STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2021AP177-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER S. BUTLER,

Defendant-Appellant.

APPEAL FROM A NON-FINAL ORDER DENYING A MOTION TO DISMISS ENTERED IN THE BROWN COUNTY CIRCUIT COURT, THE HONORABLE BEAU LIEGEOIS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Circuit courts have inherent authority to manage their calendars and adjourn or schedule hearings in the interests of justice, including a defendant's initial appearance. Additionally, under Wis. Stat. § 970.03(2), for cause, a court may extend a defendant's right to a ten-day preliminary hearing (a.k.a. preliminary examination). Whether a circuit court properly exercises its discretion in adjourning an initial appearance and whether repeated adjournments implicate section 970.03(2) depends on the facts of each case.

Christopher Butler asserts that the circuit court lost personal jurisdiction over him due to repeatedly adjourning his initial appearance until a permanent State Public Defender (SPD) counsel was located. He also claims the adjournments violated his right to due process and his right to a speedy trial.

However, Butler forfeited any jurisdictional objection by not raising it at his completed initial appearance, his preliminary examination, or his arraignment, and by entering pleas to the charges. Further, the court did not lose jurisdiction over Butler during the time he was otherwise being held on a probation hold. And the remaining delays were justified and reasonable under the circumstances.

Here, the time between the commencement of the initial appearance and the preliminary hearing involves two discrete periods of delay. First, Butler was in lawful custody from October 10, 2019 through March 30, 2020, on a probation hold; therefore, any erroneous exercise of discretion in adjourning Butler's initial appearance did not deprive the court of personal jurisdiction during this period. As for the second period thereafter, no erroneous exercise of discretion occurred due to the combination of: Butler's rejection of the experienced counsel SPD located for him; Butler's insistence on his statutory speedy trial right despite the trial

postponements caused by COVID-19; the court's personal efforts to locate counsel for Butler; SPD's refusal to provide the court with a list of attorneys who were qualified to handle Butler's case; the State's request for a timely and speedy disposition; the need for current counsel to obtain SPD certification and be formally appointed; and current counsel's scheduling conflicts.

A circuit court's inherent authority to adjourn the initial appearance is also subject to making a 48-hr *Riverside*[1] probable cause determination. However, here, *Riverside* did not apply to Butler because he was in lawful custody on a probation hold from October 10, 2019 to March 30, 2020. Thereafter, Butler did not raise any objection to the sufficiency of the complaint to establish probable cause. Once counsel was appointed, he completed his initial appearance, the court found probable cause for bind-over at the preliminary examination, and Butler entered pleas to the charges at arraignment. And he did not raise a due process issue in his motion to dismiss. By doing so, Butler forfeited any due process claim based on a *Riverside* violation. And because bail was timely set and probable cause was found at the preliminary hearing, any error was harmless.

Finally, Butler's Sixth Amendment speedy trial claim was not preserved below and expressly abandoned. But it also fails on the merits because delays to obtain counsel for a defendant are "valid" and not counted against the State. Further, the delays in locating counsel after Butler's first attorney withdrew were largely due to Butler's insistence on a statutory speedy trial demand, despite the fact that jury trial were suspended due to COVID-19, and that Butler no longer wanted a speedy trial once he posted bail. And, Butler

[1] *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

has not established any prejudice to his ability to present a defense.

Therefore, this Court should affirm the circuit court's order denying Butler's motion to dismiss. To the extent he is entitled to any relief, the appropriate remedy is a dismissal *without* prejudice.

ISSUES PRESENTED

The State reframes and reorganizes the issues presented by Butler as follows:[2]

1. Did the circuit court lose personal jurisdiction over Butler by repeatedly adjourning the initial appearance until permanent SPD counsel was located.

Answered by the circuit court: No.

This court should affirm. Butler forfeited his jurisdictional objection. The delays did not result in the loss of jurisdiction while he was on his probation hold and the remaining delays were reasonable under the circumstances. If any error occurred, the appropriate remedy is a dismissal without prejudice.

2. Did the circuit court violate Butler's right to due process by failing to make a *Riverside* probable cause determination?

Answered by the circuit court: Not addressed because this claim was never raised below.

This Court should answer: No. Butler forfeited any *Riverside* claim; *Riverside* did not apply to Butler while he was in custody on the probation hold; and any error was

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[2] The State addresses Butler's three main arguments (jurisdiction, due process, and speedy trial) as discrete issues and answers the questions posed by this Court within its analysis of each.

harmless because bail was timely set and probable cause was found at the preliminary examination.

3. Did the circuit court violate Butler's Sixth Amendment right to a speedy trial?

Answered by the circuit court: Not addressed because this claim was never raised below.

This Court should answer: No. Butler's Sixth Amendment speedy trial claim was not preserved below and expressly abandoned. The claim also fails on the merits.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

While the unique facts of this case caution against publication, publication may be warranted depending upon the scope of this Court's ruling. While the State believes that the issues can be addressed adequately in the briefs, it is happy to provide oral argument if this Court so desires.

STATEMENT OF THE CASE

On October 10, 2019, Butler was taken into custody in Brown County on a probation hold. (R. 2:1.)[3] On October 23, Butler was charged in Brown County Circuit Court with: (1) repeated acts of sexual assault of a child; (2) repeated acts of sexual assault of another child; and (3) exposing his genitals to a child. (R. 1:1–2.) All charges included a penalty enhancer due to Butler's prior convictions for second-degree sexual assault of a child and identity theft. (R. 1:1–2.)

According to the complaint, the child victims are sisters and Butler is their mother's boyfriend. Both are in high school

[3] Butler was sentenced to 12-months' probation in Brown County Case No. 2016CF0958 after pleading no-contest to identity theft charges. *See https://wcca.wicourts.gov/caseDetail.html?caseNo=2016CF000958&countyNo=5&index=0&mode=details*.

and reported to their school counsellor that Butler sexually molested them on multiple occasions when they were in the fifth and sixth grades. (R. 1:2–3.) Specifically, both victims alleged that Butler touched their breasts under their shirts, rubbed his penis against their backside, and performed cunnilingus on them. (R. 1:3–4.) Both victims wrote out statements and participated in forensic interviews where they repeated the allegations. (R. 1:2–6.)

As reported in the media, due to the shortage of public defenders, Brown County instituted a court policy of adjourning initial appearances until permanent SPD counsel can be located.[4] Judge Liegeois, who presided over this case confirmed that policy on the record. (R. 97:6.)

Butler's first initial appearance was held on October 23, 2019—the same day the criminal complaint was filed. (R. 77:1.) Butler appeared with temporary SPD counsel, who waived formal reading of the charges and reserved the right to argue bond at a later date. (R. 77:2–3.) Bond was set at $75,000 and then the "balance of the initial appearance" was scheduled for November 20, 2019, with the court commissioner remarking, "just given the nature of this, I expect it will take the public defender some time to appoint." (R. 77:3.)

Counsel had not yet been appointed by November 20, so the court rescheduled another hearing for December 4. (R. 78:2.) Additional hearings were scheduled and then adjourned on December 18, 2019 and February 5 and 26, 2020. (R. 80–82.) On March 18, 2020, Butler appeared for the "balance of initial appearance and bond hearing" at which his temporary SPD counsel argued to lower his bond. (R. 83:1–2.) The commissioner rejected the request for bond modification

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[4] *https://fox11online.com/news/local/green-bay/court-officials-public-defender-shortage-causing-delays-driving-up-local-costs*.

and set another hearing for April 22, 2021, noting that Butler had been in custody "for a long time." (R. 83:6.)

On March 24, 2020, Butler filed a pro se motion for bond modification, asking for a signature bond. (R. 14:1). He noted that he had his final revocation hearing on February 17, 2020, and that his probation would not be revoked. (R. 14:1).[5] Butler further argued that "[d]ue to the systemic breakdown in the public defender system the defendant has not been publicly-assigned counsel." (14:2–3.)

The same day, Butler filed a pro se "Demand for Speedy Trial," noting that he had been in custody since October, that he did not have and was not informed of his right to a preliminary hearing within 10 days as required by section 970.03(2), and that the victims had a statutory right to a prompt hearing. (R. 13:1.) He asserted: "Personal jurisdiction has been lost due to the preliminary examination not being timely held." (R. 13.2)

Another hearing occurred on March 26, 2020, at which time Attorney Jeffrey Cano appeared and argued for a reduction in bond and GPS monitoring. (R. 84:5–6.) The victims' mother appeared at this hearing in *support* of Butler and also argued for a decreased bond. (R. 84:4–6.) The commissioner denied the request. (R. 84:9.)

At the time of the March 26 hearing, Butler was still in custody on the probation hold; the hold was instituted on October 10, 2019, and was not lifted until March 30, 2020. (*See supra* n.4).

Attorney Aileen Henry was then appointed counsel on April 17, 2020. (R. 16.) Another hearing occurred on April 22,

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[5] According to the DOC Offender Locator, Butler's probation hold was officially released on March 30, 2020. (R-App. 5.) This Court may take judicial notice of agency records. *State v. Wachsmuch*, 73 Wis. 2d 318, 331–32, 243 N.W.2d 410 (1976).

2020, at which time Attorney Henry indicated that when she was appointed, she was unaware of the speedy trial demand and stated, "I'm not sure that I will be able to meet Mr. Butler's speedy trial demand once its reinstated, because of the trials I have now." (R. 86:2.) The commissioner responded that it took about six months to find Butler an attorney and "I wouldn't be shocked if it takes that much longer to get you a new lawyer, at which point your speedy trial demand probably doesn't mean a whole lot." (R. 86:3.) The court told Butler that he would be entitled to a new attorney if he requested one, "but the length of time it's going to take is going to be an awful [long time]." (R. 86:4.) Butler asked, "why that's happening," and the court responded: "Shortage of attorneys willing to take public defender cases." (R. 85:4.) Butler was also informed that if he insisted on his speedy trial demand, he would probably wait longer to get to trial with a new attorney. (R. 86:4.) The court also remarked that Butler's speedy trial right "doesn't actually kick in until after there's been an Information filed." (R. 86:3.)

On April 28, 2020, Butler again appeared with Attorney Henry who indicated that Butler and her "agreed that I should withdraw" and have another attorney appointed due to her inability to comply with Butler's speedy trial demand. (R. 85:3–4.) The commissioner advised Butler that if he discharged Henry, "its going to take a couple of months probably" for new counsel to be appointed; Butler responded: "Okay." (R. 85:4.) Butler said he did not want to keep Henry as his counsel, and the court therefore granted her motion to withdraw. (R. 85:5.)[6] Butler requested to be heard on bond and the court scheduled a new hearing, noting that Butler wanted SPD representation. (R. 85:5–9.) The State also

[6] Whether Attorney Henry "withdrew" or whether Butler "fired" her is a point of contention; the State views it as a mutual decision.

requested that the court impose a no-contact order preventing Butler from communication with the mother of the crime victims because he was "reaching out to her to try and coerce witnesses." (R. 85:8.)[7] The court granted the State's request. (R. 85:9.)

Butler again appeared with temporary counsel from SPD at a bail hearing on May 5, 2020. (R. 87.) Counsel argued for a significant decrease in the cash bond ($75,000 to $50,000), and the court granted the request. (R. 87:6.) The next adjourned initial appearance hearing occurred on June 2, 2020. Attorney Cano again appeared as temporary counsel and indicated SPD was still trying to locate permanent counsel. (R. 88:2.)

Then on June 22, 2020, the District Attorney wrote to the court asking that it expedite appointment of counsel for Butler. (R. 23.) The State noted that Butler's case had been pending for eight months and gone through 12 court appearances, that Butler had been on a probation hold for part of that time, and that the crime victims had a constitutional interest to a timely disposition of the case and to be free from unreasonable delay. (R. 23:1.)

Another hearing was held on June 23. (R. 89.) Butler appeared by temporary SPD counsel, who noted SPD was still seeking counsel, and argued for a reduced bond. (R. 89:2–3.) Counsel indicated appointment of counsel was *not* being delayed by any conflict within the SPD's office. (R. 89:3–4.) The commissioner denied the request for bond reduction and noted that "[i]t sounds like Judge Liegiois may be considering appointing counsel for him. (R. 89:7.)

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[7] Butler characterizes this as "a concerted effort by the State to harangue an ally of Mr. Butler into dropping her activities for the defense." (Butler's Br. 33.)

Judge Liegiois held a status conference on July 1, 2020. (R. 90.) The court noted that the case was still "at the initial appearance phase" and that there had not yet been an arraignment. (R. 90:2–3.) Judge Leiogois indicated that the case had reached the point where he was going to start calling attorneys to see if they would take a public defender appointment, but that he was limited to contacting attorneys with the appropriate certification to handle this type of case. (R. 90:4.) Butler said he was willing to have Attorney Henry be re-appointed if she could honor his speedy trial demand. (R. 90:6.)

Attorney Veil from the SPD's office stated that she thought SPD would be able to appoint counsel but-for Butler's speedy trial demand, which "appears to be limiting our options." (R. 90:7.) She indicated that due to the high caseloads and competency issues, SPD was unable to make a staff appointment. (R. 90:8.) She stated that there are only a limited number of attorneys who are qualified to represent a defendant in a case of this magnitude and that SPD had been unsuccessful in locating a private attorney to take the case with the speedy trial demand. (R. 90:8.) She elaborated that her office did not have any attorneys that were both available and qualified to take Butler's case, stating "we cannot ethically represent Mr. Butler at this time." (R. 90:12.) Attorney Viel further explained that appointing counsel is an "administrative matter" handled by "the secretaries" in SPD's office because SPD attorneys cannot exert any influence on potential appointees. (R. 90:10.)

The court then indicated that it would "contact the Public Defender's Office to get a list of attorneys, private bar attorneys that are certified to take these cases and start calling them personally to see if they'll take the public defender appointment." (R. 90:10–11.)

Another "adjourned initial appearance" occurred on July 9, at which the commissioner said she would send a

message to the judge asking if he would consider appointing counsel. (R. 91:3.) Butler stated that he thought his rights were being violated because it was taking so long. (R. 91:3.)

At another hearing on July 16, 2020, the court commissioner made a record of the fact that Judge Liegeois had contacted four private attorneys to see if they would take the case and that two refused and two had not responded. (R. 92:2–3.) The commissioner said that Judge Liegeois was next planning on calling attorneys out-of-county. (R. 92:3.) The State expressed frustration by the continued delay. (R. 92:6.)

Thereafter, Judge Liegeois began contacting attorneys personally to see if they would take an SPD appointment for Butler's case; however, his efforts were hampered because the SPD office would not share their list of qualified attorneys: "[M]y judicial assistant contacted the Public Defender's Office to obtain their list of local attorneys who are qualified enough to take this case, and they refused to provide her with that list." (R. 97:9.)

At the next adjourned hearing, the commissioner reported that Judge Liegeois may have located an attorney from Milwaukee who was qualified to take the case and that he "had put considerably [sic] effort into finding an attorney to take this case" for Butler. (R. 93:4.) Butler said, "I reject to any other court hearings." (R. 93:5.)

Counsel still had not been secured by the July 30 adjourned hearing, although SPD noted that it was in discussions with the attorney from Milwaukee who needed to complete the certification process. (R. 94:2.) The commissioner then scheduled another hearing for SPD to explain why it hasn't been able to appoint anyone. (R. 94:7–8.)

At the next hearing on August 6, Attorney Shannon Viel appeared from SPD. (R. 95:2.) Attorney Viel again stated that the local SPD office did not have any available attorneys who

were qualified to take the case due to the caseload of experienced attorneys and the significant portion of staff attorneys who were not experienced. (R. 95:4.) Attorney Viel further explained that the attorney that Judge Liegeois contacted had not completed the SPD certification process yet. (R. 95:5.) And Attorney Viel again reiterated that SPD may be more successful in locating counsel if Butler withdrew his speedy trial demand. (R. 95:6.)

Attorney Cano from SPD appeared at another bail hearing on August 12, explaining that the attorney they thought would be willing to represent Butler had not sent back the certification paperwork and "his staff doesn't put me through to him" when SPD tries to call. (R. 96:3–4.) When asked why SPD staff attorneys could not represent Butler, Attorney Cano stated, "ethical reasons" and "there's only two—there isn't enough staff here that is qualified to take it." (R. 96:5–6.) Attorney Cano again argued for a bond reduction. (R. 96:5–6.) The State opposed the request, indicating that Butler had been on a probation hold, but conceding that "six months is a long time, not [to have] appointed counsel." (R. 96:7.) The court commissioner denied the request for bond modification, but stated that "everybody sitting here agrees it's not something that is ideal, appropriate, that he doesn't have an attorney at this point." (R. 96:9.)

On August 13, 2020, SPD appointed Chris Hartley to represent Butler.[8] The initial appearance was completed on September 8, 2020 (R. 35.) No probable cause finding was made. (R. 102.) However, Butler did not object to lack of a *Riverside* probable cause determination at this point, nor did he assert that the court was without jurisdiction to continue the prosecution against him. (R. 102.) Counsel indicated that Butler had read the complaint and was "intimately familiar"

[8] He is the attorney from Milwaukee that Judge Liegeois contacted (R. 95:5) and is Butler's current counsel.

with the allegations. (R. 102:2). Due to counsel's scheduling conflicts, the preliminary hearing was set for September 29, 2020. (R. 102:2–4).

The preliminary hearing was held on September 29, at which time the court found probable cause, bound Butler over for trial, and an information was filed. (R. 103:15.) Again, Butler made no objection to the lack of a *Riverside* probable cause hearing; he did not allege that the hearing violated the ten-day period under section 970.03(2); and he did not object to the court exercising personal jurisdiction over him. (R. 103:3–16.) Butler was arraigned on November 3, 2020. (R. 105.) Butler waived reading of the complaint and entered not guilty pleas to all three charges—again, not asserting any jurisdictional or timeliness objections. (R. 105:3.)

Another hearing occurred on November 13, 2020, at which time Butler had not yet asserted a statutory speedy trial demand. (R. 106:7–8; 45.) Butler did request a speedy trial at the next hearing on November 24, 2020, and a trial date was set for February 10, 2021. (R. 107:2, 5; 46.) Again, Butler did not object to lack of personal jurisdiction. (R. 107:1–8.) Butler posted his $50,000 bond on December 28, 2020. (R. 47.)

Final pretrial conferences were held on January 15, January 22, and January 29, 2021. (R. 108; 109; 61.) At the January 15 conference, Butler expressly waived his right to a speedy trial and asked the court to reset the trial dates. (R. 108:8.)

Butler then filed a motion to dismiss at the January 22 hearing, alleging that the court lost personal jurisdiction over him under *State v. Lee*,[9] because it failed to hold the preliminary hearing within ten days of the initial appearance.

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[9] *State v. Lee*, 2021 WI App 12, 396 Wis. 2d 136, 955 N.W.2d 424 (pet. for rev. granted).

(R. 54.) Butler did *not* allege a *Riverside* due process violation, nor did he allege that his right to a speedy trial or right to counsel were violated because of the delays. (R. 54:1–4.) He also reiterated that a speedy trial wasn't "necessary any more." (R. 109:7.)

The motion was heard at the January 29 hearing. (R. 97:2.) Butler made no additional legal arguments and asserted that under *Lee* "there's a loss of personal jurisdiction, and so I think the remedy is to dismiss without prejudice." (R. 97:3.) The State argued that *Lee* was distinguishable and that Butler waived any objection to the court's personal jurisdiction because it was not raised at the arraignment or preliminary hearing. (R. 97:3.) The court denied the motion, noting several factual distinctions from the *Lee* case. (R. 97:5–12.)

After the motion was denied, Butler sought "an adjournment of this case because of its magnitude and the fact that the charges are very very serious and some additional time would be very beneficial." (R. 97:12.) The State objected to an adjournment, asserting the interests of the crime victims warranted a prompt trial and noting that Butler's position on a speedy trial had changed: "And now that's he's posted bail his position has changed and he no longer wants to proceed with trial as quickly as he did before." (R. 97:14.) The court kept the trial on as scheduled for February 9, 2021. (R. 97:16.)

On February 2, Butler filed a petition for leave to appeal, thereby delaying his jury trial. This Court granted the petition.

STANDARD OF REVIEW

Jurisdictional questions present issues of law reviewed de novo on appeal. *Socha v. Socha*, 183 Wis. 2d 390, 393, 515 N.W.2d 337 (Ct. App. 1994). Whether a defendant's

constitutional rights to due process and a speedy trial were violated are questions of constitutional fact: the circuit court's historical findings are upheld unless clearly erroneous, but this Court independently applies the law to those facts. *State v. David J.K.*, 190 Wis. 2d 726, 738, 528 N.W.2d 434 (Ct. App. 1994); *State v. Borhegyi*, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998).

ARGUMENT

I. The court did not lose personal jurisdiction over Butler by repeatedly adjourning the initial appearance so permanent SPD counsel could be located.

A. Courts have inherent authority to adjourn hearings.

Wisconsin Stat. § 970.01 governs initial appearances and states: "Any person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed." At the initial appearance, the court is required to inform the defendant of the charges against him and possible penalties, advise the defendant of his right to counsel, admit the defendant to bail, and schedule the preliminary examination, among other things. Wis. Stat. § 970.02(1)–(8).

While there is no provision in section 970.01 or .02 that permits a court to "adjourn" an initial appearance, courts have inherent authority to do so. "[T]he matter of continuances and adjournments is within the constitutional authority of the judiciary . . . . Courts have the inherent authority to ensure that 'the court functions efficiently and effectively to provide the fair administration of justice.'" *State v. Chvala*, 2003 WI App 257, ¶ 19, 268 Wis. 2d 451, 673 N.W.2d 401 (quoting *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749–50, 595 N.W.2d 635 (1999)). "A court's authority to

grant or deny continuances and adjournments is critical to ensuring that it functions efficiently and fairly." *Id.*

B. A decision to adjourn is reviewed for an erroneous exercise of discretion and in some cases might violate section 970.03(2).

When a court exercises its inherent authority, its decision is reviewed for an erroneous exercise of discretion. *State v. Henley*, 2010 WI 97, ¶ 106, 328 Wis. 2d 544, 787 N.W.2d 350. "Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning." *McCleary v. State*, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971).

There may be a number of different scenarios that justify adjourning an initial appearance. Examples include situations where a defendant disrupts the proceedings or where the presiding magistrate becomes ill. Here, the question is whether adjourning the initial appearance so counsel can be located is an erroneous exercise of discretion, particularly when repeated adjournments are made that implicate a defendant's right to a ten-day preliminary examination under section 970.03(2).

The State does not concede that there are no instances in which adjourning an initial appearance to locate counsel could constitute a proper exercise of discretion—particularly where, as here, the court does so to ensure a defendant has representation at all "critical stages" for purposes of the Sixth Amendment right to counsel. *State v. Anderson*, 2006 WI 77, ¶ 67, 291 Wis. 2d 673, 717 N.W.2d 74 (accused has right of counsel at all critical stages of the proceeding).

However, the State also recognizes that repeated adjournments could, in some cases, defeat the purpose of section 970.03(2), as set forth in *State v. Lee,* 2021 App 12, 396 Wis. 2d 136, 955 N.W.2d 424. Pursuant to section 970.03(2), a preliminary examination must be held in ten days in cases

of a felony where bail is set in excess of $500, except: "On stipulation of the parties or on motion and for cause, the court may extend such time." Wis. Stat. § 970.03(2).

In *Lee*, this Court held that the circuit court erroneously exercised its discretion by repeatedly extending the ten-day statutory deadline in section 970.03(2) for holding the preliminary hearing, so that SPD could appoint permanent counsel for Lee. *Lee*, 396 Wis. 2d 136, ¶ 4. This Court concluded that the circuit court erroneously exercised its discretion by repeatedly extending the ten-day statutory deadline for a preliminary hearing based solely on SPD's inability to appoint permanent counsel and without considering other factors. *Lee*, 396 Wis. 2d 136, ¶ 3. This Court held that circuit courts must consider "the extent of the SPD's efforts to locate counsel, the reasons for the delay in obtaining counsel, and how long that delay is likely to continue given the other circumstances." *Id.* ¶ 53. Likewise, actual prejudice to the defendant is also an important factor in the analysis. *Id.* ¶ 58. Whether there was an erroneous exercise of discretion is dependent on the particular facts of each case. *Id.* ¶¶ 44–46. When courts do not properly exercise discretion in extending the ten-day deadline for cause, the result is "a loss of personal jurisdiction, which requires only a dismissal without prejudice." *Id.* ¶ 61.

Here, for several reasons, the court did not lose personal jurisdiction: (1) Butler forfeited any violation; and (2) Any potential error was harmless and invited.

C. Butler forfeited any violation of section 970.03(2) by not objecting to the Court's jurisdiction at his completed initial appearance, preliminary examination, or arraignment, and by entering pleas to the charges.

Butler claims that the circuit court lost personal jurisdiction over him by not timely holding the preliminary hearing. (Butler's Br. 41–42.) However, Butler has forfeited any objection to personal jurisdiction.

It is well-established that "a defense of lack of personal jurisdiction is waived by pleading to the information." *State v. Asmus*, 2010 WI App 48, ¶ 4, 324 Wis. 2d 427, 782 N.W.2d 435. Under *Armstrong v. State*, 55 Wis. 2d 282, 285–86, 198 N.W.2d 357 (1972), "[a] defense based on lack of personal jurisdiction is waived by pleading to the information." Thus, any objections to the timeliness of the preliminary hearing must be made at the time of the hearing and at the arraignment. *Id.* And in *Godard v. State,* 55 Wis. 2d 189, 190, 197 N.W.2d 811 (1972), the Wisconsin Supreme Court held that the failure to object at the preliminary hearing to lack of personal jurisdiction by a year-long delay in holding the hearing constituted waiver of that defense.

Here, Butler did not preserve and has forfeited his objection to the court's exercise of personal jurisdiction over him due to non-compliance with section 970.03(2). Butler, acting pro se, initially objected to the repeated adjournments of his initial appearance before counsel was appointed in September 2020; however, he did not object to the court's personal jurisdiction or claim any procedural defects when his initial appearance was completed, at his preliminary hearing, or when he was arraigned. And he entered pleas to the charges without objection.

Specifically, at his completed initial appearance, Butler simply requested a date for the preliminary hearing.

(R. 102:1–5.) Likewise, at his preliminary hearing, while Butler cross-examined the State's witness and moved to dismiss, he raised no objection to the court's personal jurisdiction over him or the timing of the pretrial proceedings. (R. 103:1–17.) And also at the arraignment, Butler entered pleas to the charges in the information and made no objection to the court's personal jurisdiction or timeliness. (R. 105:1–7.)

Therefore, under *Asmus, Armstrong,* and *Goddard,* Butler has forfeited his claim of loss of personal jurisdiction due to non-compliance with section 970.03(2).

D. Any violation of section 970.02(3) was harmless and invited error.

If this Court concludes that the application of Brown County's adjournment policy in this case violated section 970.03(2) or was otherwise an erroneous exercise of discretion, and if it ignores Butler's forfeiture of his objection, then it should conclude that any error was harmless during the period of his probation hold and that any continuing error was invited after he was informed SPD could not appoint counsel if he asserted a statutory speedy trial demand. And, in any event, the delays after Butler rejected his first appointed SPD counsel were reasonable.

1. Failure to timely hold the preliminary hearing was harmless error during the time in which Butler was in custody on a probation hold.

This "Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *State v. Flynn*, 190 Wis. 2d 31, 56 n.10, 527 N.W.2d 343 (Ct. App. 1994). An error is harmless if it does not affect a party's substantial rights. *State v. Harvey*, 2002 WI 93, ¶ 36, 254 Wis. 2d 442, 647 N.W.2d 189.

Here, the court could not lose personal jurisdiction because Butler was already in state custody on the probation hold for the first six months of the delay—until March 30, 2020. (R-App. 5.) "Jurisdiction does not depend upon the warrant but upon the accused's physical presence before the magistrate." *Pillsbury v. State*, 31 Wis. 2d 87, 92, 142 N.W.2d 187 (1966). Thus, "there need not be the issuance of another arrest warrant when a person is already being held in custody under another charge." *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 443, 173 N.W.2d 175 (1970). If the absence of a warrant or complaint does not deprive the court of personal jurisdiction over someone who is already in custody, then it follows that personal jurisdiction cannot be lost due to non-compliance with the ten-day period for a preliminary hearing if the defendant is otherwise lawfully in custody.

And, as this Court recognized in *Lee*, "the preliminary hearing is designed 'to ensure that people are not held for unreasonably long periods of time where the possibility exists that the State cannot muster even minimal proof in support of the allegations set out in the petition or complaint.'" *Lee*, 396 Wis. 2d 136 ¶ 56 (quoting *State v. Brissette*, 230 Wis. 2d 82, 88, 601 N.W.2d 678 (Ct. App. 1999)). That purpose was not frustrated here. Because probable cause was, in fact, found at the preliminary hearing, Butler suffered no appreciable harm while his preliminary hearing was delayed. "Probable cause existing at the time of arrest does not dissipate during the time of detention, irrespective of whether the probable cause determination was unreasonably delayed." *State v. Golden*, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994). In other words, as the court found probable cause to bind Butler over for trial at the preliminary hearing, then it necessarily possessed probable cause to hold him in the preceding period based on the exact same charges.

Therefore, the court did not lose personal jurisdiction over Butler during the time he was in lawful custody on his probation hold—until March 30, 2020.[10]

2. Any error after the probation hold lifted was invited because SPD's continuing inability to locate counsel was due to Butler's statutory speedy trial demand.

Next, any error after Butler was released from the probation hold was invited error. "Under the doctrine of strategic waiver, also known as invited error, a defendant cannot create his own error by deliberate choice of strategy and then ask to receive benefit from that error on appeal." *State v. Gary M.B.*, 2004 WI 33 ¶ 11, 270 Wis. 2d 62, 676 N.W.2d 475 (citation omitted).

As noted, Butler made a pro se statutory speedy trial demand on March 24, 2020, while he was still in custody on the probation hold. (R. 13:1.) Thereafter, Butler was repeatedly informed by the court that his insistence on a statutory speedy trial demand would result in his waiting longer for counsel to be appointed than if he did not make such a demand. (R. 85:4; 86:3–4; 90:3–6.) Butler was told that his statutory speedy trial rights could not be exercised until the State filed an information and that if he insisted on a new

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[10] Butler also asserts that the court never informed him of the charges against him or his right to counsel at his initial appearance. (Butler's Br. 34.) That is not accurate. The temporary SPD counsel that appeared with Butler at his first initial appearance waived formal reading of the charges. (R. 77:1–2.) And while the court commissioner did not perform a formal colloquy advising Butler of his right to counsel, it stated: "Just given the nature of this, I expect it will take the public defender some time to appoint." (R. 77:4.) This (as well as the fact that temporary SPD counsel appeared on his behalf) indicates that Butler was aware of his right to SPD representation.

lawyer, it likely would take another five months to locate one. (R. 86:3.) Butler said: "Okay." (R. 85:4.) Representatives from the SPD's office repeatedly informed the court that the delay in appointing counsel was due to the lack of qualified attorneys that could comply with the statutory speedy trial demand and that it likely could find counsel much sooner if Butler would drop that demand. (R. 88:2; 90:7–9; 95:3–6; 96:5.) Butler's insistence on a statutory speedy trial demand—despite the fact that the courts were not open due to COVID-19—is largely what accounted for the delays after March 2020. Accordingly, this Court should conclude that any error occurring after March 2020 when Butler was no longer on his probation hold was invited error.

To be clear, the State is not arguing that Butler invited error simply by asserting a speedy trial demand in the abstract. But Butler's actions must be viewed in the context that as soon as he was released on bail, he jettisoned his speedy trial rights and requested an adjournment of the trial date. He not only did so once, he did so three times. (R. 97:12; 108:8; 109:7.) Butler should not be allowed to create his own error by this kind of gamesmanship.

3. The delays after Butler's first counsel withdrew were reasonable.

Finally, if the court rejects the State's invited error argument, then the delays that occurred after Butler was released from the probation hold were justified and reasonable under the circumstances—whether viewed as a series of discretionary adjournments or de facto "cause" determinations under section 970.03(2). Attorney Henry withdrew on April 28, 2020 at Butler's request due to her inability to accommodate his statutory speedy trial demand. (R. 85:3–4.) Butler appeared with temporary SPD counsel on May 5; counsel argued for a significant decrease in Butler's bond ($75,000 to $50,000), and the court granted it. (R. 87:6.)

At the next hearing on June 2, 2020, the court questioned Attorney Cano from SPD about the reason for the continued delays. (R. 88:2.) The State then asked the court to expediate proceedings to comply with the crime victims' rights to a timely and speedy disposition. (R. 23.)

At this time, Judge Leiogois became personally involved in the efforts to locate counsel for Butler. (R. 89:7.) At the next status conference on July 1, SPD indicated that it "could not ethically represent Mr. Butler at this time" due to the inexperience of their staff attorneys and unavailability of any qualified counsel to honor Butler's speedy trial demand. (R. 90:8–12.) Judge Leiogois stated that he would start calling attorneys to see if they would take a public defender appointment, but that he was limited to contacting attorneys with the appropriate certification to handle this type of case. (R. 90:4.)

At another hearing on July 16, 2020, the court commissioner made a record of the fact that Judge Liegeois had contacted four private attorneys to see if they would take the case and that two refused and two had not responded. (R. 92:2–3.) The commissioner indicated that Judge Liegeois was planning on calling attorneys out-of-county to see if they would take an SPD appointment. (R. 92:3.) But the judge's efforts to locate counsel where hampered because SPD would not share its list of qualified attorneys with the court. (R. 97:9.)

By the next adjourned hearing on July 23, 2020, it appeared Judge Liegeois had found an attorney from Milwaukee (present counsel) to represent Butler. (R. 93:3–4.) However, there were further delays because counsel needed to complete the SPD certification process. (R. 94:2.) Attempts to certify present counsel were delayed because his office would not put through SPD's phone calls. (R. 96:3–4.) However, when asked to explain the continued delays, SPD

said it had no other options for qualified counsel to represent Butler. (R. 96:5–6.)

Attorney Hartley was formally appointed on August 13, 2020, and the initial appearance was completed on September 8. (R. 35.) The preliminary hearing was then held on September 29, 2020, which appears to have been the first date counsel was available, with no objection from Butler.

Thus, after Butler terminated his first attorney (April 2020), there was roughly a three-month delay before the court located Attorney Hartley (July 2020). Roughly another month of delay occurred due to Attorney Hartley needing to obtain SPD certification. And then a final month of delay occurred due to Attorney Hartley's scheduling conflicts with no objection from Butler.

Unlike *Lee*, the record here demonstrates that the court took an active role in trying to locate counsel for Butler. It repeatedly had representatives from SPD come in to explain the reason for the continued delays, and it personally contacted counsel from out of county to try and secure representation for Butler.

Butler is critical of the court because it never "seriously contemplated appoint[ing] a private attorney at county expense." (Butler's Br. 39.) But there is absolutely no evidence that the difficulty in locating counsel for Butler had anything to do with the SPD rate of compensation. Rather, SPD represented numerous times that the problem was the lack of qualified attorneys who had time available to handle a child sexual assault case with a speedy trial demand. (R. 90:8–12; 95:4; 96:5–6.)

So, the court here was presented with a dilemma: Butler had discharged his first appointed SPD counsel and was demanding a statutory speedy trial; there were no qualified attorneys available to handle Butler's case; the crime victims and the State were demanding a speedy

disposition; and Butler was objecting to the continued delays. The court's actions here were commendable; it took a personal interest in securing counsel for Butler. Butler has not shown any action that the court could have taken that would have resulted in a qualified, available attorney being appointed at an earlier time.

In short, the court's actions in this case after Butler discharged his first attorney were reasonable. And the adjournments between April 28, 2020 and August 13, 2020—whether viewed as an exercise of inherent authority or a de facto finding of "cause" under section 970.03(2)—were entirely justified. The court did not erroneously exercise its discretion.

E. The remedy, if any, is limited to a dismissal without prejudice.

If this Court concludes that the circuit court erroneously exercised its discretion or violated section 970.03(2), then the only remedy available to Butler is a dismissal *without* prejudice. As this Court stated in *Lee*, "Wisconsin law for decades has held that the failure to hold a preliminary hearing within the prescribed time results in a loss of personal jurisdiction, which requires only a dismissal without prejudice." *Lee*, 396 Wis. 2d 136, ¶ 61.

Butler has not cited any authority to support the notion that the State loses the ability to prosecute a defendant accused of serious crimes due to the court being unable to provide a preliminary hearing with counsel within ten days. In fact, in his motion to dismiss at the circuit court, Butler requested a dismissal *without* prejudice. (R. 97:3.)

II. *Riverside* did not apply to Butler during his probation hold, he forfeited any claimed violation after his hold was lifted, and any error was harmless.

Butler also claims that the court violated his rights under *Riverside* by not making a probable cause determination based on the face of the complaint. (Butler's Br. 25–29.) However, *Riverside* did not apply to Butler during the time he was otherwise in custody on a probation hold. Also, once the hold was lifted, Butler forfeited any claimed *Riverside* violation by not raising the issue in the circuit court and never challenging probable cause based on the face of the complaint. Finally, any error was harmless because sufficient probable cause to bind Butler over for trial was found at the preliminary hearing.

A. The *Riverside* 48-hour rule does not apply to probationers in custody.

In *Gerstein v. Pugh*, 420 U.S. 103, 124–25 (1975), the United States Supreme Court held that the due process clause requires a prompt judicial determination of probable cause as a prerequisite to an extended pretrial detention following a warrantless arrest. In *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991), the Supreme Court defined "prompt" to mean that a judicial determination of probable cause must be made within 48 hours of arrest barring "a bona fide emergency or other extraordinary circumstance." "The post-arrest probable cause determination is required to fulfill the same function for suspects arrested without warrants as the pre-arrest probable cause determination fulfills for suspects arrested with warrants." *State v. Koch*, 175 Wis. 2d 684, 698, 499 N.W.2d 152 (1993). "In both cases, a neutral magistrate is required to determine whether there is probable cause to believe an offense was committed by the suspect." *Id.* "The probable cause finding can be based upon the complaint,

affidavits, or testimony of complainant or witnesses under oath." *Id.* 698 n.8.

In practice, Wisconsin combines the *Riverside* probable cause determination with the initial appearance, meaning that the initial appearance must be held within 48 hours of arrest, *State v. Evans*, 187 Wis. 2d 66, 91, 522 N.W.2d 554 (Ct. App. 1994), when a judicial probable cause determination hasn't been made prior to the initial appearance.

However, in *State v. Harris,* this Court held that "the forty-eight-hour rule announced in *County of Riverside* does not apply to persons already in the State's lawful custody." *State v. Harris*, 174 Wis. 2d 367, 377, 497 N.W.2d 742 (Ct. App. 1993). This Court explained that none of the considerations that led the *Riverside* court to adopt the 48-hour rule—the concern of an "'incorrect or unfounded' detention" that would adversely affect an arrestee's income, family relationships, and job—applied to someone "who . . . is already in lawful custody at the time." *Id.* at 377.

As noted, Butler was in custody on a probation hold from October 10, 2019 until March 30, 2020, *infra* n. 4. (R-App. 5.) Thus, no due process violation occurred during this timeframe.

B. Butler forfeited any *Riverside* violation by not asserting it below and never challenging the sufficiency of the complaint.

Alleged errors, even constitutional ones, require a timely objection in order to be preserved for appeal. *State v. Pinno*, 2014 WI 74, ¶¶ 7–8, 356 Wis. 2d 106, 850 N.W.2d 207. Here, Butler did not assert an alleged *Riverside* violation at any point prior to his brief before this Court. While the State does not seek to hold Butler to the timely objection rule during the period in which he did not have permanent SPD counsel, Butler failed to assert a *Riverside* violation once counsel had been appointed, despite numerous opportunities to do so.

Specifically, Butler did not raise any *Riverside* violation at his completed initial appearance, and counsel indicated that Butler had reviewed the complaint and was "intimately familiar" with the allegations. (R. 102:1–5.) He failed to do so at the preliminary hearing. (R. 103:1–17.) At the arraignment, Butler entered pleas to the charges in the information and made no objection under *Riverside*. (R. 105:1–7.) And while Butler did move to dismiss the complaint for lack of personal jurisdiction at the final pretrial conference, he did not assert a *Riverside* violation in his motion to dismiss. (R. 54:1–4.)

Thus, Butler forfeited his objection to an untimely *Riverside* probable cause determination.

C. Any *Riverside* violation was harmless error.

A *Riverside* error does not "fall into the 'limited class of fundamental constitutional errors . . . that defy analysis by harmless error standards and require automatic reversal.'" *United States v. Fullerton*, 187 F.3d 587, 591 (6th Cir. 1999) (citation omitted). Accordingly, in *Evans*, 187 Wis. 2d at 88, this Court concluded that a harmless error analysis applied to a *Riverside* violation.[11] Likewise, in *Golden*, 185 Wis. 2d at 769, this Court held that a *Riverside* violation "is not a jurisdictional defect causing a trial court to lose competency over the case." *Id.* at 769. Stated differently, no prejudicial error occurs due to a *Riverside* violation if the judge ultimately found probable cause. *See Ewell v. Toney*, 853 F.3d 911, 918 (7th Cir. 2017) (no harm caused by untimely *Riverside* hearing in 42 U.S.C. § 1983 action because probable

[11] *See also United States v. Milano*, 443 F.2d 1022, 1024–25 (10th Cir. 1971) (claimed *Riverside* violation subject to harmless error).

cause was eventually found before trial).[12] Under such circumstances, the defendant "would not have been entitled to release any sooner." *Id.*

Here, any *Riverside* violation was harmless because Butler cannot show any prejudice as a result of the failure to make a formal finding of probable cause at his first initial appearance. Butler has *never* claimed that the face of the criminal complaint lacked *Riverside* probable cause. As noted, a probable cause determination at the initial appearance "can be based upon the complaint, affidavits, or testimony of complainant or witnesses under oath." *Koch*, 175 Wis. 2d at 698 n.8. As the criminal complaint was filed the same day as Butler's initial appearance (R. 1; 3), a *Riverside* probable cause determination would have been based on the four corners of the sworn complaint. The criminal complaint contained a six-page recitation of probable cause, based on the records of the Green Bay Police Department, the oral and written statements given by the two victims, an officer's recounting of the victims' recorded forensic interviews, and Butler's own admissions to police officers. (R. 1:2–7.) Butler cannot seriously contend that the detailed allegations in the complaint failed to establish "probable cause to believe an offense was committed by the suspect." *Koch*, 175 Wis. 2d at 698.[13]

And, as noted previously, the court found probable cause to bind Butler over for trial at the preliminary

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[12] *See also Bridewell v. Eberle*, 730 F.3d 672, 676, 680 (7th Cir. 2013) (same).

[13] To confer personal jurisdiction on the circuit court in a criminal prosecution, Wis. Stat. § 968.01 requires a criminal complaint to show probable cause in its "four corners" to allow a reasonable person to conclude that a crime was probably committed by the defendant. *State v. Adams*, 152 Wis. 2d 68, 73, 447 N.W.2d 90 (Ct. App. 1989). "To be sufficient, a complaint must only be minimally adequate." *Id.*

examination based on the same allegations. (R. 103:15.) "Probable cause existing at the time of arrest does not dissipate during the time of detention, irrespective of whether the probable cause determination was unreasonably delayed." *Golden*, 185 Wis. 2d at 769. Thus, "[h]ad the judicial determination occurred earlier, the outcome would have been the same." *Ewell*, 853 F.3d at 918.

For these reasons, the court's failure to make a formal probable cause determination at Butler's initial appearance constituted harmless error and does not require dismissal.

D. The remedy for a *Riverside* violation is at most a dismissal without prejudice.

Butler states, without any citation to authority, that the remedy for a *Riverside* violation is a dismissal with prejudice. (Butler's Br. 28–29.) But Wisconsin law is clear that a *Riverside* violation is not even a jurisdictional defect. *Golden*, 185 Wis. 2d at 769; *see also. Evans,* 187 Wis. 2d at 92 (re-affirming *Golden*). Accordingly, "dismissal with prejudice is not the appropriate remedy for a *Riverside* violation." *Evans*, 187 Wis. 2d at 94.

Rather, the appropriate remedy "may be suppression of evidence that is obtained as a result of the violation-i.e., after the point at which the delay became unreasonable." *Golden*, 185 Wis. 2d at 769. Where there was no unlawfully obtained evidence and the defendant has not shown "the delay prejudiced his ability to prepare a defense," dismissal is not appropriate. *Id.*

Here, Butler has not alleged any improperly obtained evidence and has not made a record of any prejudice to his ability to present a defense. Although he makes passing reference to the State allegedly "harassing one of his witnesses," (Butler's Br. 40), this assertion is disingenuous: What happened was that after the two victims failed to appear for Butler's revocation hearing, the State requested

that the court impose a no-contact order preventing Butler from communication with the mother of the victims—his girlfriend—because he was "reaching out to her to try and coerce witnesses." (R. 85:8.)

And, in any event, even if Butler could show prejudice to his ability to present a defense, he has not cited any authority that the proper remedy is a dismissal *with* prejudice is appropriate. *Cf. Evans* 187 Wis. 2d at 94 ("dismissal with prejudice is not the appropriate remedy for a *Riverside* violation").

III. Butler's right to a speedy trial was not violated.

Finally, Butler claims that the adjournments of his initial appearance violated his right to a speedy trial. (Butler's Br. 29–33.) This claim fails for multiple reasons. First, Butler forfeited any Sixth Amendment speedy trial claim by not raising it below and abandoning it. Second, he has not established a Sixth Amendment violation under the framework of *Barker v. Wingo*.[14] Finally, any speedy trial violation was harmless because jury trials were suspended in Brown County during the period of delay due to the COVID-19 pandemic.

A. Butler forfeited any Sixth Amendment speedy trial claim by not raising it below and by abandoning it.

As noted above, the only claim raised in Butler's motion to dismiss was loss of personal jurisdiction. (R. 54.) Butler never asserted a Sixth Amendment speedy trial violation, and like his *Riverside* claim, first raised it in his brief before this Court. Accordingly, Butler has thus failed to preserve the issue for review. *Pinno*, 356 Wis. 2d 106, ¶¶ 7–8.

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[14] *Barker v. Wingo*, 407 U.S. 514 (1972).

Additionally, as discussed below, a Sixth Amendment speedy trial claim is analyzed under a totality of the circumstances test that requires a court to analyze several interrelated facts. However, because Butler never asserted a Sixth Amendment speedy trial claim below, there is no evidentiary record or factual findings necessary to conduct the requisite *Barker* analysis. Accordingly, this Court cannot assess and weigh the appropriate factors to adjudicate a Sixth Amendment speedy trial claim in a pretrial posture without fact finding. *State v. Lemay*, 155 Wis. 2d 202, 212–13, 455 N.W.2d 233 (1990); *York v. United States*, 389 F.2d 761, 762 (9th Cir. 1968). This Court is not a fact-finding body. *State v. Below*, 2011 WI App 64, ¶ 3, 333 Wis. 2d 690, 799 N.W.2d 95. Thus, Butler's speedy trial claim is not properly before this court.

Additionally, Butler expressly abandoned any speedy trial claim in the circuit court after he was released on bond. At the January 15, 2021 final pretrial conference, Butler expressly waived his right to a speedy trial, and asked the court to reset the trial dates. (R. 108:8.) Defense counsel reiterated this at the next final pretrial conference: "I know initially Mr. Butler asked me to file a speedy trial demand, which I did because that was his request, but I don't think it's necessary anymore." (R. 109:7.) And at the January 29 hearing, Butler stated that he "doesn't necessarily need a speedy trial" because he was not in custody. (R. 97:13.)

For these reasons, this Court should not address Butler's speedy trial claim.

B. Under the *Barker* balancing test, even extremely long delays do not violate the Sixth Amendment if the reasons for delay are justified and there is minimal actual prejudice.

A defendant has a right to a speedy trial. U.S. Const. amends. VI, XIV; Wis. Const. art. I, § 7. In *Barker v. Wingo*, 407 U.S. 514, 521–22 (1972), the United States Supreme Court recognized that the right to a speedy trial is different from other constitutional rights in that there is no "fixed point" where the right is violated and delays "may work to the accused advantage." The right to a speedy trial also differs from other constitutional rights in that if a court finds a constitutional violation, the only remedy is the "severe" remedy of vacating the judgment and releasing the defendant. *Id.* at 522.

For these reasons, the United States Supreme Court has eschewed bright-line rules for determining if a Sixth Amendment violation has occurred and instead utilizes a "functional analysis" that is heavily dependent upon the facts in a particular case. *Id.* The right to a speedy trial thus is "necessarily relative" and "consistent with delays." *Id.* (citation omitted). The Seventh Circuit has explained that under the *Barker* analysis, "there is no per se rule of constitutional law that requires the states to bring their criminal defendants to trial within a fixed time failing which charges must be dropped." *United States ex rel. Mitchell v. Fairman*, 750 F.2d 806, 810 (7th Cir. 1984). Instead, courts must exercise "due regard for the importance to the public safety" and should "not lightly upset[ ] the conviction of a man clearly guilty of a heinous crime." *Id.*

Under the *Barker* analysis, courts employ a four-part balancing test considering (1) the length of delay, (2) the reason for the delay, (3) whether the defendant timely asserted his right to a speedy trial, and (4) whether the delay

resulted in any prejudice to the defendant. *Barker*, 407 U.S. at 530; *Borhegyi*, 222 Wis. 2d at 509. Courts determine whether a constitutional violation occurred under the totality of the circumstances. *State v. Urdahl*, 2015 WI App 191, ¶ 11, 286 Wis. 2d 476, 704 N.W.2d 324.

C. Butler has not established a Sixth Amendment violation under the *Barker v. Wingo* framework.

1. The delay was long enough to trigger analysis under *Barker*.

The *Barker* analysis is triggered only when there is a delay significant enough to raise a constitutional issue. That is, a delay of over a year is considered "presumptively prejudicial" such that it "triggers further review of the allegation under the other three *Barker* factors." *Lemay*, 155 Wis. 2d at 212–13. Here, there is no dispute that the length of the delay at issue is sufficient to trigger scrutiny under *Barker*.

2. Delays to locate counsel are "valid" and not counted against the State.

The second *Barker* factor looks to the reason for the delay: Delays caused by the defendant or "something intrinsic to the case, such as witness unavailability" are not counted against the State. *Urdahl*, 286 Wis. 2d 476, ¶ 26. Intentional delays by the State "in order to hamper the defense" are "weighted heavily against" it. *Id.* Delays caused by government negligence or the court's docket "though still counted, are weighted less heavily." *Id. See also Barker* 407 U.S. at 531. Delays caused by scheduling are counted against the State for purposes of a Sixth Amendment analysis but not weighted heavily. *Barker*, 407 U.S. at 531; *West v. Symdon,* 689 F.3d 749, 752 (7th Cir. 2012). But delays caused for "valid" reasons, such as waiting for another sovereign to finish

prosecuting a defendant, are not counted. *See United States v. Grimmond,* 137 F.3d 823, 828–29 (4th Cir. 1998) (collecting cases); *United States v. Black*, 918 F.3d 243, 272 (2d Cir. 2019) (delays for "valid" reasons are "taken off the scale entirely") (citation omitted).

A delay caused by the need to find counsel for a defendant is "valid" and does not violate the Sixth Amendment. For instance, in *York*, 389 F.2d at 762, the court held that no constitutional violation occurred due to "twenty-three month delay between the lineup and the appointment of counsel and arraignment." Likewise, in *Cowart v. Hargett*, 16 F.3d 642, 648 (5th Cir. 1994), the court rejected the assertion that a delay caused by "the failure to arraign and therefore appoint an attorney in a timely manner" violated the defendant's right to a speedy trial. And in *United States v. Scott*, 180 F. Supp. 3d 88, 95 (D. Mass. 2015), the court held that delays "for the benefit of the defendant," including a lengthy delay to appoint new counsel, did not weigh in the defendant's favor. *See also United States v. Low*, 452 F. Supp. 2d 1036, 1049 n.18 (D. Haw. 2006) (same).

Here, there is no dispute that nearly all of the delays in the case before Butler obtained present counsel was to secure the appointment of counsel and then to appoint new counsel after Attorney Henry withdrew in April 2020 at Butler's request. (R. 85:3–4.) Even lengthy delays caused by the need to obtain counsel for the defendant's benefit are "valid" and not counted against the State. *United States v. Varca*, 896 F.2d 900, 904 (5th Cir. 1990) (11-month delay between indictment and trial).

And there is no evidence that the delays were an intentional effort to "hamper the defense." *Urdahl*, 286 Wis. 2d 476, ¶ 26. To the contrary, the State actually asked the court to expedite the proceedings. (R. 23.) Once Butler's current counsel was appointed, the preliminary hearing was delayed by about a month due to counsel's scheduling

conflicts. (R. 102:2). Additional delays in this case after current counsel was appointed were due to the court's busy schedule after the court re-opened (R. 102), and to accommodate defense counsel's schedule. (R. 107.) Specially, defense counsel rejected a January 2020 trial date and requested a date in February due to his own trial calendar. (R. 107:4.)

In short, none of these delays in this case were caused by the prosecution in an attempt to thwart Butler's defense. The vast majority of the delays were due to a valid reason—to locate counsel for Butler's benefit and are therefore not counted against the State. At most, they are a neutral institutional delay. The remainder of the delays were due to normal scheduling conflicts by the court and Butler's counsel.

3. Butler asserted his right to a speedy trial but then abandoned it.

Here, Butler was proceeding pro se when he made an initial request for a speedy trial on March 24, 2020. (R. 13.1) And, as discussed above, counsel filed a statutory speedy trial demand at a bond hearing on November 13, 2020. But, once Butler posted bond, counsel expressly abandoned his demand for a speedy trial three times, saying "I don't think it's necessary anymore." (R. 97:13; 108:8; 109:7.) Therefore, the State views this factor as neutral.

4. Butler has not shown prejudice under *Barker*.

As to the last *Barker* factor, while a defendant does not have to establish actual prejudice in fact in every case, *Hadley v. State*, 66 Wis. 2d 350, 225 N.W.2d 461 (1975), it is nonetheless "an important factor in the analysis." *Urdahl*, 286 Wis. 2d 476, ¶ 34. But, just as the defendant is not required to prove prejudice, case law does "not place an

additional burden on the state to prove the negative, lack of prejudice." *Lemay*, 155 Wis. 2d at 212.

Accordingly, while "a showing of prejudice is not a prerequisite to finding a sixth amendment violation, courts generally have been reluctant to find a speedy trial violation in the absence of genuine prejudice." *United States v. Jones*, 129 F.3d 718, 724 (2d Cir. 1997) (citation omitted). Indeed, in *United States v. Trotman*, 406 F. App'x 799, 807 (4th Cir. 2011), the court found no Sixth Amendment violation due to a *17-year delay* between indictment and trial because the defendant "ha[d] not identified any true prejudice that he suffered as a result of the delay in bringing his case to trial."

While Butler claims he was prejudiced due to pretrial incarceration and anxiety (Butler's Br. 32), *Barker* looks to a specific type of prejudice—whether the defendant can show an "inability . . . [to] adequately [ ] prepare his case." *Barker*, 407 U.S. at 532. Accordingly, courts look to whether the defendant has "identified any witness that was unavailable as a result of the delay" or "exculpatory evidence [that] was lost," or a witness who was "unable accurately to recall the events in question." *Grimmond*, 137 F.3d at 830.

And as this Court explained in *Lemay*, 155 Wis. 2d at 214, assessing prejudice before a trial has occurred is nearly impossible. "Evidence of prejudice is speculative until after trial." *Lemay*, 155 Wis. 2d at 214. Relying on *United States v. MacDonald*, 435 U.S. 850, 858–59 (1978), this Court held that "a pretrial determination of prejudice to the defendant under a speedy trial analysis was speculative and premature" because "[w]hether the state's witnesses' memories or lack thereof are prejudicial to the defendant's ability to present his defense can only be seen with finality at trial." *Lemay*, 155 Wis. 2d at 215

Here, while Butler asserts prejudice, he has no proof of it. He says that "there can be no denying the delay impaired

Butler's ability to arrange for his defense. His inability to contact lawyers or arrange for investigation of the evidence against him damaged his defense." (Butler's Br. 32.) But Butler cites to nothing in the record to support this. Further, Butler doesn't specify what evidence he was unable to secure or which witnesses he was unable to contact. In short, Butler's prejudice claim is entirely speculative.

The mere fact that there was a delay in appointing counsel does not, in and of itself, constitute prejudice: "we are not disposed to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel." *Chambers v. Maroney,* 399 U.S. 42, 54 (1970). Counsel was present for Butler's preliminary hearing, examined the State's witness, and moved to dismiss. (R. 103:15.) Through counsel Butler requested and received pretrial discovery. (R. 41.) Through counsel Butler requested and then abandoned a statutory speedy trial demand. (R. 107:2; 108:8; 109:7.) Counsel then moved to dismiss due to Butler's jurisdictional objection. (R. 54.) In short, Butler has not produced any concrete evidence that his ability to defend his case was hampered by the delays in this case.

And Butler *cannot* demonstrate prejudice for another reason. Brown County courts were closed for jury trials due to the COVID-19 pandemic through most of 2020 and only started having trials again as of August 1, 2020. (R. 97:5.) Thus, even if counsel had been appointed sooner, a substantial portion of the delay in his case would otherwise have occurred and have been justified.

While COVID speedy trial claims are still in their infancy nationwide, the trend is that court closures due to the public health emergency are viewed as "valid" or "neutral" for purposes of a speedy trial analysis. *See State v. Brown*, 310 Neb. 224, 241 (2021) ("For the same reasons we determined above that the pandemic-related delays were for 'good cause' under the statutory analysis, we also determine that the

delays were for a 'valid reason for purposes of the constitutional analysis.)[15]

Therefore, even if Butler had been appointed counsel immediately after his October 23, 2019 initial appearance, the earliest he could have theoretically (assuming no problems with court congestion, scheduling conflicts, or pretrial motion practice) had a trial scheduled in Brown County was 10-months later. That leaves only six months of delay (August 1, 2020 through February 9, 2021), during five of which Butler was represented by counsel. That is well below the presumptive prejudice threshold in *Barker*.

For these reasons, Butler's Sixth Amendment speedy trial claim fails.

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[15] *See also United States v. Pair,* 522 F. Supp. 3d 185, 193 (E.D. Va. 2021); *United States v. Morgan*, 493 F. Supp. 3d 171, 219 (W.D.N.Y. 2020); *United States v. Akhavan*, No. 20-CR-188, 2021 WL 797806, at **5 (S.D.N.Y. Mar. 1, 2021); *People v. Ordonez*, 150 N.Y.S.3d 212, 214 (N.Y. Co. Ct. 2021).

CONCLUSION

This Court should affirm the order denying Butler's motion to dismiss. Alternatively, the only remedy available is dismissal without prejudice.

Dated this 14th day of October 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,857 words.

Dated this 14th day of October 2021.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 14th day of October 2021.

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