STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP1276-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NELSON GARCIA, JR.,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM S. POCAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUES

1. Did Nelson Garcia's Sixth Amendment right to counsel attach at the *Riverside* hearing?

   The trial court answered no.

   This Court should answer no.

2. Did the trial court err in declining to suppress the evidence from the lineup based on Garcia's claim that the line-up was unduly suggestive?

   The trial court answered no.

   This Court should answer no.

3. Did Garcia forfeit his right to represent himself based on his manipulative and disruptive behavior?

   The trial court answered yes.

   This Court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

Garcia sets forth three arguments for relief: two related to the lineup and one that he was denied his right to self-representation. None of his arguments have merit.

It is well-established that in Wisconsin, the right to counsel attaches when the criminal complaint or an arrest warrant has been filed. Here, neither had occurred when the police conducted the lineup. Therefore, Garcia did not have the right to counsel at the lineup.

In addition, Garcia's lineup was not impermissibly suggestive. Asking the witnesses if they wanted to see the

lineup again and running the entire lineup a second time does not suggest a suspect to the witnesses or make the identification unreliable.

And finally, Garcia's behavior speaks for itself. He was manipulative, argumentative and disruptive. His conduct toward his attorneys successfully delayed the trial for more than three years. His attempt to proceed pro se on the near-eve of trial—after having repeatedly denied that he had any interest in representing himself—was another effort to disrupt the proceedings. Garcia forfeited his right to represent himself.

STATEMENT OF THE CASE

In late December 2011, a man put a handwritten note in front of DL, a teller at an M&I Bank in Milwaukee. (R. 89:56.) The note said that the man was robbing the bank and directed DL to put money into a bag. (R. 89:56.) DL reached into her teller drawer for money and put it into the bag the man gave her. (R. 89:58–60.) After DL returned the bag to the man, the man turned around and left the bank. (R. 1:1.)

Police released video surveillance of the robbery to the media and received several leads identifying the robber, including a lead that pointed to Garcia. (R. 89:30, 35–36.) In early January 2012, officers went to Timothy Ridley's house, where Garcia was staying and arrested him based on probable cause. (R. 90:20–22.) Milwaukee Police Detective Ralph Spano showed Ridley and his girlfriend, Samantha Patek, a photo of the bank robber from the video surveillance. (R. 91:24, 26–29.) Both Ridley and Patek identified Garcia as the robber. (R. 91:28–30.)

Within 48 hours of his arrest, the court found probable cause to believe that Garcia had committed the robbery. (R. 2.) The police then conducted a live lineup to see if DL and another teller from the bank could identify Garcia. (R. 86:54–

65.) After the police ran the lineup once, they asked if the witnesses wanted to see it again and then ran it a second time. (R. 3:4; 86:63–64.) DL positively identified Garcia as the robber. (R. 86:68.) The other teller said that she was not positive that Garcia was the suspect. (R. 86:66.)

The State charged Garcia with robbery of a financial institution and the case proceeded slowly to trial as Garcia cycled through attorneys. (R. 1; 6; 67:3; 69; 73:5; 75; 83; 87.) Garcia moved to suppress the results of the lineup, arguing that his right to counsel had attached at the probable cause proceeding and that the lineup conducted in the absence of counsel violated his Sixth Amendment rights. (R. 17; 26.) He also argued that asking the witnesses if they wanted to see the lineup again and then running it a second time made it impermissibly suggestive. (R. 26.) The court held a hearing on Garcia's motion and concluded that Garcia's right to counsel had not attached before the lineup and the lineup was conducted properly. (R. 86:93–94, 101–103.)

The final pretrial hearing was held in June 2015—more than three years after Garcia's arrest. (R. 87.) At that point, Garcia was represented by his sixth attorney. (R. 87:9.) Many of Garcia's previous lawyers had moved to withdraw from their representation because of Garcia's conduct. (R. 67:3; 69:3; 73:5; 75; 83.) One attorney called Garcia's behavior "the worst" that he had seen in his 30 years of practice. (R. 83:3.) The attorney said that Garcia's behavior was harassing and abusive. (R. 83:3.) The court had previously found that Garcia's treatment of his attorneys was a "clear pattern" that was intended to delay the trial. (R. 87:23.) At the final pretrial, Garcia said that he wanted to proceed pro se (R. 87:7)—a position that he had expressly rejected multiple times before. (R. 75:4; 77:3; 83:5.) The court conducted a colloquy with Garcia to make sure that he understood his right to counsel and the dangers inherent in self-representation. (R. 87:9–14.) But after the colloquy, Garcia

began to argue with the court and displayed behavior that the court found troubling. (R. 87:18–22.) Although the court concluded that Garcia was competent and understood his rights, it ultimately denied Garcia's request because his conduct acted as a forfeiture of his right to represent himself. (R. 87:19–23.)

The case proceeded to trial and a jury found Garcia guilty of robbery of a financial institution. (R. 57.) The court sentenced Garcia to 15 years' initial confinement, to be followed by 10 years' extended supervision. (R. 57.)

Garcia appeals.

ARGUMENT

I. Garcia was not entitled to counsel at the lineup.

A. Standard of review and relevant law.

This case raises the question of when a defendant's Sixth Amendment right to counsel attaches, which is a question of constitutional fact. *State v. Martwick*, 2000 WI 5, ¶ 17, 231 Wis. 2d 801, 604 N.W.2d 552 (stating that a constitutional fact is one that determines constitutional rights). This Court reviews a question of constitutional fact by employing a two-step analysis. *Id.* First, the Court defers to the circuit court's factual findings unless they were clearly erroneous. *Id.* ¶ 18. Second, the Court independently applies constitutional principles to those facts. *Id.*

The Sixth Amendment right to counsel "does not attach until a prosecution is commenced." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). "When a person has not been formally charged with a criminal offense," there is no Sixth Amendment right to counsel at a lineup. *Kirby v. Illinois*, 406 U.S. 682, 691 (1972).

"The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole

system of adversary criminal justice." *Id.* at 689. "For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and the defendant have solidified." *Id.* But "once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). A post-indictment lineup is a "critical stage." *United States v. Wade*, 388 U.S. 218, 235–37 (1967). In fact, "[t]here is no question that a defendant is entitled to the presence of counsel at any live lineup conducted after the initiation of adversary judicial criminal proceedings against him." *McMillian v. State*, 83 Wis. 2d 239, 243, 265 N.W.2d 553 (1978).

The start of adversary judicial criminal proceedings are generally a "formal charge, preliminary hearing, indictment, information, or arraignment." *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 198 (2008). "In Wisconsin, the right to counsel arises after the State initiates adversarial proceedings by the filing of a criminal complaint or the issuance of a warrant." *State v. Anson*, 2002 WI App 270, ¶ 11, 258 Wis. 2d 433, 654 N.W.2d 48. A bright line therefore determines when the Sixth Amendment right to counsel attaches in Wisconsin. "[T]he complaint or the warrant must be issued. Anything prior to that falls on the wrong side of the line." *Jones v. State*, 63 Wis. 2d 97, 105, 216 N.W.2d 224 (1974)

B. Garcia's *Riverside* hearing did not start the adversary process; thus, Garcia's right to counsel did not attach at the *Riverside* hearing.

Based on probable cause that Garcia was the bank robber, police arrested Garcia without a warrant. (R. 2:1.) *See* Wis. Stat. § 968.07(1)(d). Just under 48 hours later, a court commissioner determined that the police could continue to

detain Garcia because there was probable cause to believe that Garcia had robbed a bank and violated his parole. (R. 2:1; 86:14–15, 24.) The police then conducted a lineup with Garcia and five other men in order to determine whether two witnesses from the bank could identify Garcia. (R. 86:14, 34, 57–58.) Garcia was not represented by counsel at the lineup.

Relying primarily on *Rothgery*, Garcia argues that the court commissioner's probable cause determination started the adversary judicial proceedings against him.[1] In the circuit court, Garcia argued that his right to counsel attached after the court commissioner found probable cause. (R. 86:88–89.) In this Court, it is not clear if Garcia contends that his right to counsel attached at the probable cause hearing or immediately after. But under either theory, Garcia's argument is that evidence from the lineup must be suppressed because he was entitled to counsel at that point. Garcia is mistaken.

When a suspect is arrested without a warrant, the Fourth Amendment "requires that a judicial determination of probable cause be made within 48 hours of a warrantless arrest." *State v. Koch*, 175 Wis. 2d 684, 695–96, 499 N.W.2d 152 (1993). This probable cause determination is also known as a *Riverside*[2] hearing. *State v. Evans*, 187 Wis. 2d 66, 86, 90–92, 522 N.W.2d 554 (Ct. App. 1994).

A suspect has limited rights when it comes to a *Riverside* proceeding. For example, an arrested person does not have a right to be present at a *Riverside* hearing. *Id.* at 86. And the *Riverside* hearing "need not be an adversarial proceeding." *Id. Riverside*'s probable cause determination "demands no more than an *ex post facto* validation of the probable cause for the arrest by a neutral magistrate without the full panoply of rights afforded a defendant at later

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[1] Garcia's Br. 25–35.

[2] *Riverside v. McLaughlin*, 500 U.S. 44 (1991).

adversarial stages of a criminal prosecution." *Fiscus v. City of Roswell*, 832 F. Supp. 1558, 1563 (N.D. Ga. 1993).

The Supreme Court has specifically rejected Garcia's argument that the *Riverside* hearing starts the adversary process. *See Gerstein v. Pugh*, 420 U.S. 103, 119–120 (1975). In *Pugh*, the Supreme Court addressed the question whether an accused was entitled to a judicial determination of probable cause when he was in pretrial custody. *Id.* at 105. The Court noted that the standards for arrest and detention are rooted in the Fourth Amendment. *Id.* at 111. "To implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy, the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible." *Id.* at 112. The Court recognized that while judicial review *before* arrests in every case would be ideal, "such a requirement would constitute an intolerable handicap for legitimate law enforcement." *Id.* at 113. Thus, while arrest warrants are preferable, arrests supported by probable cause without a warrant are appropriate. *Id.* But in this latter case, "the State's reasons for taking summary action subside, [and] the suspect's need for a neutral determination of probable cause increases significantly." *Id.* at 114. After arrest without a warrant, "the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty." *Id.* Therefore, after the arrest, "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty." *Id.*

In *Pugh*, the lower courts had concluded "that the determination of probable cause must be accompanied by the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses." *Id.* at 119. But the Supreme Court rejected this approach, stating that the Fourth Amendment did not require "[t]hese

adversary safeguards." *Id.* at 120. Instead, "[t]he sole issue is whether there is probable cause for detaining the arrested person pending further proceedings." *Id.* And the issue of whether there is probable cause to continue to detain the person "can be determined reliably without an adversary hearing." *Id.* The Court stated that the probable cause hearing had a "limited function" and had a "nonadversary character." *Id.* at 122. Because of this, the Court said that the *Riverside* hearing was "not a 'critical stage' . . . that would require appointed counsel." *Id.*

Garcia plucks language from *Rothgery* in an effort to bolster his argument that the *Riverside* hearing was the start of the criminal case against him. But Garcia misreads *Rothgery*.

In *Rothgery*, the Supreme Court addressed the plaintiff's 42 U.S.C. § 1983 claim in which he argued that he had been entitled to counsel at his first appearance before a judicial officer. *Rothgery*, 554 U.S. at 194–98. Agreeing that the plaintiff was entitled to counsel at the hearing in question, the Court reiterated that the right to counsel attaches at the start of adversary judicial criminal proceedings. *Id.* at 198. Citing *Kirby*, the Court said that this "rule is not 'mere formalism,' but a recognition of the point at which 'the government has committed itself to prosecute.'" *Id.*

At issue in *Rothgery* was a particular hearing in the Texas's criminal code. *Id.* at 195. Because Rothgery had been arrested without a warrant, the police were required to bring him promptly before a magistrate. *Id.* This hearing—held pursuant to Tex. Code Crim. Proc. Ann., arts. 14.06(a) and 15.17(a) (West 2017)—"followed routine." *Id.* at 196. Under Texas statute, the magistrate was required to tell Rothgery the charge against him, his right to retain counsel, his right to stay silent, his right to have counsel with him during interrogations, and his right to stop the interrogations. *See* Tex. Code Crim. Proc. Ann., art. 15.17(a). After the magistrate

found probable cause, "[t]he magistrate informed Rothgery of the accusation, set his bail at $5,000, and committed him to jail, from which he was released after posting a surety bond." *Rothgery*, 554 U.S. at 196. The bond stated that Rothgery was *charged* with being a felon in possession of a firearm. *Id.*

The hearing in *Rothgery* is akin to Wisconsin's initial appearance. *See* Tex. Crim. Code Proc. Ann., art. 15.17(a) and Wis. Stat. §§ 970.01, 970.02. At an initial appearance in Wisconsin, the judge has certain duties, among them the obligation to inform the defendant of the charges against him or her, the penalties he or she faces, the defendant's right to counsel, and the right to a preliminary examination. *See* Wis. Stat. § 970.02; *State v. Thompson*, 2012 WI 90, ¶¶ 61–62, 342 Wis. 2d 674, 818 N.W.2d 904.

The proceeding at issue in this case was not an initial appearance; thus, it was not analogous to the hearing in *Rothgery*. The proceeding in this case was held pursuant to *Riverside*, which the Supreme Court has held is a "nonadversary" proceeding at which the accused's right to counsel does not attach. *See Pugh*, 420 U.S. at 120–121.

It has been a long-established rule in both Wisconsin courts and the Supreme Court that the Sixth Amendment right to counsel does not attach until the defendant is charged with a crime—either through the complaint or an arrest warrant. *Kirby*, 406 U.S. at 689; *State v. Dagnall*, 2000 WI 82, ¶ 30, 236 Wis. 2d 339, 612 N.W.2d 680, *reversed on other grounds by Montejo*, 556 U.S. 778; *Jones*, 63 Wis. 2d at 105. There is no right to counsel at a proceeding—including a lineup—that is conducted before the defendant has been charged with a crime. *Kirby*, 406 U.S. at 690–91. Nothing in *Rothgery* changed that rule.

In other words, adversary proceedings have started when the State has signaled that it is committed to prosecute. *Id.* at 689. In *Rothgery*, Texas initiated that signal. *Rothgery*,

554 U.S. at 196 (stating that the defendant was charged with a crime). In this case, the *Riverside* proceeding merely allowed police to continue to detain Garcia based on probable cause. Neither a complaint nor an arrest warrant had been filed; thus, Garcia's right to counsel had not attached by the time of the lineup.

Garcia does not advance an argument that Wisconsin's *Riverside* proceeding should be treated differently than the Supreme Court has instructed.[3] In fact, Garcia's argument is based solely on *Rothgery* and other cases in which the formal charges have already been filed.[4]

For example, Garcia asserts that his case is similar to the proceeding in *Daigre v. Maggio*, 705 F.2d 786 (5th Cir. 1983). In *Daigre*, the question was whether the defendant had a right to counsel at a pre-information, post-preliminary hearing lineup. *Daigre*, 705 F.2d at 788. The *Daigre* court recognized that "[t]he right to counsel attaches at the commencement of formal criminal proceedings of an adversarial nature." *Id.* Citing *Kirby*, the *Daigre* court pointed out that "the right to counsel specifically attache[s] at the time of arraignment or at the time of a preliminary hearing." *Id.* (citing *Kirby*, 406 U.S. at 688–69). Because the defendant in *Daigre* had been arrested and held in custody for more than a week and had had a preliminary hearing before his lineup, the *Daigre* court concluded that the adversarial proceedings had begun before the lineup. *Id.* Because of this, the court concluded that the defendant's right to counsel had attached.

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[3] Citing *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992), Garcia notes that the State may not intentionally delay formal charging in order to hold a lineup in the absence of counsel, but he does not argue that that occurred here. (Garcia's Br. 24.) His argument is solely that the right to counsel had attached and he was entitled to counsel.

[4] Garcia's Br. 25–35.

Nothing in *Daigre* conflicts with the circuit court's conclusion in this case that Garcia's right to counsel had not yet attached. Despite Garcia's assertion to the contrary, the *Riverside* hearing here did not "function similarly as the preliminary examination in" *Daigre.*[5] It is a long-standing rule that the right to counsel attaches at a preliminary hearing. *Kirby*, 406 U.S. at 688–89. But just as a *Riverside* proceeding is not an initial appearance, so too is it not a preliminary examination. *See* Wis. Stat. § 970.03 (the preliminary examination statute).

In other words, the Court has made clear that initial appearances and preliminary examinations are adversarial proceedings at which the right to counsel has attached. *United States v. Gouveia*, 467 U.S. 180, 188 (1984). But the Court has made equally clear that a *Riverside* hearing is a non-adversary proceeding. *See Pugh*, 420 U.S. at 120–121. Thus, the right has does not attach at the *Riverside* proceeding because the adversary process has not begun. *See id.*

Moreover, the State is not aware of a case in any jurisdiction that has concluded that a defendant's Sixth Amendment right to counsel attaches at a *Riverside* proceeding.[6] For all of these reasons, this Court should

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[5] Garcia's Br. 25.

[6] In a footnote, Garcia asserts that states must align their Sixth Amendment jurisprudence to Supreme Court law. (Garcia's Br. 29 n. 4.) The State does not disagree. In *Rothgery*, the Supreme Court stated that "what counts as a commitment to prosecute is an issue of federal law." *Rothgery*, 554 U.S. at 207. But as the State notes, Garcia has not pointed to any Supreme Court case that has held that a *Riverside* hearing has signaled a commitment to prosecute. The one source he cites for such a declaration is an article in a law journal. (Garcia's Br. 29 n.4.) But in addition to the article not having precedential value, the assersstion that the right to counsel attaches at a *Riverside* hearing appears a footnote in the article

continue to follow established federal and Wisconsin law and conclude that the right to counsel did not attach at Garcia's *Riverside* proceeding. And because the right to counsel did not attach, the lineup in the absence of counsel did not violate Garcia's Sixth Amendment right. Thus, the circuit court properly denied his motion to suppress the results of the lineup.

II. The lineup was not suggestive.

As a preliminary matter, this Court may affirm the circuit court's decision to deny Garcia's motion to suppress the lineup because Garcia has failed to ensure that the lineup recording is in the appellate record. Although the lineup was recorded, played at the suppression hearing, and admitted into evidence (R. 86:57–62), it is not part of the record. "It is the appellant's responsibility to ensure completion of the appellate record and 'when an appellate record is incomplete in connection with an issue raised by the appellant, [this Court] must assume that the missing material supports the trial court's ruling.'" *State v. McAttee*, 2001 WI App 262, ¶ 5 n.1, 248 Wis. 2d 865, 637 N.W.2d 774 (quoting *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26–27, 496 N.W.2d 226 (Ct. App. 1993)). Therefore, this Court may affirm the circuit court's decision by assuming that the recording of the lineup shows a non-suggestive lineup. But if this Court addresses the merits of Garcia's claim, Garcia has not met his burden to establish any suggestiveness in the lineup.

A. Standard of review and relevant law.

The Supreme Court has recognized "a due process check on the admission of eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the

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and is stated without analysis. *Interrogation and Silence: A Comparative Study*, 27 Wis. Int'l L. J. 271, 273 n.16 (2009).

perpetrator of a crime." *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012).

"In reviewing a trial court's determination whether a pretrial identification should be suppressed, [this Court] appl[ies] the same rules as the trial court." *State v. Benton*, 2001 WI App 81, ¶ 5, 243 Wis. 2d 54, 625 N.W.2d 923. First, the Court decides whether the identification procedure was so suggestive that there was a substantial likelihood of irreparable misidentification. *Id.* The defendant bears the burden of showing that the lineup was impermissibly suggestive. *Powell v. State*, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). If the defendant meets this burden, then for the identification to be admissible, the State must show that the identification was reliable under the totality of the circumstances. *Benton*, 243 Wis. 2d 54, ¶ 5.

As usual, this Court will not alter the trial court's factual findings unless they are clearly erroneous. *Id.* But the legal decision of whether the identification was tainted is reviewed de novo. *Id.*

B. The lineup was reliable.

Milwaukee Police Detective Kenneth Fortune testified that he worked on the "prisoner side" of Garcia's lineup, which meant that he was with Garcia and the five other "filler" men in the lineup behind the "pretty much sound resistant" glass in a room in the police administration building. (R. 86:32–35, 40.) Fortune said that all of the participants in the lineup were wearing orange jumpsuits, flip flops, green socks and a black winter cap. (R. 86:35.) Each man wore a number, one through six. (R. 86:35.) The men came into the room, one at a time, faced forward for about 10 seconds and then made a series of quarter turns. (R. 86:37–38.)

Milwaukee Police Detective Patrick Pajot administered Garcia's lineup. (R. 86:54–55.) Pajot said that after he gave

the witnesses the lineup instructions and a form for them to fill out to identify the suspect, he called for the lineup participants to come out one at a time. (R. 86:55–56, 59.) Pajot had each man come out and perform a routine series of turns. (R. 86:56.) After "the first run through" of the lineup, Pajot asked the witnesses if they wanted to see the lineup again. (R. 86:63.) Pajot said that he almost always asks witnesses whether they want to see the lineup again, and here, according to Pajot, one witness wanted to see one of the people in the lineup again and the other witness wanted to see either one or two people again. (R. 86:63–64.) But Pajot stressed that he never allows witnesses to see just one or two people in the lineup a second time. (R. 86:64.) Pajot said, "I always instruct them the exact same way that if they want to see just one (1) or two (2) people in the line-up, we would have to show them the entire line-up over." (R. 86:64.) To do otherwise, Pajot said, would be unfair to the suspect. (R. 86:64.) Pajot then ran the lineup again. (R. 86:69.)

After the witnesses saw the lineup the second time, Pajot met with each of them separately. (R. 86:64–65.) The first witness, BC, told Pajot that "number four," who was Garcia, "seemed to have the same youthful face and facial features as the person she saw rob the bank." (R. 86:65–67.) But Pajot told BC that if she was not positive that the bank robber was "number four" that she should "circle no" on her form, which she did. (R. 86:66.) Pajot then met with DL, who told him that she was 100 percent positive that "number four" was the bank robber. (R. 86:67–68.) DL told Pajot that she had "concentrated solely on the perpetrator's face because he had a hood up over his head." (R. 86:68.) DL said that she had thought that "number four" was the robber when she saw the lineup the first time, but that his facial hair "looked a little bit different." (R. 86:69.)

There was nothing suggestive about the lineup the police conducted in this case. Garcia does not argue that he

stood out in an impermissible way[7] or that the other men in the lineup did not fit the description of the suspect. His only argument that the lineup was suggestive is that the police wrongly asked the witnesses if they wanted to see the entire lineup again and then allowed it. According to Garcia, this somehow tainted the lineup.[8]

Garcia's argument rests primarily on his misreading of the Wisconsin Department of Justice's Bureau of Training and Standards for Criminal Justice's Model Policy and Procedure for Eyewitness Identification.[9] The policy guide contains a section on how to conduct live lineups. (R. 3:23–27.) Garcia contends that his lineup violated the section of the guide that states, "Only upon request of the witness, the witness may view one or more of the subjects again after the lineup has been completed." (R. 3:25.) And, "[t]he lineup administrator should never suggest additional viewing." (R. 3:26.) But this argument misunderstands the law, the policy and the facts.

As stated, a defendant is denied due process when his in-court identification is the result of an impermissibly suggestive pretrial police procedure that makes it likely that he was misidentified. *See Benton*, 243 Wis. 2d 54, ¶ 5. But a violation of the Wisconsin Department of Justice's guidelines is not, in itself, a due process violation, which is what Garcia

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[7] A year and a half before the suppression hearing, Garcia—through different counsel than represented him at the suppression hearing—argued that the lineup was suggestive because Garcia stuck "out like a sore thumb." (74:6.) This argument was not pursued at the suppression hearing and has been abandoned.

[8] Garcia's Br. 38–39.

[9] Garcia's Br. 38. In his brief, Garcia refers to this policy simply as, "Model Policy." (Garcia's Br. 38, 40.) But based on the suppression hearing, it is clear that Garcia is referring to the policy from the Wisconsin Department of Justice. (R. 86:46–47, 50, 73.). The policy is in the record attached to the incident report and transcript of the lineup. (R. 3:6–33.)

seems to be suggesting. And perhaps more importantly, the lineup did not violate the purpose behind the policy.

The explanation for the policy that Garcia points to is to prevent the "sequential" lineup from turning into a "quasi-simultaneous lineup, thereby risking the benefits of the sequential procedure." (R. 3:26.) A sequential lineup is one in which the persons are shown to the witnesses one at a time. *State v. Shomberg*, 2006 WI 9, ¶ 47, 288 Wis. 2d 1, 709 N.W.2d 370. A simultaneous lineup is one "in which all persons are shown to an eyewitness at the same time." *Id.* Here, both lineups were sequential lineups—the persons in the lineup were brought out one at a time—so there was no violation of the policy. In fact, the policy allows for individuals to be brought out upon request of the witness, but Pajot specifically said that he does not do this because it would not be fair to the suspect. (R. 86:64.)

Pajot did not suggest that the witnesses view particular people in the lineup a second time, but asked if they wanted him to run the whole lineup a second time. Under a strict reading of the policy, this may run afoul of the directive not to suggest additional viewing, but it does not violate the purpose of this policy or due process. Nothing about running the *entire* lineup a second time so that the witnesses saw everyone in the lineup twice made the lineup impermissibly suggestive.

Garcia emphasizes that the witnesses did not positively identify Garcia during the first lineup.[10] And then he faults Pajot for asking the witnesses if they wanted to see the lineup again.[11] Because the witnesses were not certain about whether "number four" was the robber at the end of the first lineup, and Pajot asked them if they wanted to see *the entire lineup again*, this to Garcia was somehow "tantamount" to

[10] Garcia's Br. 38–39.

[11] Garcia's Br. 38.

having only Garcia shown to the witnesses the second time.[12] The State has difficulty understanding Garcia's reasoning, but it seems to be that because the witnesses believed that he was the robber, but wanted to be sure, they should not have been allowed to view the entire lineup again. This is nonsensical.

As shown, the police conducted a proper lineup. Because of this, the circuit court correctly denied Garcia's motion to deny the results of the lineup and Garcia's due process rights at trial were not violated.

III. Garcia forfeited his right to represent himself at trial through his manipulative and disruptive behavior.

A. Standard of review and relevant law.

The Sixth Amendment grants a defendant the right to defend himself. *Faretta v. California*, 422 U.S. 806, 819 (1975). The right to defend oneself is personal. *Id.* at 834. "It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* But before a defendant may be permitted to represent himself, the trial court must ensure that that the defendant has both knowingly, intelligently and voluntarily waived his right to counsel and that the defendant is competent to represent himself. *State v. Klessig*, 211 Wis. 2d 194, 203–04, 564 N.W.2d 716 (1997). "If these conditions are not satisfied, the circuit court must prevent the defendant from representing himself or deprive him of his constitutional right to the assistance of counsel." *Id.* at 203–04. On the other hand, if these conditions are satisfied, "the circuit court must allow him to [proceed pro se] or deprive him of his right to represent himself." *Id.* at 204.

[12] Garcia's Br. 38–39.

Nonetheless, "the Sixth Amendment does not bestow upon a defendant absolute rights and . . . a defendant can forfeit Sixth Amendment rights through his or her own disruptive and defiant behavior." *State v. Cummings*, 199 Wis. 2d 721, 757, 546 N.W.2d 406 (1996) (citing *Illinois v. Allen*, 397 U.S. 337, 342–43 (1970)). "[T]he triggering event for forfeiture is when the 'court becomes convinced that the orderly and efficient progression of the case [is] being frustrated." *Id.* at 753 n.15 (quoting *State v. Woods*, 144 Wis. 2d 710, 715, 424 N.W.2d 730 (Ct. App. 1988)). Circumstances that may trigger forfeiture of Sixth Amendment rights include: "(1) a defendant's manipulative and disruptive behavior; (2) withdrawal of multiple attorneys based on a defendant's consistent refusal to cooperate with any of them and constant complaints about the attorneys' performance; [and] (3) a defendant whose attitude is defiant and whose choices repeatedly result in delay." *State v. Suriano*, 2017 WI 42, ¶ 24, 374 Wis. 2d 683, 893 N.W.2d 543.[13]

Whether a defendant has forfeited his right to self-representation is a question of constitutional fact. *Martwick*, 231 Wis. 2d 801, ¶ 17. When this Court reviews a question of constitutional fact, it employs a two-step analysis. *Id.* First, the Court defer to the circuit court's factual findings unless they were clearly erroneous. *Id.* ¶ 18. Second, the Court independently applies constitutional principles to those facts. *Id.*

B. Garcia forfeited his right to represent himself.

Garcia's pretrial behavior toward the court and his attorneys was manipulative, uncooperative and disruptive. The State filed the complaint in January 2012, but Garcia was not tried until July 2015. (R. 1; 89.) The extraordinary delay

[13] A petition for certiorari is pending in this case. *Suriano v. Wisconsin*, No. 17-5452 (Aug. 1, 2017).

from charging to trial was due almost entirely to Garcia's vexing conduct. Garcia's own conduct resulted in the forfeiture of his right to represent himself.

At the preliminary hearing, held in January 2012, Garcia was represented by Nathan Opland-Dobs. (R. 64.) But Opland-Dobs moved to withdraw in March 2012, telling the court that he could no longer effectively represent Garcia because communication between the two of them had broken down. (R. 6.) The court granted the motion. (R. 68:4.)

Garcia was then represented by Melissa Fitzsimmons from the State Public Defender's Office (SPD). (R. 69.) Fitzsimmons continued to represent Garcia until approximately November 2012 when Louis Epps from the SPD took over for her. (R. 72:2; 73:4.) At a December 2012 hearing, Epps noted that Garcia's parole had been revoked and he was serving a three-year term of confinement. (R. 73:3.) At this same hearing, Garcia told the court that he did not feel "comfortable" being represented by the SPD. (R. 73:5.)

The record does not disclose when Epps withdrew from representing Garcia, but new counsel, Thomas Harris, filed a motion on Garcia's behalf in January 2013. (R. 13.) And Harris continued to represent Garcia at a September 2013 hearing. (R. 74.)

But in December 2013, Harris moved to withdraw, calling his relationship with Garcia "volatile, hostile and confrontational." (R. 22.) At a hearing on Harris's motion, Harris told the court that Garcia was not happy with his representation and had filed a complaint against him with the Office of Lawyer Regulation (OLR). (R. 75:2.) Although the State did not object to Harris's motion, it expressed its concern that Garcia's inability to cooperate with his attorneys was actually a tactic to delay his trial. (R. 75:3.) The court then asked Garcia if he wanted to represent himself. (R. 75:4.) Garcia said, "No, I do not. I do not waive my right to counsel."

(R. 75:4.) The court granted Harris's motion to withdraw, but warned Garcia that if he could not cooperate with his next attorney, he would have to represent himself. (R. 75:5.)

Paul Bonneson began to represent Garcia in January 2014. (R. 76:2.) At a March 2014 status conference, Bonneson told the court that Garcia wanted him to withdraw. (R. 77:3.) The court replied, "What a surprise" and asked Garcia, "Are you going to represent yourself?" (R. 77:3.) Garcia denied that he told Bonneson that he wanted him to withdraw. (R. 77:3.) According to Garcia, he told Bonneson that if Bonneson "was unwilling to give provide [him] guaranteed protections of the United States Constitution, they should assign [his] case to somebody who is willing to do that." (R. 77:3.) Garcia then read the court a long statement that outlined his arguments concerning the suppression motion and then said that he did want Bonneson to withdraw. (R. 77:4–8.)

Bonneson complained that it was difficult to represent Garcia because Garcia continued to file pro se motions. (R. 77:9.) Bonneson suggested that Garcia consider representing himself. (R. 77:9.) The court agreed, asking Garcia, "You want to act as your own lawyer?" (R. 77:9.) Garcia again declined, saying, "No, Your Honor. What I would like to do is complete my statement." (R. 77:9–10.) The court said, "Why don't we just let Mr. Bonneson withdraw and you represent yourself. You obviously know more about the law than anybody else in the room." (R. 77:10.) And Garcia specifically said, "No. I'm not waiving my right to counsel, Your Honor. I'm not waiving my right to effective assistance of counsel." (R. 77:10.)

Garcia then agreed to let Bonneson file motions on his behalf and the court agreed to let Garcia read the remainder of his statement. (R. 77:11–15.) But as Garcia was reading, Bonneson interrupted to ask the court to stop the proceedings because he worried that Garcia was "starting to say some things here that are prejudicial to him" and that Bonneson is "the one who is here to speak for him." (R. 77:15.) Garcia

objected to being interrupted and said that Bonneson "probably needs to be removed from [his] case." (R. 77:16.) The court then granted Garcia's motion to have Bonneson withdraw. (R. 77:16.) The court also concluded that Garcia was competent to represent himself and that "further appointment of counsel [would] be a waste of time, because . . . there's been numerous delays in this case created by" Garcia. (R. 77:17.) At this, Garcia again told the court that he was not waiving his right to counsel. (R. 77:17–18.) The court told Garcia that it was not going to appoint him another attorney and that it found that he had waived his right to counsel. (R. 77:20.)

Despite having told the court that Bonneson should be removed from the case, Garcia then backtracked and said, "I never asked Attorney Bonneson to withdraw. What I did ask was that I be afforded effective representation." (R. 77:22.) The court replied,

> Mr. Bonneson is the third lawyer on this case, not counting those that have withdrawn for reasons other than you. And as long as you are unwilling to accept professional opinions of the lawyers appointed to represent you, you know better than, why do you need a lawyer? I'm not going to have two lawyers in the case. I'm not going to take filings from two people and motions from two people and every time you think he's wrong we are going to go down a different road. It's not going to work like that.
>
> This case is going to get tried before I leave this branch. We have already got a trial date and you have already indicated that you don't have any confidence in Mr. Bonneson because he doesn't agree with you, which is a standard that you apply to everybody that represents you and so, if you are not qualified to represent yourself, I don't know how that is, every time we get a lawyer in here your legal opinion overrules theirs. But that is the clear pattern here which I find is frankly a basis to delay every case and so, I believe I have heard there was a motion to withdraw. You moved to withdraw, did you not?

(R. 77:22–23.) Bonneson agreed that he had moved to withdraw because Garcia did not want his representation unless he followed his precise directions. (R. 77:23–24.)

The court then asked Garcia why he would want Bonneson to continue to represent him if he was unwilling to cooperate with him. (R. 77:24.) Garcia replied that he would work with Bonneson as long as Bonneson agreed with him regarding his interpretation of *Rothgery*. (R. 77:24.) The hearing ended with the court deciding to take the motion to withdraw "under advisement." (R. 77:25.) The court suggested that the motion should be renewed if Bonneson and Garcia could not work together. (R. 77:26.)

The court held several hearings in April and May 2014, at which Bonneson represented Garcia. (R. 78; 79; 80.) Also in April 2014, Bonneson filed a motion to suppress the identification of Garcia from the lineup. (R. 27.) In June 2014, the court held a status hearing at which Bonneson told the court that Garcia had filed complaints against him with OLR. (R. 82:3.) Bonneson said that he did not feel the need to withdraw from representation, but Garcia said that he felt that their relationship was now awkward. (R. 82:3–4.) The court accepted Bonneson's assertion that he could continue to represent Garcia despite the complaint and concluded the hearing. (R. 82:5–6.)

Garcia then filed a pro se motion to the court requesting the appointment of counsel. (R. 35.) In July 2014, the court held a hearing on the motion. (R. 83.) At the hearing, Bonneson told the court,

> Your Honor, I decided about a week or so ago to make a motion to withdraw in this case.[14] I know the Court is very familiar with Mr. Garcia and what's—and the history of this case.

[14] Bonneson did not file a written motion. (R. 84:5.)

> But in light of Mr. Garcia's filing one thing after another, both with the Office of Lawyer Regulation, and also his pro se motions that he's filed with the Court, comments that he's made, and the grievances he filed with the Office of Lawyer Regulation, I concluded I can no longer represent him. I consider Mr. Garcia's behavior in this case, since I was appointed to represent him, to essentially constitute harassment and abuse; and I personally am not going to take it anymore.
>
> . . . And this is one of those cases where Mr. Garcia has decided not to back off with his harassment and abuse, and this is the worst that I've seen in my 30 years of practicing law.
>
> . . . .
>
> I don't think a defendant has the right to harass and abuse his attorney, and attack—he essentially has declared war against me in this case.

(R. 83:3–4) (footnote added).

The court then asked Garcia if he wanted Bonneson to withdraw and Garcia said that he did. (R. 83:5.) But Garcia again denied that he wanted to represent himself. (R. 83:5.) The court declined to decide Bonneson's motion because a different judge was going to be sitting on the case and the court did not want to "t[ie] his hands." (R. 83:7–8.)

At an August 2014 hearing, before the new judge, Bonneson renewed his motion. (R. 84:5–10.) The State did not object to the motion, but noted that it was in a "difficult position." (R. 84:10–11.) The court worried that allowing Bonneson to withdraw was "encouraging" Garcia's poor behavior. (R. 84:11.) The court said,

> I have sympathy for Mr. Bonneson and the position that he is in based upon what I have heard.
>
> But we need to move the case forward.
>
> So, if the State was objecting . . . . But if you are not abjecting at this point, I am inclined to one (1)

> more time to grant Mr. Bonneson's request and give Mr. Garcia a new attorney.
>
> At some point, this has to stop. We have to get this matter moved forward.

(R. 84:11–12.) Garcia confirmed that he no longer wanted Bonneson's representation. (R. 84:14.) The court then granted Bonneson's motion to withdraw. (R. 84:15.)

In February 2015, Garcia filed a pro se letter in the court, complaining that his newest appointed counsel, Doug Bihler, was not performing up to his standards. (R. 39.) At the next hearing, which was also held in February 2015, the court addressed the relationship between Bihler and Garcia. (R. 85:12.) Bihler told the court that he was ready to try the case and was not moving to withdraw. (R. 85:12.) Garcia then complained that Bihler had not been communicating with him. (R. 85:13.) The court asked Garcia if he wanted to continue to work with Bihler. (R. 85:13.) Garcia said, "Well, at this point I am requesting, Your Honor that, you know, I don't know that this conduct on his behalf will change or not change, I don't know, I met him yesterday." (R. 85:13–14.) The court said that its question was simple, "[D]o you want to continue with Mr. Bihler, or not?" (R. 85:15.) Garcia again evaded answering the question. (R. 85:15.) The court said, "So you want to continue with him or not? It is an easy, easy question. Yes or no. Yes or no." (R. 85:15.) When Garcia began to speak—and had not answered with a yes or no—the court interrupted him, telling him that it was not going to spend the afternoon "just speaking randomly on the record." (R. 85:15.) The court asked a final time, "So do you want to continue with Mr. Bihler, yes or no?" (R. 85:16.) Garcia answered, "At this point, no." (R. 85:16.)

After Garcia set forth his reasons in support of his request to have Bihler withdraw, which were based largely on Garcia's dissatisfaction with Bihler's communication with him—as well as Bihler's response to those reasons—the State

objected to the motion. (R. 85:16–20.) The State said that Garcia had numerous attorneys and "Garcia seems to have this issue with everybody and at a certain point the indication is that it is Mr. Garcia." (R. 85:19.) The court then denied Garcia's motion, saying "I don't see a basis for it. In fact I am concerned regarding the age of this case and the number of attorneys we have had in this case, and so I am going to deny your motion today for a new attorney." (R. 85:20.)

The case proceeded and Bihler argued the suppression motion. (R. 86.) But after the suppression motion, in May 2015, Garcia filed a pro se motion to represent himself. (R. 30.) The court addressed the motion at the final pretrial hearing, which was held in June 2015—more than three years after the complaint was filed and just weeks before the trial was scheduled to begin. (R. 87.)

The court said that the case was going to trial as scheduled. (R. 87:9.) The court emphasized, "There is absolutely no reason for this case to have been pending as long as it has with six (6) attorneys and me now being the third Judge assigned to it." (R. 87:9.)

The court then engaged Garcia in a *Klessig*[15] colloquy, asking him if he understood his constitutional rights, including the right to have an attorney represent him and the right to represent himself. (R. 87:9.) Garcia said that he understood these rights. (R. 87:9.) The court asked Garcia his age, his level of education, his ability to read and write English, what he reads, whether he wrote the motion himself, and whether he was being pressured to proceed pro se. (R. 98:9–10.) The court asked Garcia about his health. (R. 87:11.) The court made sure that Garcia understood the charge against him and the penalties he faced. (R. 87:11–12.) The court instructed Garcia about the benefits that counsel could provide and the disadvantages of self-representation. (R.

[15] *State v. Klessig*, 211 Wis. 2d 194, 203–04, 564 N.W.2d 716 (1997).

87:12–13.) Finally, the court asked Garcia if he wanted to give up his right to counsel and represent himself. (R. 87:14.) Garcia responded that he did. (R. 87:14.)

The State expressed its concern that Garcia would not behave appropriately in front of the jury and that he would not follow the court's rules. (R. 87:14.) The court said, "Well, and, of course, part of Mr. Garcia's request is to have Mr. Bihler serve as standby counsel." (R. 87:14.)

The court said that it believed that Garcia was making a mistake, but said it was inclined to grant Garcia's request because he was competent. (R. 87:15–18.) To make sure that Garcia was indeed exercising his right to represent himself and waive his right to counsel, the court asked him again if that is what he wanted to do. (R. 87:18.) The following discussion then occurred in which the court made an initial finding that Garcia validly waived his right to counsel:

> [Garcia]: Well, Your Honor, I have prepared a statement.
>
> The court: Well, I don't need your statement.
>
> It's a simple question. And this highlights what [the State] indicated; and that is, you're going to follow the same rules that the attorneys follow in my courtroom.
>
> And when I ask you questions that involves a yes or no answer, that's what I expect.
>
> I have indicated to you that under these circumstances, I am inclined to grant your request, because I don't think under the law, I have any choice under this set of facts.
>
> But I don't think it's a wise decision.
>
> But if it's what you want, I will do this.

So, do you want me to allow you to proceed pro se as indicated, yes or no?

[Garcia]: Yes.

The court: All right. Well. The defendant appears to have knowingly and voluntarily waived his right to counsel based on the record before this Court.

It appears that the defendant is making a deliberate choice.

He is aware of the difficulties and disadvantages of proceeding without a lawyer.

And he is aware of the seriousness of the charges and what could happen to him if convicted.

I think actually I may have misspoke on the penalty. It's actually forty (40) years. And it's twenty-five (25) in and fifteen (15) out and a maximum of one hundred thousand dollars ($100,000).

Do you understand that, Mr. Garcia?

[Garcia]: Yes.

The court: All right.

(R. 87:18–20.)

The court then asked Garcia whether its clarification on the penalty changed his decision to proceed without counsel "in any way," and the following discussion occurred that led the court to find that Garcia forfeited his right to represent himself:

[Garcia]: There are several things that you are incorrect about.

The court: Yes or no? Does that change your decision in any way?

[Garcia]: Well, it changes my decision with regards to Attorney Bihler being the standby counsel.

I never requested him to be my standby counsel.

The court: Well, he's the one (1) you are going to get.

Do you want to represent yourself with Mr. Bihler as standby counsel, or do you want Mr. Bihler to continue as counsel for you? Those are your two (2) choices. Pick one (1).

[Garcia]: If I understand, correctly, Your Honor—

The court: Stop. Your choices are to represent yourself, or you can have Mr. Bihler represent you.

If you decide to represent yourself, then Mr. Bihler will serve as your standby—

[Garcia]: You are not allowing me to speak, Your Honor.

The court: You don't get to. Well, this has convinced me right here that there is something going on with Mr. Garcia.

Under these circumstances, I can't believe that because this would make a mockery of the system.

He won't answer the Court's questions.

I don't' know how we could proceed with him as counsel.

So, I think that now, Mr. Garcia, himself, has made a sort of record that would, perhaps, require me to deny his request.

(R. 87:20–21.)

The court then made a record of the reasons for its decision, which was based not only on Garcia's argumentative behavior in court that day, but his long history of failing to cooperate.

> The court: [T]he problem, of course, is, I have to conduct the trial.
>
> Mr. Garcia has now had six (6) attorneys.
>
> And at this point, we do need to proceed.
>
> Quite frankly, and I will let the record reflect, the record would otherwise not have any way of knowing this, but Mr. Garcia has, as the record will indicate, he's been argumentative with the Court.
>
> He refuses to answer the Court's direct questions.
>
> He says he wants to make a speech to the point where, of course, the record would not be clear, the deputy actually got up from his chair. He was standing next to him.
>
> Because, of course, the deputy knows that this is the sort of situation which might require me to remov[e] Mr. Garcia from the courtroom.
>
> During the trial, all parties must show respect to the Judge and to the jury so that we can proceed.
>
> Mr. Garcia has not been able to do that even at this simple motion hearing.

(R. 87:22–23.) The court concluded that Garcia's behavior made it so that it could not allow him to represent himself. (R. 87:23.) Thus, the court denied Garcia's motion to represent himself and Bihler represented him at trial. (R. 87:23; 88.)

Garcia complains that the court's denial of his motion to represent himself violated his Sixth Amendment right to

proceed pro se.[16] Garcia acknowledges that a defendant's behavior may be so disruptive and obstructionist that a court may conclude that he has waived his right to represent himself.[17] But according to Garcia, the court violated his right because his statement, "If I understand, correctly, Your Honor—" was not disruptive enough to permit the court to deny his request to represent himself.[18] Garcia misrepresents the facts by looking at this statement in a vacuum.

Just as a criminal defendant is guaranteed the right to counsel, he is guaranteed the right to represent himself. *Imani v. Pollard*, 826 F.3d 939, 941 (7th Cir. 2016). But the right is not absolute. *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 161 (2000). "[T]he government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer." *Id.* at 162.

The Wisconsin Supreme Court recently addressed the question whether a defendant's behavior forfeited his Sixth Amendment right to counsel. *Suriano*, 374 Wis. 2d 683, ¶¶ 21–32. The court held that a defendant forfeits his right to counsel when the trial court believes that the defendant is deliberately frustrating the progression of the case. *Id.* ¶ 30. For these same reasons, a defendant can forfeit his right to represent himself.

The record belies Garcia's assertion that the court denied his request to proceed pro se simply because Garcia did not directly answer its question and instead began his

[16] Garcia's Br. 45–50.

[17] Garcia's Br. 46–47.

[18] Garcia's Br. 47–48.

response with, "If I understand correctly, Your Honor—."[19] (R. 87:20.) Garcia forfeited his right to represent himself because he was disruptive, manipulative and obstructive over the course of three years. At the time Garcia requested to represent himself, Garcia was represented by his sixth attorney and the trial was before his third judge. He had repeatedly denied that he wanted to represent himself, but just weeks before trial he told the court that he had changed his mind. He would not directly answer the court's questions and was argumentative and obstreperous. And the court noted that Garcia's behavior had caused the court's deputy concern that he would have to remove Garcia from the courtroom.

As the *Suriano* court explained, circumstances that trigger forfeiture of the Sixth Amendment right to counsel include manipulative and disruptive behavior, withdrawal of multiple attorneys based on the defendant's conduct, and a defendant's choices that repeatedly result in delay. *Suriano*, 374 Wis. 2d 683, ¶ 24. Here, Garcia's behavior falls into all of these categories. Although his behavior at the final pretrial may not in itself have been enough to warrant the conclusion that he had forfeited his right to self-representation, an examination of the record on the whole establishes that Garcia acted with intent—since at least March 2012 when his

[19] Garcia also claims that the circuit court erred when it asked him if he wanted standby counsel because the court is permitted to appoint stand-by counsel over a defendant's objection. (Garcia's Br. 47.) But of course this was not error. Although the court is permitted to appoint standby counsel without a defendant's permission, it does not follow that it was error for the court to have asked Garcia what he wanted. *See Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). For this same reason, as Garcia seems to understand, it was of no consequence that Garcia did not want Bihler to be standby counsel. Because the court may appoint standby counsel over a defendant's objection, Garcia's preference with regard to Bihler was not relevant.

first counsel moved to withdraw—to delay and disrupt the proceedings. It was Garcia's long history of misconduct that led the court to conclude that he could not represent himself and that he forfeited his Sixth Amendment right to act pro se.

Garcia does not address *Suriano* in his brief; instead, he relies on language in *Faretta*, *Allen*, *Imani* and *United States v. Banks*, 828 F.3d 609 (7th Cir. 2016), that courts must allow a defendant to represent himself unless his behavior is egregiously disruptive. But, as stated, Garcia's behavior *was* egregiously disruptive. Every one of the cases that Garcia cites recognizes a limit on a defendant's Sixth Amendment rights. *See Faretta*, 422 U.S. at 834 n.46 (recognizing that "a defendant who deliberately engages in serious and obstructionist misconduct" loses his right to self-representation)*; Allen*, 397 U.S. at 339–41, 345–47 (holding that a defendant may lose his Sixth Amendment right to be present by his disruptive behavior); *Banks*, 828 F.3d at 617 (recognizing that a defendant's obstructionist behavior can rescind his waiver of rights); *Imani*, 826 F.3d at 947 (noting that a court may deny the right to self-representation when the defendant has made his claim "so late as to delay the trial" or has engaged in obstructionist behavior). The defendant forfeited his right to self-representation when his behavior through the course of proceedings, as in this case, was obstructionist and manipulative. *See Faretta*, 422 U.S. at 834 n.46; *Imani*, 826 F.3d at 947.

Accordingly, Garcia is not entitled to relief on this claim.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of conviction.

Dated this 12th day of October, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9664 words.

_____
KATHERINE D. LLOYD
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 12th day of October, 2017.

_____
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