk's papers contain no requests by Nugent for the issuance of any subpoenas. Nugent stated that he wanted to call several of the people, including the lessees of the house located at 500 Vicki Drive, who lived with him in the house. During the hearing on the motion to dismiss, Nugent's counsel asked him to identify these witnesses, to which he answered, "Laverne and Jerome Shaw." He further identified two other residents by the names of "Antonio" and "Thamas." When Nugent's counsel inquired, "What efforts have you made in order to locate these people?," Nugent replied, "I didn't make any efforts."

Nugent also asserted that he was unable to contact them because they moved during his lengthy incarceration before his trial. However, according to the testimony of Nancy Williams Skipion, office manager for Williams Realty who had originally leased the house to "Toney and Tina Porter," all the residents of 500 Vicki Drive had vacated the premises by the end of December 1987, only two weeks after Nugent's arrest. It appears to this Court that if Nugent's trial had been held within eight months after his arrest, Nugent still would have been unable to locate and subpoena the witnesses whom the delay in going to trial denied him. Thus, this Court holds that the delay in his trial did not prejudice him by rendering Nugent unable to produce witnesses whose testimony would aid in his defense.

e. Balancing the *Barker* Factors

The Mississippi Supreme Court's holding in *Smith v. State*, 550 So. 2d 406, 408 (Miss. 1989), "that any delay of eight (8) months or longer is presumptively prejudicial," triggers the *Barker* analysis.

See Simmons, 678 So. 2d at 686 (holding that a delay of eight months or longer "triggers" the *Barker* analysis). Accordingly, we found that the second factor, the reason for the delay, must weigh evenly against the State and Nugent; that the third factor, assertion of the right to a speedy trial, must weigh in favor of Nugent; but that the fourth factor, prejudice to Nugent, must weigh against his claim that he had been denied a speedy trial. However, we further hold that while the first and third factors weigh in favor of Nugent, the fourth factor weighs so heavily in favor of the State that we hold that Nugent was not denied his right to a constitutional speedy trial pursuant to the United States Constitution or the Mississippi Constitution and affirm the trial court's denial of Nugent's motion to dismiss the charge against him with prejudice.

III. CONCLUSION

This Court both finds and holds that the affidavit for search warrant, underlying facts and circumstances, and a search warrant were all properly admitted into evidence before the trial court and thus became a part of the record in this case. Therefore, we resolve Nugent's first issue against him because his entire argument on this issue rests on the failure of the record to include this documentation. From our balancing of the four factors in the *Barker* analysis, we resolve Nugent's second issue against him and hold that under the facts and events which are unique to the case *sub judice*, the delay of 768 days between Nugent's arrest and trial did not violate his right to a speedy trial which the Sixth Amendment to the United States Constitution assures the criminally accused. Therefore, this Court affirms the trial court's judgment of Nugent's conviction of the felony of possession of cocaine, a controlled substance, with the intent to deliver and its sentence of Nugent to serve fifteen years in the custody of the Mississippi Department of Corrections.⁽³⁾

THE JUDGMENT OF THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT OF HARRISON COUNTY OF THE APPELLANT'S GUILT OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER AND ITS SENTENCE TO SERVE FIFTEEN YEARS IN THE CUSTODY OF MISSISSIPPI DEPARTMENT OF CORRECTIONS ARE AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO HARRISON COUNTY.

BRIDGES, C.J., McMILLIN P.J., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.

1. The photo of the house had been separated from the certified copy of the affidavit for search warrant when the trial court heard Nugent's motion to suppress; however, during the trial, the State moved to introduce as a separate exhibit another copy of the same photograph, to which Nugent's trial counsel did not object.

2. Section 26 of the Mississippi Constitution provides that "the accused shall have . . . in all prosecutions by indictment or information, a speedy and public trial . . ."

Miss. Const. art. 3, § 26.

3. After the trial court denied Nugent's motion for a new trial on July 10, 1990, Nugent's trial

counsel, who appears to have been employed rather than court-appointed, did not perfect an appeal of Nugent's conviction. On April 23, 1991, Nugent, by then an inmate of the state penitentiary at Parchman, filed motions for leave to proceed with out-of-time appeal, for leave to proceed in forma pauperis, and for appointment of counsel. On July 1, 1991, the trial judge entered an order which granted Nugent's motions. Later, on July 19, 1991, the trial judge appointed Nugent's trial counsel to represent Nugent in his appeal. There followed a series of motions for withdrawal by appointed counsel and orders sustaining these motions, the ultimate result of which was the entry of an order by the trial judge almost three years later on March 29, 1994, which appointed Nugent's present appellate counsel. Hence this delay of more than seven years between Nugent's trial and this Court's review and disposition of Nugent's appeal.