STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2017AP000228-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

JULIO CESAR PACHECO ARIAS,

Defendant-Respondent.

ON APPEAL FROM THE ORDER OF DISMISSAL
ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT,
THE HONORABLE HANNAH C. DUGAN, PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. Any delay caused by the State was not intended to, nor did it actually hamper Pacheco-Arias' case.

Pacheco-Arias argues in his response brief that the State's reason for delay was an affront to the circuit court and a deliberate attempt to hamper the defense and that factor must be weighed heavily against the State. Some of the delays that were made in the case were "required for the orderly administration of criminal justice". *Scarbrough v. State*, 76 Wis. 2d 87, 101, 250 N.W.2d 354, 361 (1977), (R11) (R37).

In addition, several delays were specifically requested by Pacheco-Arias, including setting the cases for plea hearings and having his original attorney withdraw. (R11, R34, R36). The State argues that only two months of the thirteen month delay are attributed to the State. Those periods are the period between March 8, 2016 to April 13, 2016, in which the State did not have the file in court and the period between September 6, 2016 to October 3, 2016, the date of the jury trial. Other than time delay, which is mostly attributed to other factors outside of the State, Pacheco-Arias does not mention how his defense was actually hampered in this case. In Pacheco-Arias' response brief, he is unable to point to any specifics in regards to how his defense was hampered.

"Closely related to length of delay is the reason the government assigns to justify the delay". *Barker v. Wingo*, 407 U.S. 514, 531(1972). The reason for delaying the August 15, 2015 case was to resolve the August 1, 2015 case first as a matter of public policy in handling OWI matters. The delay was attributed to a chronological matter, as the State wished to resolve the first offense date (August 1) and achieve a result, and then from there the State could properly handle the second offense date. As stated by Assistant District Attorney Randy Sitzberger at the October 3, 2016 hearing and cited by Pacheco-Arias in his reply brief, the State wanted to dismiss the August 15 case (the latter case) because

> [i]t's in the public interest to do so. To do otherwise, Judge, would allow the possibility of Mr. Pacheco Arias falsely making both of these misdemeanor allegations when the spirit of the law is that the offense committed within five years of a prior, should he be convicted on the early case, should be handled as a felony.

(R40:6).

If Pacheco-Arias was found not guilty of the earlier case (August 1), then Pacheco-Arias could proceed with the latter case (August 15) as a misdemeanor. However, if Pacheco-Arias was found guilty of the August 1, 2015 offense, the August 15, 2015 offense would be considered a felony, as reflected in Wis. Stat. Section 346.65 (2)(am)4m. There are significant public policy reasons to resolve these offenses in chronological order. OWI offenses, especially third and fourth offenses, are offenses

that are taken seriously in Wisconsin. Handling the cases in the order of the offense date is crucial due to the importance of the State's effort to combat drunk driving offenses, especially when there is a possible felony level offense involved.

II. This court should consider any additional delay that would accrue as only one factor in a four-factor *Barker* analysis.

In his brief to the court, Pacheco-Arias stated that,

> [w]hat the state wholly fails to appreciate, though, is that if the court allowed the state to dismiss the charges without prejudice, the charges could be reissued *and all of this additional time is counted in the speedy trial analysis*.

(emphasis in original) (Respondent's Brief, p. 8-9). Pacheco-Arias additionally cites the fact that the law is not settled when it comes to including the time frame in which a first complaint is dismissed and a second complaint is issued. (Respondent's Brief, p. 9).

In *State v. Urdahl*, the Court of Appeals stated that

> [w]e conclude that, under *MacDonald*, the time period between the dismissal on August 8, 2001, of the initial charges against Urdahl and the filing of the complaint on October 3, 2001, is not included in determining whether his constitutional right to a speedy trial was violated.

State v. Urdahl, 2005 WI App 191, ¶ 20, 286 Wis. 2d 476, 491, 704 N.W.2d 324, 332. Thus, the time in between the charges, if they were to be dismissed without prejudice in this case, would not be counted. As to the time frame in the predismissal, the court was more wary of deciding if it would count in the analysis, stating:

> We are reluctant to decide which approach to follow in the absence of fuller briefing by the parties, and we are satisfied that we need not make that decision in this case. As we explain in considering the second *Barker* factor-the reason for the delay-at most two weeks of the predismissal time period would be counted against the State, even if we were to decide that the predismissal time period should

> initially be included in determining the length of delay. We will therefore assume without deciding that we do include the predismissal time period.
>
> Adding the four predismissal months to the approximately twenty-six and one-half months from the filing of the complaint on October 3, 2001, to the scheduled trial date of December 19, 2003, results in a total of thirty and one-half months. Because this is greater than one year, we presume prejudice. We therefore analyze the remaining three factors, and then discuss how we weigh all four factors.

Id. at ¶¶ 24-25.

Any delay from the pending second charge would in fact be accounted for in any consideration of the delay. However, as found in *Urdahl*, the court was

> considering the predismissal time period, but not the time between dismissal and the filing of this complaint, and subtracting delays caused by Urdahl and by the unavailability of witnesses, there are at most approximately twenty and one-half months that are counted against the State. However, since the delays during that time period were due to the court's calendar, the reason for delay is not heavily weighted against the State.

Id. at ¶ 32.

Regardless, the State agrees with Pacheco-Arias in that there would be additional delay if the charges were to be reissued. However, as stated in *Urdahl*, factors such as delays caused by the court's calendar are not heavily weighed against the State and are just one factor to consider. There would need to be an additional finding that any delay in the reissued case was intentionally caused by the State. Again, any length of delay, if found to be presumptively prejudicial, is only one factor of the four-factor *Barker* balancing test. *Id*. ¶ 12. Those factors are: "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant *Id*. ¶ 11, (citing *Barker v. Wingo*, 407 U.S. 514, 530.) The three remaining *Barker* factors would have to be considered for the future delay that would be caused if the charges were to be reissued. Any delay accrued is

implemented into the analysis of whether a Defendant's speedy trial rights were violated. The State contends that Pacheco-Arias' rights would not be violated on the sole basis of additional time delay if charges could be reissued.

CONCLUSION

For the reasons stated above, the court should reverse the trial court's decision dismissing Pacheco-Arias' case with prejudice.

Dated this _____ day of July, 2017.

Respectfully submitted,

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_____
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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 word count of this brief is 1,231.

_____ _____

Date Francesco G. Mineo
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CERTIFICATE OF COMPLIANCE WITH 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 s. 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.

_____ _____

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