STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP1276-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NELSON GARCIA, JR.,

Defendant-Appellant-Petitioner.

ON REVIEW FROM A DECISION IN THE WISCONSIN COURT OF APPEALS AFFIRMING 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. When police arrest a person without a warrant, the Fourth Amendment requires a judicial determination of probable cause within 48 hours of the arrest. This determination is known as a *Riverside*[1] hearing.

Does the Sixth Amendment right to counsel attach at the *Riverside* hearing?

The trial court and court of appeals answered no.

This Court should answer no.

2. The Wisconsin Department of Justice's Bureau of Training and Standards has issued a model policy that suggests how police departments should conduct live lineups.

Is a lineup that does not strictly comply with the Department's policy per se impermissibly suggestive?

The trial court and court of appeals answered no.

This Court should answer no.

3. A defendant has a Sixth Amendment right to self-representation, but he can forfeit that right through his disruptive behavior.

Did Garcia forfeit his Sixth Amendment right to self-representation when the circuit court declined to allow him to proceed pro se after it became convinced that doing so would frustrate the orderly and efficient progression of the case?

The trial court and court of appeals answered yes.

This Court should answer yes.

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

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with all cases this Court has accepted for review, oral argument and publication are appropriate.

INTRODUCTION

Adversary judicial criminal proceedings begin when the State files formal charges against the defendant. "[I]t is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law."[2] Once the State has filed charges, the defendant's Sixth Amendment right to counsel has attached.

Garcia seeks to upend this longstanding principle of both Wisconsin and federal law by asking this Court to hold that the criminal prosecution starts when a judicial officer finds that the police have shown probable cause of a crime—not when the State commits itself to prosecution. This Court should reject Garcia's proposal and continue to follow current law.

As for the lineup, there was nothing suggestive about it; it was properly executed and fair. Garcia also asks this Court to create a new rule on how to evaluate the reliability of lineups. But Garcia did not petition for review on this question. Because this question is not squarely before the Court, it should decline to address it.

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[2] *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

Finally, the record shows the circuit court soundly denied Garcia's request to represent himself. Because a defendant can forfeit his Sixth Amendment right to self-representation by his behavior, the circuit court correctly concluded that Garcia's dilatory tactics and disruptive conduct forfeited his right to proceed pro se.

This Court should reject Garcia's claims and affirm the decision of the court of appeals affirming Garcia's judgment of conviction for armed robbery.

STATEMENT OF THE CASE

In late December 2011, a man gave a handwritten note and a bag to a teller at a bank in Milwaukee. (R. 89:56.) The note said that the man was robbing the bank and directed the teller to put money into the bag. (R. 89:56.) The teller complied and the man left the bank. (R. 1; 89:58–60.)

After police released video surveillance of the robbery to the media, they received several leads identifying the robber, including one that pointed to Garcia. (R. 89:30, 35–36.) 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).

Within 48 hours of his arrest, a Milwaukee detective submitted a statement to the court commissioner arguing that there was probable cause to believe that Garcia had committed the robbery. (R. 2; 86:14–15, 23–25.) The commissioner agreed and set Garcia's bail at $50,000. (R. 2; 86:24–26.)

The police then conducted a live lineup to see if the teller and another bank employee could identify Garcia as the robber. (R. 86:54–65.) After the police ran the lineup once, they asked if the witnesses wanted to see the lineup again. When the witnesses indicated that they wanted a

second viewing of some of the lineup participants, the police ran the full lineup a second time. (R. 3:4; 86:63–64.) The teller then positively identified Garcia as the robber. (R. 86:68.) The other employee said that she was not positive that Garcia was the robber. (R. 86:65.)

The State charged Garcia with robbery of a financial institution. (R. 1.) 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 that was conducted in the absence of counsel had 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 the lineup 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 case proceeded slowly to trial as Garcia cycled through attorneys. (R. 1; 6; 67; 69; 73:5; 75; 83; 87.) Many of Garcia's lawyers had moved to withdraw from their representation because of Garcia's conduct. (R. 67; 69; 73:5; 75; 83; 87.) 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 found that Garcia's treatment of his attorneys was a "clear pattern" intended to delay the trial. (R. 77:23.)

In June 2015—more than three years after Garcia's arrest—the circuit court held Garcia's final pretrial hearing. (R. 87.) At that point, Garcia was represented by his sixth attorney. (R. 87:9.) At the hearing, Garcia told the court that he wanted to proceed pro se—a position that he had rejected in September 2013, March 2014, and July 2014. (R. 75:4; 77:3; 83:5; 87:7.) The court conducted the appropriate

colloquy with Garcia to ensure that Garcia understood his constitutional rights and the dangers inherent in self-representation. (R. 87:9–14.) At the close of the colloquy, the court told Garcia that although it believed self-representation was a mistake, it was inclined to let him represent himself if that was what he wanted and would appoint his then-counsel as "standby counsel." (R. 87:17–19.) But Garcia then began to argue with the court and displayed behavior that the court found troubling. (R. 87:18–23.) Although the court concluded that Garcia was competent and understood his rights, it denied Garcia's request to represent himself because it found that his behavior demonstrated it was not possible for him to conduct himself appropriately in the courtroom. (R. 87:19–23.)

Garcia filed a pro se motion asking the court to reconsider its decision. (R. 45.) On the first day of trial, Garcia's appointed counsel presented Garcia's motion to the court, telling the court that "the reason he wants to represent himself, is to file some motions that [counsel had], according to him, failed to file." (R. 97:3.) The court again denied the motion, citing the delays that Garcia had caused and sought, as well as Garcia's behavior. (R. 97:3–4.) The case proceeded to trial. (R. 88- 93; 97.)

The jury found Garcia guilty of robbery of a financial institution.[3] (R. 57.) The court sentenced Garcia to 15 years'

[3] In addition to the above-mentioned evidence, Milwaukee Police Detective Ralph Spano testified at trial that he showed Garcia's friend and the friend's girlfriend a still photo of the robber from video surveillance of the bank. (R. 91:23–30.) Spano said that both parties identified Garcia as the robber in the photo. (R. 91:23–30.)

initial confinement, to be followed by 10 years' extended supervision. (R. 57.)

Garcia appealed. (R. 61.) He argued that his Sixth Amendment right to counsel had attached at the probable cause hearing, which entitled him to counsel at the line-up. He also argued that the line-up was impermissibly suggestive, and the circuit court denied his right to self-representation. The court of appeals disagreed with Garcia on all three grounds, affirming his judgment of conviction. (A-App. 101-22.)

This Court granted Garcia's subsequent petition for review.

ARGUMENT

I. A defendant's Sixth Amendment right to counsel attaches when the State begins adversary judicial proceedings against him.

Garcia argues that the prosecution against him began at the *Riverside* hearing. Under Garcia's theory, if the prosecution began at the *Riverside* hearing, his Sixth Amendment right to counsel attached at that point. And if his right to counsel had attached at the *Riverside* hearing, then he was entitled to counsel at the lineup that followed the hearing. But Garcia is wrong: the *Riverside* hearing was not adversarial; it was not the beginning of the prosecution.

A. Standard of review.

When a defendant's Sixth Amendment right to counsel attaches is a question of constitutional fact. *See State v. Martwick*, 2000 WI 5, ¶ 17, 231 Wis. 2d 801, 604 N.W.2d 552. This Court employs a two-step analysis when reviewing a question of constitutional fact. *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.*

B. Law relevant to the start of adversary judicial proceedings.

The Sixth Amendment right to counsel "does not attach until a prosecution is commenced." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). A defendant's "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). The start of adversary judicial criminal proceedings is generally a "formal charge, preliminary hearing, indictment, information, or arraignment." *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 198 (2008).

"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." *Kirby*, 406 U.S. 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 defendant have solidified." *Id.* "A defendant who has been arrested but not charged . . . has no right to counsel under the Sixth Amendment." *State v. Badker*, 2001 WI App 27, ¶ 19, 240 Wis. 2d 460, 623 N.W.2d 142.

"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 time falls on the wrong side of the line." *Jones v. State*, 63 Wis. 2d 97, 105, 216 N.W.2d 224 (1974).

"[O]nce 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).

C. A *Riverside* hearing does not start the adversary judicial process.

The *Riverside* procedure is designed to avoid prolonged custody of persons arrested without a warrant but not yet subject to criminal charges. The genesis of that procedure came in *Gerstein v. Pugh*, 420 U.S. 103 (1975), when the Supreme Court "held unconstitutional Florida procedures under which persons arrested without a warrant could remain in police custody for 30 days or more without a judicial determination of probable cause." *Riverside*, 500 U.S. at 52. The Court directed states to make judicial probable cause determinations promptly. *Gerstein*, 420 U.S. at 125. Fifteen years later, the Court revisited *Gerstein* and found that it had not been "enough to say that probable cause determinations must be 'prompt.'" *Riverside*, 500 U.S. at 55–56. Instead, the Court decided that "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*." *Id.* at 56.

Here, Garcia was arrested without a warrant and, within 48 hours, the court commissioner found probable cause that he had committed the robbery. Thus, the State satisfied its obligation under *Riverside*.

Yet this was not enough, according to Garcia. Relying primarily on *Rothgery*, Garcia asserts that the *Riverside*

hearing started the adversary criminal judicial proceedings against him.[4] According to Garcia, at the *Riverside* hearing, the State signaled its "commitment to prosecute" and the defendant's Sixth Amendment right to counsel attached.[5] Garcia is incorrect.

As a preliminary matter, it is important to note that the Sixth Amendment right to counsel and Wisconsin Constitution's corollary are coextensive. *See State v. Delebreau*, 2015 WI 55, ¶ 6, 362 Wis. 2d 542, 864 N.W.2d 852. The Sixth Amendment "right to counsel attaches during 'the initiation of adversary judicial criminal proceedings.'" *Montejo*, 556 U.S. at 802 (quoting *Rothgery*, 554 U.S. at 198)). And the Sixth Amendment "guarantees the assistance of counsel not only during in-court proceedings but during all critical stages, including *postarraignment* interviews with law enforcement officers." *Id.* (emphasis added).

The procedure in *Gerstein* and *Riverside* is rooted in the Fourth Amendment due process guarantees that a neutral and detached magistrate determines probable cause. *Gerstein*, 420 U.S. at 112–13. *Gerstein* recognized that requiring judicial review before every arrest "would constitute an intolerable handicap for legitimate law enforcement." *Id.* at 113. But the Court said that after arrest, "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty." *Id.* at 114.

But, when asked, the Court expressly rejected the notion that when the judicial officer determines probable cause, the full panoply of adversary safeguards attach to the defendant, including the right to "counsel, confrontation,

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[4] Garcia's Br. 19–27.

[5] Garcia's Br. 26–27.

cross-examination, and compulsory process for witnesses." *Id.* at 119. The Court said that "[t]hese adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings." *Id.* at 120. Whether there is probable cause "can be determined reliably without an adversary hearing." *Id.*

And this Court has agreed with the Supreme Court. Citing *Gerstein*, this Court has said that "[t]he probable cause determination does not involve any adversarial rights and can be based entirely on hearsay and written testimony." *State v. Koch*, 175 Wis. 2d 684, 697–98, 499 N.W.2d 152 (1993). "The arrested person has no right to a physical appearance before a judicial officer for the probable cause determination." *Id.* at 698. "The post-arrest probable cause determination is required [in order] to fulfill the same function for suspects arrested without warrants as the pre-arrest probable cause determination fulfills for suspects arrested with warrants." *Id.* Because "[t]he probable cause determination which is made when an arrest warrant is issued obviously does not involve an adversary hearing or personal appearance," neither does a probable cause hearing after a warrantless arrest. *Id.*

Garcia argues that the *Riverside* hearing is the equivalent of the probable cause determination required for an arrest warrant.[6] And this Court has said that the right to counsel attaches upon the "filing of the criminal complaint or issuance of a warrant." *See State v. Harris*, 199 Wis. 2d 227, 235 n.3, 544 N.W.2d 545 (1996). Thus, because this Court has said that the right to counsel attaches upon issuance of a

[6] Garcia's Br. 25.

complaint *or* warrant, Garcia argues that the right to counsel must also attach at the *Riverside* hearing.[7] Garcia is mistaken.

First, as stated, this Court has expressly held that the *Riverside* proceeding "does not involve any adversarial rights." *Koch*, 175 Wis. 2d at 698. Neither this Court nor the Supreme Court has ever held that a defendant's Sixth Amendment rights attach at the *Riverside* hearing.

Second, "[i]n Wisconsin, a criminal proceeding is commenced by the filing of a complaint." *State v. Copening*, 103 Wis. 2d 564, 576, 309 N.W.2d 850 (Ct. App. 1981). The Legislature has instructed the State that it begins a criminal prosecution by filing a complaint.[8] *See* Wis. Stat. § 967.05(1)(a). And that when the complaint is filed with the court, the criminal case has started. *See* Wis. Stat. § 968.02(2). Thus, despite that this Court has sometimes said that the prosecution begins when the complaint *or* warrant is filed, the better understanding of Wisconsin criminal procedure is that the formal criminal case begins when the complaint is filed—whether the complaint has an accompanying warrant or not. *See* Wis. Stat. § 968.04(3); *State v. Jennings*, 2003 WI 10, ¶ 1, 259 Wis. 2d 523, 657 N.W.2d 393.

Garcia also plucks language from *Rothgery* to bolster his argument that the *Riverside* hearing started the criminal

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[7] Garcia's Br. 24-25.

[8] Under Wis. Stat. § 939.74(1), "a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed" for purposes of time limitations. But in applying this statute, this Court held that a complaint also starts the prosecution when it was unnecessary to obtain a warrant. *State v. Jennings*, 2003 WI 10, ¶ 1, 259 Wis. 2d 523, 657 N.W.2d 393.

case against him.[9] But his effort is unpersuasive because Garcia misreads *Rothgery* to equate an initial appearance—at which point the State has filed criminal charges—with a *Riverside* hearing, at which point the State has not.

In *Rothgery*, the Supreme Court addressed the Rothgery's 42 U.S.C. § 1983 claim arguing that he had been entitled to counsel at his first appearance before a judicial officer. *Rothgery*, 554 U.S. at 194–98. Agreeing that Rothgery was entitled to counsel at that hearing, 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.*

The hearing at issue in *Rothgery* was peculiar to Texas. *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)—"followed routine." *Id.* at 196. Under Texas' procedure, the magistrate was required to inform Rothgery of 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.*

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[9] Garcia's Br. 19-27.

The hearing in *Rothgery* is akin to Wisconsin's initial appearance. *Compare* Tex. Crim. Code Proc. Ann., art. 15.17(a) *with* Wis. Stat. §§ 970.01, 970.02. In Wisconsin, the judge at the initial appearance has certain obligations, among them the duty to inform the defendant of the charges against him, the penalties he 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. Again, at the initial hearing, the State has filed charges; it is not a "nonadversary" *Riverside* pre-arraignment hearing. *See Gerstein*, 420 U.S. at 120–121 (holding that a probable cause hearing is a "nonadversary" proceeding before which the accused's right to counsel has attached).

Nothing in *Rothgery* changed the long-established rule in both Wisconsin and the Supreme Court that the Sixth Amendment right to counsel does not attach until the State has charged the defendant with a crime. *See Kirby*, 406 U.S. at 689; *State v. Dagnall*, 2000 WI 82, ¶ 30, 236 Wis. 2d 339, 612 N.W.2d 680, *rev'd 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 State has charged the defendant with a crime. *Kirby*, 406 U.S. at 690–91.

In other words, adversary proceedings have not started until the State signals that it is committed to prosecute. *Id.* at 689. In *Rothgery*, Texas made that signal when it charged Rothgery. *Rothgery*, 554 U.S. at 196. Here, Wisconsin had not charged Garcia at the time of the *Riverside* hearing or the time of the lineup. The *Riverside* proceeding was merely a judicial determination of probable cause; the State had not filed a complaint. Thus, Garcia's right to counsel had not attached when police conducted the lineup just after the *Riverside* hearing.

The State is not aware of a case in any jurisdiction—and Garcia points to none—in which a court has concluded that a defendant's Sixth Amendment right to counsel attaches at a *Riverside* proceeding. And it is worth noting that Garcia does not argue how the absence of counsel at the hearing was meaningful. For all of these reasons, this Court should continue to follow established federal and Wisconsin law to conclude that the right to counsel did not attach at the probable cause hearing. And because the right to counsel had not attached, the absence of counsel did not violate the Constitution. Thus, the circuit court properly denied Garcia's motion to suppress the results of the lineup.

II. The lineup was not unduly suggestive.

Garcia argues that the evidence from the lineup should have been suppressed because the lineup procedure was unduly suggestive and unreliable.[10] But the circuit court correctly concluded that the lineup was not unduly suggestive. Thus, it properly denied Garcia's motion to suppress. This Court should affirm that decision.

A. Standard of review and relevant law.

In general, the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012). Those means include the rights to counsel, compulsory process, and confrontation, as well as the rules of evidence. *Id.* It is "[o]nly when evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice' have

[10] Garcia's Br. 27-36.

[the courts] imposed a constraint tied to the Due Process Clause." *Id.* (citation omitted).

In the context of lineups, "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Id.* at 238-39. And even then, "suppression of the resulting identification is not the inevitable consequence." *Id.* at 239. "Instead of mandating a *per se* exclusionary rule, . . . the Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a 'substantial likelihood of misidentification.'" *Id.* (quoting *Neil v. Biggers*, 409 U.S. 188, 201 (1972)).

To determine whether a court should have suppressed evidence from a pretrial police identification procedure, this Court employs the same two-step standard that the circuit court applied.[11] *State v. Benton*, 2001 WI App 81, ¶ 5, 243 Wis. 2d 54, 625 N.W.2d 923. First, the defendant must show that the lineup was impermissibly suggestive. *Powell v. State*, 86 Wis. 2d 51, 65, 271 N.W.2d 610 (1978). If the defendant satisfies this burden, then—in order to admit the evidence—the State must show that the totality of the circumstances make the identification reliable. *Benton*, 243 Wis. 2d 54, ¶ 5.

This Court will not alter the trial court's factual findings unless they are clearly erroneous. *Id.* But this Court decides whether the identification was tainted and the reliability of the evidence de novo. *Id.*

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[11] The State agrees with Garcia that the court of appeals failed to acknowledge that the test for a due process violation in this setting is two-pronged. (Garcia's Br. 29 n.5.)

B. The lineup was not impermissibly suggestive.

To start, the lineup in this case was recorded, but that recording is not in the record. Garcia, as appellant, was tasked with compiling the record. *State v. McAttee*, 2001 WI App 262, ¶ 5 n.1, 248 Wis. 2d 865, 637 N.W.2d 744. When an appellate record lacks an item germane to an issue on appeal, this Court assumes the material supports the trial court's decision. *Id.*

Accordingly, the evidence pertinent to the lineup in this record came in through testimony. 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 wore orange jumpsuits, flip flops, green socks and a black winter cap. (R. 86:34.) Each man wore a number, one through six. (R. 86:34.) 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 conducted Garcia's lineup. (R. 86:54-55.) Pajot showed the lineup to two witnesses: the teller whom Garcia robbed and another bank employee. (R. 86:66-67; 89:39-43, 56-70.) Pajot said that after he gave the witnesses the lineup instructions and a form for them to fill out, 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 entire lineup again. (R. 86:69.)

After the witnesses saw the lineup the second time, Pajot met with each witness separately. (R. 86:64–65.) The first witness told Pajot that "number four"—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 the witness that if she was not positive that the bank robber was "number four" that she should "circle no" on her form, which she then did. (R. 86:66.)

Pajot then met with the teller whom Garcia robbed. (R. 86:67–68.) She told Pajot that she was 100 percent positive that "number four" was the bank robber. (R. 86:67–68.) She said that she had "concentrated solely on the perpetrator's face because he had a hood up over his head." (R. 86:68.) She also 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.)

As stated, a defendant is denied due process only when the evidence from the pretrial identification was the result of an impermissibly suggestive pretrial police procedure and the procedure created a substantial likelihood of misidentification. *See Perry*, 565 U.S. at 237. Here, there was nothing suggestive about the manner in which the police conducted the lineup. Garcia does not argue that he

stood out in an impermissible way[12] or that the other men in the lineup did not fit the description of the suspect. Garcia failed to satisfy his burden to show that Pajot used a lineup procedure that was impermissibly suggestive.

And Garcia's misreading of DOJ's Bureau of Training and Standards for Criminal Justice's Model Policy and Procedure for Eyewitness Identification ("model policy") does not persuade otherwise.[13] Garcia contends that when Pajot asked the witnesses if they wanted to see the entire lineup again, he ran afoul of the model policy's direction that a "witness may view one or more of the subjects again after the lineup has been completed" "[o]nly upon request of the witness."[14] (R. 3:25.) Garcia correctly points out that the model policy explains that a subsequent viewing of the lineup "converts" the procedure from a sequential lineup to a "quasi-simultaneous lineup." But he is wrong that this question made the lineup impermissibly suggestive.

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. Simultaneous lineups present the individuals to the witness all at once. (R. 3:8, 10.) According to the model policy, simultaneous lineups can be less accurate than sequential lineups because "[w]hen witnesses are given a simultaneous

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[12] 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." (R. 74:6.) Garcia has since abandoned this claim.

[13] Garcia's Br. 30–32. The policy is in the record attached to the incident report and transcript of the lineup. (R. 3:6–33.)

[14] Garcia's Br. 30.

presentation of multiple photographs or lineup subjects, they tend to make relative judgments." (R. 3:10.)

At the end of the initial lineup, Pajot asked the two witnesses if they had any questions or if they would like to see the lineup again.[15] (R. 86:63–64.) One of the witnesses said she wanted to see one of the individuals again; the other witness said she wanted to see one or two of the people again. (R. 86:64.) But Pajot told the witnesses that if they wanted to see people in the lineup again, he would have to run the entire lineup again. (R. 86:64.) And he did so. (R. 86:64–65.) Thus, both of the lineups were performed sequentially.

The only manner in which Pajot's conduct arguably ran afoul of the model policy is that he asked the witnesses if they wanted to see the lineup again. But when the witnesses answered that they wanted to see specific people—a practice that the model policy specifically contemplates and allows—Pajot declined their request and instead ran the full sequential lineup again. Even if running the entire lineup a second time converted the sequential lineup into a quasi-simultaneous lineup, Garcia fails to explain how a quasi-simultaneous lineup is per se unduly suggestive.

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[15] In his statement of the facts, Garcia says that Pajot "knew from his training that he was not supposed to show a witness the lineup a second time." (Garcia's Br. 7.) This statement mischaracterizes the record. The model policy 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.) Pajot testified that he did not remember reading this, but he was "sure" he had gone through the policy during detective school. (R. 86:73–74.) He also said that he had administered "well over one hundred" lineups and always asked if the witnesses wanted to see the lineup again. (R. 86:63.)

Nothing about how Pajot presented either lineup highlighted Garcia or caused him to stand out. Pajot did not suggest that the witnesses view particular people in the lineup a second time, but he asked if they wanted him to run the whole lineup a second time. Under a strict reading of the policy, Pajot's question arguably violated the directive not to suggest additional viewing, but it did not violate the purpose of this policy or due process. Nothing about running the lineup a second time made the lineup impermissibly suggestive. And Garcia's suggestion that the manner in which Pajot ran the lineup is per se impermissibly suggestive "is contrary to the general rule in Wisconsin that whether an identification procedure is impermissibly suggestive must be decided on a case-by-case basis." *Benton*, 243 Wis. 2d 54, ¶ 8.

Further, to the extent that Pajot's procedure risked the reliability of the witness's identification, the jury heard about it. Garcia was able to cross-examine Pajot and the eyewitnesses about the lineup at trial, which allowed him to argue that it was not conducted in accord with the model policy. (R. 90:45–51.) He specifically asked Pajot whether he had "decided to ignore" the policy. (R. 90:49.) And in his closing argument, Garcia argued that Pajot conducted the lineup in violation of the policy. (R. 93:46–49.) Thus, the jury was able to evaluate the strength of the witnesses' identification in light of Pajot's departure from the model procedure.

Because Garcia failed to meet his burden to show that the lineup was impermissibly suggestive, the circuit court properly denied his motion to suppress the evidence. *See Benton*, 243 Wis. 2d 54, ¶ 5.

Finally, Garcia faults the State for not presenting the eyewitnesses at the suppression motion hearing, arguing that it was the State's burden at the hearing to prove the

reliability of the identification.[16] But the circuit court unambiguously concluded that Garcia failed to meet his burden to show that the lineup was impermissibly suggestive; in doing so, it expressly declined the State's offer to hear additional evidence on the reliability of the identification. (R. 86:103–05.) Thus, Garcia's criticism of the State misrepresents the record. Should this Court decide that the lineup was impermissibly suggestive, the proper recourse is to remand the case to give the State the opportunity to meet its burden.

C. This Court should decline to address Garcia's request for a new rule on reliability.

As stated, under long-established law, if a defendant establishes that the police identification procedure was impermissibly suggestive, the burden shifts to the State to show that the identification evidence was nonetheless reliable under the totality of the circumstances. *See Biggers*, 409 U.S. at 198–99. "[R]eliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977).

Garcia asks this Court to overrule this approach and craft a new rule—either under the Wisconsin Constitution or under the Court's superintending authority—to determine admissibility.[17] But this Court should decline to do so for at least two reasons.

One, Garcia failed to raise this issue in his petition for review. *See* Wis. Stat. § 809.62(6). Two, Garcia's proposal concerns application of the second step of the two-pronged

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[16] Garcia's Br. 32.

[17] Garcia's Br. 36-43.

due process inquiry, which is not at issue in this case because the lineup was not unduly suggestive and because the circuit court did not take evidence on the question of reliability. This Court generally does not reach out to decide issues that are not necessary to decide to settle the dispute before it. *See Stoughton Trailers, Inc. v. Labor and Indus. Review Comm'n,* 2007 WI 105, ¶ 5 n.3, 303 Wis. 2d 514, 735 N.W.2d 477. It should decline Garcia's request to fashion a new rule here.

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

After three years, the circuit court was prepared to begin Garcia's trial when Garcia sought to discharge his sixth appointed counsel and proceed pro se. After conducting a colloquy and finding Garcia competent to represent himself, the court concluded that Garcia forfeited by his behavior his right to self-represent. As discussed below, the circuit court soundly explained how Garcia's dilatory and manipulative behavior caused him to forfeit his constitutional right to represent himself.

A. Standard of review and relevant law.

The Sixth Amendment grants a defendant the right to defend himself at trial. *Faretta v. California*, 422 U.S. 806, 819 (1975). It is the defendant "who must be free personally to decide whether in his particular case counsel is to his advantage." *Id.* at 834. But before a defendant may be permitted to represent himself, the trial court must ensure that that he or she knowingly, intelligently and voluntarily waived the right to counsel and that he or she is competent to exercise the right to self-representation. *State v. Klessig*, 211 Wis. 2d 194, 203–04, 564 N.W.2d 716 (1997). If these conditions are not met, the circuit court may not allow the

defendant to proceed pro se. *Id.* at 203–04. On the other hand, if these conditions are satisfied, the court must allow the defendant to represent himself or herself because not to do so would be to violate the Sixth Amendment. *Id.* at 204.

But "the Sixth Amendment does not bestow upon a defendant absolute rights." *State v. Cummings*, 199 Wis. 2d 721, 757, 546 N.W.2d 406 (1996). For example, "a defendant can forfeit Sixth Amendment rights through his or her own disruptive and defiant behavior." *Id.* "[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.

Whether a defendant has forfeited his right to self-representation is a question of constitutional fact. *Martwick*, 231 Wis. 2d 801, ¶ 17. The Court defers to the circuit court's factual findings unless they were clearly erroneous but independently applies constitutional principles to those facts. *Id.*

B. Garcia forfeited his right to represent himself.

The State charged Garcia in January 2012, but his trial did not begin until July 2015. (R. 1; 89.) The extraordinary delay from charging to trial was due almost entirely to Garcia's vexing conduct. And it was this same

type of conduct that led to Garcia's forfeiture of his right to represent himself.

At the preliminary hearing, held in January 2012, Garcia was represented by Nathan Opland-Dobs. (R. 64.) 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 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 Garcia was serving a three-year term of confinement. (R. 73:3.) At this hearing, Garcia told the court that he did not feel "comfortable" being represented by 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, and Harris represented Garcia at a September 2013 hearing. (R. 13; 74.)

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.) When the court asked Garcia if he wanted to represent himself, 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 it 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; rather, 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 wanted 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.) Garcia then repeated that he was not waiving his right to counsel. (R. 77:17-18.) The court said that it was not going to appoint Garcia 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 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 told Garcia that, by his insistence on filing motions and making his own arguments, he was refusing the assistance of counsel and unduly delaying the trial:

> Mr. Bonneson is the third lawyer on this case . . . 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. (R. 77:23-24.)

Garcia said that he would work with Bonneson if he agreed with him regarding his interpretation of Supreme Court law. (R. 77:24.) The hearing ended when the court said it would take the motion to withdraw "under advisement." (R. 77:25.) The court suggested that Bonneson should renew the motion if they could not work together. (R. 77:25.) The court held several hearings in April and May 2014, at which Bonneson continued to represent Garcia. (R. 78-81.)

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 Garcia's complaints. (R. 82:5-6.)

Garcia then moved—pro se—for the court to appoint him counsel. (R. 35.) In July 2014, the court held a hearing on the motion. (R. 83.) At the hearing, Bonneson told the court that he sought to withdraw based on Garcia's "harassment and abuse," which he described as "the worst that [he had] seen in [his] 30 years of practicing law." (R. 83:3.)

> Your Honor, I decided about a week or so ago to make a motion to withdraw in this case.[18] I know the Court is very familiar with Mr. Garcia and what's -- and the history of this case.
>
> 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. 83:2-3.)

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 it noted its "difficult position." (R. 84:10-11.) The court worried that allowing Bonneson to

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

withdraw was "encouraging" Garcia's poor behavior. (R. 84:11.) The court ultimately stated that it sympathized with Bonneson, and because the State was not objecting, it would grant Bonneson's withdrawal request and provide Garcia a new attorney. (R. 84:11-12.) But the court made clear that this would be Garcia's last 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. 8 5:15.) 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. But in May 2015, Garcia filed a pro se motion to represent himself. (R. 30.) In his motion, Garcia also asked the court to appoint standby counsel. (R. 30:2.) The court addressed the motion at the final pretrial hearing in June 2015—more than three years after the State filed the complaint and just weeks before the trial was scheduled to begin. (R. 87.)

The court said that the case would proceed to trial on the scheduled date. (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 provided a *Klessig*[19] colloquy, asking Garcia if he understood his constitutional rights—including the right to have an attorney represent him and the right to represent himself—and Garcia said that he did. (R. 87:9.) After a thorough colloquy that included the court's

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

questioning Garcia about his level of education, health, understanding of the charge against him and its penalties, understanding of the perils of self-representation and the benefits of an attorney, the court ultimately asked Garcia if he wanted to give up his right to counsel and represent himself. (R. 87:9-14.) 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 that 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:

> [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.

(R. 87:18–19.)

At this point, it seems the court was prepared to conclude that Garcia had validly waived his right to counsel.

But the court then realized it had misstated the penalty Garcia faced. (R. 87:19.) The court clarified that Garcia faced a steeper penalty that the court had previously told him. (R. 87:11, 19.) So the court asked whether knowing the correct penalty changed Garcia's decision "in any way." (R. 87:19-20.) The court and Garcia then had the following exchange in which Garcia told the court that he did not want Bihler as standby counsel:

> [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.) At this, the court reversed course and concluded that Garcia had forfeited his right to represent himself.

The court made clear that its decision was based on both Garcia's argumentative behavior in court that day and on 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.) Thus, the court concluded that Garcia had forfeited his right to self-representation and denied his motion. (R. 87:23.)

Garcia filed a pro se motion asking the court to reconsider. (R. 45.) He said his "primary" reason for seeking to represent himself was because Bihler had not moved the court "regarding the unlawful prosecution brought" against him, which he argued violated the Fourth, Fifth, Sixth, and Fourteenth Amendments. (R. 45:5.) Garcia emphasized that he did not want Bihler to act as standby counsel. (R. 45:4.)

On the first day of trial, Bihler presented Garcia's motion to the court. (R. 97.) But the court again explained that while it had been inclined to grant Garcia's motion earlier, "when asked simple questions, he couldn't respond with a yes or no, and he made it impossible, we do have to proceed with the trial, so as a practical matter, we couldn't function." (R. 97:3.) Further, the court said that "[t]he second problem was the delay." (R. 97:3.) When Garcia learned that the court would appoint Bihler as standby counsel, Garcia "didn't like that" and his response was "another attempt at delay." (R. 97:3-4.) Pointing out that the State filed the complaint in 2012, that the trial was just beginning in July 2015, and that Garcia had now had six attorneys, the court said, "Enough is enough" and denied Garcia's motion for reconsideration. (R. 97:4)

Before this Court, Garcia complains that the circuit court's denial of his motion to represent himself violated his Sixth Amendment right to proceed pro se.[20] Garcia criticizes

[20] Garcia's Br. 43-58.

the court of appeals' decision for its reliance on *Cummings*, 199 Wis. 2d 721, as opposed to *Faretta* or *Illinois v. Allen*, 397 U.S. 337 (1970).[21] According to Garcia, there are different standards in how the state and federal courts assess a defendant's trial behavior to determine whether he forfeited his right to proceed pro se.[22] Garcia seems to argue that a circuit court may conclude that a defendant forfeited his right to self-representation only when it applies the language expressly found in *Faretta* or *Allen*.[23] Garcia also argues that the circuit court denied his right to self-representation based upon only its speculation that he "*may* frustrate orderliness or efficiency" of the proceedings, as opposed to Garcia's actual disruptive and dilatory conduct.[24] But Garcia's arguments miss the mark for at least two reasons.

First, there is no distinction between the federal and State standards as it relates to a defendant's forfeiture of his constitutional right to self-representation.

In *Faretta*, the Supreme Court affirmed that a defendant has a Sixth Amendment right to represent himself at trial. *Faretta*, 422 U.S. at 832–34. But, as Garcia recognizes, the *Faretta* Court acknowledged that there are limits on a defendant's Sixth Amendment right to act as his own attorney, and that a "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." *Id.* at 834 n.46. In support, the Court cited *Allen*, 397 U.S. 337.

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[21] Garcia's Br. 46-48, 52-58.

[22] Garcia's Br. 46-48, 52-58.

[23] Garcia's Br. 46-47.

[24] Garcia's Br. 48.

In *Allen*, the Court held that an accused could lose his constitutional right to be present at trial through his "noisy, disorderly, and disruptive" conduct that made it "exceedingly difficult or wholly impossible to carry on the trial." *Allen*, 397 U.S. at 338. Specifically, it held that a defendant can lose his right to be present "if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Id.* at 343.

More recently, the Supreme Court reiterated that "the right to self-representation is not absolute." *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 161 (2000). Although *Martinez* concerned the scope of a defendant's appellate rights, the Court said that, "[e]ven at the *trial* level . . . the 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 (emphasis added).

Wisconsin courts apply the same standard. In *Cummings*, for example, the Court held that the circuit court did not deny the defendant his Sixth Amendment rights by "*requiring* him to proceed pro se, after his third court-appointed counsel had withdrawn, even though he had not verbally waived his right to counsel." *Cummings*, 199 Wis. 2d at 751–52. After acknowledging that a defendant must normally knowingly, intelligently, and voluntarily waive the right to counsel in such circumstances, the Court noted that there are times that "permit a court to find that the defendant's voluntary and deliberate choice to proceed pro se has occurred by operation of law." *Id.* at 752. The Court found that "a circuit court must have the ability to find that a defendant has forfeited his right to counsel." *Id.* at 756–59.

Citing *Allen*, the Court said that "the Sixth Amendment does not bestow upon a defendant absolute rights and that a defendant can forfeit Sixth Amendment rights through his or her own disruptive and defiant behavior." *Id.* at 756–57.

So too in *Woods*, 144 Wis. 2d at 714, which the *Cummings* court relied on. In *Woods*, the court of appeals affirmed the circuit court's requiring Woods to represent himself after he refused the assistance of his fifth-appointed counsel. *Woods*, 144 Wis. 2d at 714. The court rejected Woods's argument that the court should have colloquized him, saying that it would have put the "trial court in an impossible situation" because Woods conceded that he would not have waived his right to counsel. *Id.* The court said that Woods's case was about more than whether the trial court made an adequate record of Woods's waiver; the "case must also address considerations of the orderly and efficient administration of justice." *Id.* at 715.

Despite Garcia's argument to the contrary, *Faretta*, *Allen*, *Cummings* and *Woods* set the same standard to evaluate whether a defendant's behavior is so egregious that it operated as a matter of law to forfeit his right to self-representation. There is no meaningful difference between whether the conduct is characterized as "serious and obstructionist misconduct"; "so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom"; or "disruptive and defiant."[25] And Garcia points to none.

Thus, no matter which language this Court employs, a competent defendant's Sixth Amendment right to self-

[25] *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975); *Illinois v. Allen*, 397 U.S. 337, 343 (1970); *State v. Cummings*, 199 Wis. 2d 721, 757, 546 N.W.2d 406 (Ct. App. 1996), respectively.

representation is bounded by his own conduct. *See Faretta*, 422 U.S. at 834 n.46; *Allen*, 397 U.S. at 339-41, 345-47.[26]

Second, Garcia incorrectly asserts that the trial court "rescind[ed] the right to self-representation at the first sign of frustration" and was "very quick to revoke" Garcia's right.[27] Garcia faults the court for its "displease[ure]" with him when he declined to directly answer the court's question on how he would like to proceed to trial.[28] But in determining whether Garcia forfeited his right to counsel, this Court may not examine the record in a vacuum.

Garcia forfeited his right to represent himself because he was disruptive, manipulative and obstructive over the course of three years. When Garcia requested to represent himself, Garcia was represented by his sixth attorney and the proceedings were before the third judge. Garcia had repeatedly denied that he had wanted to represent himself but just weeks before trial, he told the court that he had changed his mind. But he also specified that he did not want Bihler involved in his case. (R. 30; 45.) And when it came time for the court to instruct Garcia that his choices were to proceed pro se with Bihler as standby counsel—as Garcia

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[26] *See also United States v. Banks*, 828 F.3d 609, 616 (7th Cir. 2016) (recognizing that a defendant's obstructionist behavior can rescind his waiver of rights); *Imani v. Pollard*, 826 F.3d 939, 946–47 (7th Cir. 2016) (acknowledging that a court may deny a motion for self-representation based on a defendant's delay in the assertion of the right or obstructionist behavior); *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998) (stating a judge may terminate a defendant's right to self-representation based on his conduct).

[27] Garcia's Br. 48, 52.

[28] Garcia's Br. 52–53.

admits is the court's prerogative[29]—or to have Bihler represent him—Garcia refused to directly answer the court's questions. (R. 87:20.) Instead, he continued on his argumentative and obstreperous path.

Further, the court said that it was "convinced" that "something [was] going on with Mr. Garcia" such that the court did not know how to proceed with him representing himself. (R. 87:21.) The court noted that Garcia's behavior had caused the court's deputy concern that he would have to remove Garcia from the courtroom. (R. 87:22–23.)

Notably, after the court denied Garcia's motion, Garcia moved for reconsideration, claiming that if he had been allowed to continue his discussion with the court at the previous hearing, he would have explained that he did not agree to have Bihler act as standby counsel and that he would have objected to the court's trial schedule, arguing that if he had been allowed to proceed pro se, the July 2015 trial date would have been too soon for him to prepare. (R. 45:4.)

At the hearing on his motion for reconsideration, Bihler said that Garcia not only wanted to represent himself, but he sought an adjournment of the trial to do so. (R. 97:3.) The court again denied the motion, pointing to how Garcia had made it "impossible" to conduct the trial because he would not answer simple questions. (R. 97:3.) Moreover, the court said that Garcia's effort was just "another attempt at delay[ing]" the trial. (R. 97:3-4.)

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

[29] Garcia's Br. 52. *See Faretta*, 422 U.S. at 834 n.46.

repeatedly result in delay. *Suriano*, 374 Wis. 2d 683, ¶ 24. Garcia's behavior was a textbook example of all of these circumstances. As the State pointed out at a hearing not long before trial, "Mr. Garcia seems to have [an] issue with everybody and at a certain point the indication is that it is Mr. Garcia, it is not every single attorney that he is appointed." (R. 85:1–-20.)

Garcia argues that his behavior was not *that* bad. Although Garcia's behavior at the final pretrial alone may not have been enough to warrant the trial court's conclusion that he forfeited his right to self-representation, the record as a whole establishes that Garcia acted with intent—since at least March 2012, when his first counsel moved to withdraw—to delay and disrupt the proceedings. His conduct created a delay of over three years from charging to trial. Garcia's long history of misconduct, not just his misconduct that day, led the court to conclude that he could not represent himself and that he forfeited his Sixth Amendment right to act pro se.

Finally, that the circuit court here did not explicitly warn Garcia before holding that he forfeited his right, *see Suriano*, 374 Wis. 2d. 683, ¶ 1, does not change the result in this case. Garcia cannot have been unaware of the disruptive nature of his behavior. Over the three years that he spent before the court on this case, the court told him time and again that his behavior was obstructive. (R. 84:9–17; 85:14–15.) The court even noted that Garcia was learning that by engaging in his obstreperous conduct "this matter can really be drawn out forever." (R. 84:11.) Further, even after the court told Garcia he had only a choice between standby counsel and representation, Garcia refused the choice and requested an adjournment of the trial. (R. 45; 97:3.) With all of that, Garcia created a no-win situation for the trial court. Thus, as in *Woods*, requiring the court to give Garcia

warnings here would be holding it to "unattainable requirements" when Garcia effectively conceded he would not have heeded them. *See Woods*, 144 Wis. 2d at 714. The lowed courts therefore properly concluded that Garcia had forfeited his right to self-representation.

CONCLUSION

For these reasons, the State respectfully requests that this Court affirm the decision of the court of appeals.

Dated this 14th day of March, 2019.

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 11,471 words.

Dated this 14th day of March, 2019.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 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. § (Rule) 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 14th day of March, 2019.

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