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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 22AP959-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS A. RAMIREZ,

Defendant-Appellant.

Appeal from a Judgment of Conviction and Denial of
Postconviction Motions Entered in the Circuit Court for
Columbia County, the Honorable Andrew W. Voigt
Circuit Court Case No.: 16CF31

BRIEF OF
DEFENDANT-APPELLANT

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ISSUES PRESENTED

- I. Was Mr. Ramirez' constitutional right to a speedy trial violated by a delay of over three years and ten months between the filing of complaint and the trial?

Trial Court Answered: The circuit court denied Mr. Ramirez' motion to dismiss on constitutional speedy trial grounds prior to trial and denied Mr. Ramirez' postconviction motion finding there was no speedy trial violation.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The issue in this case involves the application of well-settled law to the facts of this case, therefore neither oral argument nor publication is requested.

STATEMENT OF THE CASE AND THE FACTS

On February 1, 2016, the State charged Mr. Ramirez with one count of battery by prisoner and one count of disorderly conduct, both with repeater and dangerous weapons enhancers, in violation of Wis. Stats. §§ 940.20(1), 947.01, 939.63(1)(b), 939.62(1). (1.) The charges arose out of a May 5, 2015 incident at Columbia Correctional Institution. (1.)

Pretrial Proceedings

Mr. Ramirez made his initial appearance on February 11, 2016. (108.) At that time, Mr. Ramirez did not waive his right to a preliminary hearing within the 20-day time limits. (108:5-6.)

On February 18, 2016, Mr. Ramirez appeared for the preliminary hearing, but had not yet been appointed an attorney by the State Public Defender, and the hearing was set over. (101.) On March 3, 2016, Mr. Ramirez again appeared without counsel as he was still waiting to be appointed an attorney by the State Public Defender. (102.) Given the choice of proceeding without an attorney or waiving the time limits for his preliminary hearing, Mr. Ramirez waived the time limits. (102:3.)

On March 15, 2016, a staff attorney from the State Public Defender's Office was appointed to represent Mr. Ramirez. (13.) That attorney was replaced by another staff attorney on July 7, 2016. (19.) There is nothing in the record to indicate that Mr. Ramirez was responsible for the change of attorneys.

The preliminary hearing was held on August 4, 2016. (109.) The court found probable cause and bound Mr. Ramirez for trial. (109:14.) Arraignment was held on October 26, 2016. (104.)

On December 21, 2016, the case was scheduled for a jury trial on April 13, 2017. (31.) On February 17, 2017, the State requested a new trial date on the basis that a necessary witness was unavailable for the April 13th trial date. (32.) Before the court ruled on the State's request, the State again

requested a setover on March 3, 2017, because it had concluded three days, rather than one, would be necessary to try the case. (34.)

On March 30, 2017, the jury trial was rescheduled to September 26, 2017. (37.) On August 4, 2017, the State informed the court that it had two cases, of which Mr. Ramirez' case was the older, scheduled for jury trial at the same time and requested one be rescheduled. (37.) The jury trial was rescheduled for April 4, 2018. (50.)

On March 6, 2018, defense counsel moved for a continuance of the April 4th jury trial date as the defense needed additional time to investigate a potential NGI defense. (50.) After the defense motion, several hearings were held in 2018 that were not reported and/or for which minutes do not appear on the record, and for which Mr. Ramirez did not appear.¹

On September 26, 2018, Mr. Ramirez wrote the court personally, stating: "I want a speedy trial. I've been asking for my counsel to put a motion for this for months." (59.)

On October 8, 2018, defense counsel wrote to the court stating: "I am writing to advise the court and the parties that the earliest telephone conference I could set with Mr. Ramirez is on Thursday, October 11th, at 8:30

¹ According to the Wisconsin Circuit Court Access listing of events for the case, hearings scheduling or status conferences were held on March 12, 2018; May 21, 2018; August 6, 2018; October 3, 2018; and December 5, 2018.

a.m. I will report on the status of the case after that conference.” (62.)

The trial was later scheduled to begin on April 3, 2019. (67.) Mr. Ramirez filed motions in limine on March 26, 2019 (65; 66.) That same day, the State requested an adjournment of the jury trial, because a new assistant district attorney had recently been assigned to the case. (67.)²

On April 15, 2019, Mr. Ramirez filed a pro se motion to dismiss on the basis that his constitutional speedy trial rights had been violated. (70:3-5.) The court denied the motion at a hearing on June 17, 2019. (110:11; App.13.)

Jury Trial and Sentencing

A two-day jury trial was held beginning December 3, 2019. (163; 164.) The jury convicted Mr. Ramirez of both counts. (164:158-59.) He was sentenced on February 24, 2020, to concurrent sentences totaling 12 years initial confinement and 3 years extended supervision, running consecutive to the sentence he was already serving. (92.)

Postconviction Proceedings

Mr. Ramirez filed a timely notice of intent to appeal. (98.) A postconviction motion was filed on June 21, 2021, arguing that the circuit court erred in denying his pretrial motion to dismiss on constitutional speedy trial grounds

² The State’s request indicated that defense counsel did not object to the request for continuance; however, defense counsel represented otherwise during a hearing on June 17, 2019. (110:2; App.3.)

and that the additional six months delay between the court's denial of the motion to dismiss and the trial only compounded the constitutional violation. (121.)

An evidentiary hearing was held on November 29, 2021, during which Mr. Ramirez testified regarding the factual basis for his claims that he was prejudiced by the delay in bringing him to trial. (142; App.14-36.) At the time of the incident leading to the charges in this case, Mr. Ramirez was incarcerated at Columbia Correctional Institution and classified as AC4 security level, the level with the least security restrictions and one step away from general population. (142:5; App.16.) Because of the incident leading to charges in this case, Mr. Ramirez received 360 days disciplinary separation. (142:5-6; App.16-17.) During the next year, Mr. Ramirez transferred prisons several times and was at Green Bay Correctional Institution when he ended disciplinary separation in June of 2016. (142:6-8; App.17-19.) Mr. Ramirez was then placed under administrative confinement at level AC1. (142:6; App.17.) Mr. Ramirez was told by prison staff that he would have to remain on administrative confinement until this case was resolved. (142:6-8, 12-13; App.17-19, 23-24.)

Mr. Ramirez had been incarcerated since 1998 on his conviction of armed robbery party to a crime. (142:14; App.25.) During his incarceration, he had been placed on administrative confinement once before from October 2006 to February 2007, for having too many conduct reports; at that time he had 80 conduct reports. (142:14-15; App.25-26.) Mr. Ramirez testified that having too many conduct reports and having an open case were the two most

common reasons that he was aware of for an inmate being placed in administrative confinement. (142:17; App.28.)

Being kept in administrative confinement meant that Mr. Ramirez was required to remain in a small cell for all or nearly all of every day. (142:9, 11; App.20, 22.) Mr. Ramirez detailed the difficulties of being in the segregation area, particularly in Green Bay Correctional. (142:17-18; App.28-29.) Even when he was able to come out from his cell to the recreation area, he was kept separate from everyone else. (142:11; App.22.) Mr. Ramirez testified that this led to him facing sensory deprivation, feelings of claustrophobia and panic, and an inability to sleep. (142:9-11; App.20, 22.) He testified that he would not have been subjected to this if he were in general population. (142:11-12; App.22-23.)

The delay in bringing him to trial had additional negative impacts upon Mr. Ramirez aside from the placement in administrative confinement. Specifically, Mr. Ramirez testified that having the case pending for multiple years resulted in feelings of stress, anxiety, and panic for him. (142:9; App.20.) At the same time, he was unable to participate in programming related to his mental health needs during this time due to the limited mental health resources allocated to those inmates in administrative confinement. (142:10; App.21.) Mr. Ramirez testified that he would be lucky to see psychological services once every four to five months in front of his cell. (142:10; App.21.)

After additional briefing,³ the circuit court issued an oral ruling on May 13, 2022, in which it denied the postconviction motion. (161; App.37-46.) The court found “no question” about the length of the delay: “The complaint was filed on February 1st of 2016, and the trial did not start until December 3rd, 2019.” (161:3; App.39.)

The circuit court considered the causes of the delay, “a more complicated consideration...largely because this Court and the Defendant are the only ones who experienced this case from start to finish.” (161:3; App.39.) Further, frequent off-the-record status conferences were held that Mr. Ramirez did not attend while he was in custody. (161:3; App.39.) For these off-the-record status conferences, the court based its findings on its own recollection and notes. (161:3; App.39.)

The court found “some portion” of the delay was attributable to Mr. Ramirez:

[A]t least some portion of the delay in addition to what was acknowledged in the Defendant's briefing, was due to the Defendant himself at his insistence that additional video evidence of this incident existed and was available and had not been disclosed by the State.

³ Mr. Ramirez filed a brief in further support of his postconviction motion on February 14, 2022. (143.) The State filed an opposition to Mr. Ramirez's motion on March 15, 2022. (149.) The circuit court did not consider “in any meaningful way” the arguments made in the State's opposition in making its decision, due to it being filed well past the briefing schedule established by the court. (161:2-3; App.38-39.)

More than once, those discussions revolved around getting commitment from the defense attorney about whether or not Defendant wanted to have his trial sooner or wanted to have his trial with what we now know I believe is nonexistent additional video evidence.

There is no way really to tell the count of days associated with that because there were so many other things going on at the same time.

(161:3-4; App.39-40.)

The court also found that other delays were attributable to other causes:

Among them the retirement of the District Attorney, the new attorney being assigned from the District Attorney's Office, at least twice, the courthouse moved its entire operation to a temporary location and back. We operated in a three judge courthouse with only one courtroom that could accommodate a jury trial for almost a full year during this time.

(161:4; App.40.) The court acknowledged that, “this collection of issues indicate that there is more than necessary period of delay that’s chargeable to the State for there to have been any Constitutional violation.” (161:5-6; App.41-42.) However, the court found that it was not “any way near as wide a margin as asserted by the Defendant.” (161:6; App.42.)

Regarding Mr. Ramirez's assertion of his right to a speedy trial, the court found that "Defendant's assertion of his right doesn't weigh as heavily in his favor as it might otherwise." (161:6; App.42.) This was because, at the June 17, 2019 hearing on Mr. Ramirez's pro se motion to dismiss for speedy trial violation, "even at that late date, the Defendant was still insistent that discovery was missing, this same mythical additional video..." (161:7; App.43.) The court found Mr. Ramirez's request for discovery and his request for a change of venue at this hearing were "patently inconsistent with someone whose only goal is to get to trial as quickly as possible." (161:7; App.43.)

Regarding whether Mr. Ramirez was prejudiced by the delay, the court described Mr. Ramirez' testimony at the evidentiary hearing as "facially incredible." (161:7-8; App.43-44.) The court found that, "[f]or someone who acknowledged the number of conduct reports and disciplinary history that this Defendant has while in the prison system, it is impossible for this Court to conclude the harms this Defendant claimed to have suffered simply because this case was open could be true." (161:8; App.44.) The court found that Mr. Ramirez' history of disciplinary problems and other issues within the prison system are equally likely to explain the harms he claimed were caused by the delay of his trial. (161:10; App.46.)

Mr. Ramirez timely filed a notice of appeal. (152.) However, this court later granted Mr. Ramirez' motion to remand the case to the circuit court on the basis that appellate counsel belatedly became aware of information that called into question the circuit court's factual findings relating to the defendant's postconviction motion. (166.)

Mr. Ramirez filed a supplemental postconviction motion requesting that the circuit court to reconsider its denial of his original postconviction motion as the ruling was based in part on inaccurate information about the discovery in his case. (167.) The motion supplemented the record regarding the discovery issue and argued that the court's finding that Mr. Ramirez was responsible for some of the pretrial delay due to his requests for discovery unfairly pitted his constitutional due process rights against his constitutional speedy trial rights. (167; 168.)

Specifically, Mr. Ramirez argued that the circuit court's factual finding that the video evidence being requested by Mr. Ramirez prior to trial was "nonexistent" and "mythical" was contradicted by several written reports by law enforcement contained in the discovery. (167:3-5.) Those reports indicated that during the initial investigation of the incident, a detective from the Columbia County Sheriff's Office was informed by prison staff that the dayroom in which the incident was alleged to occur did have video surveillance, though it did not captured only the legs of Mr. Ramirez and the alleged victim rather than the entire incident. (168:9.) The prison provided law enforcement a copy of the video surveillance, but law enforcement was not able to play the DVD provided. (168:9.) On a later date, the investigating officer returned to the prison and did view a copy of the video footage there. (168:14.) The footage was summarized in that detective's report. (168:14.) However, the report did not state that he obtained a copy of the video footage or that this video was otherwise placed into evidence in this case. (168:14.)

Mr. Ramirez argued that these reports showed that a working copy of video of the dayroom that was described in the written reports was not logged into evidence and therefore was not provided in the discovery for this case. (167:5.) This fact called into question the factual findings made by the circuit court regarding whether Mr. Ramirez had received all the discovery he was entitled to prior to trial, and whether his additional requests for specific discovery should be treated as a delay on his part, and/or inconsistent with the assertion of a speedy trial demand, when performing a constitutional speedy trial analysis. (167:5-7.)

The State opposed Mr. Ramirez' supplemental motion, its arguments focusing on whether there was a discovery violation under *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333 (1988). (179:2-3.) The State did not dispute that the video had not been provided to Mr. Ramirez in discovery. (179:1-3.)

Mr. Ramirez argued in reply that Mr. Ramirez made numerous requests for this video during the lengthy pretrial period, and despite clear evidence in the written discovery that it did exist at some point, the video was never provided in discovery. (181:1.) Mr. Ramirez argued that the circuit court's factual finding that the video evidence being requested by Mr. Ramirez prior to trial was "nonexistent" and "mythical" is inaccurate and cannot support the court's determination that Mr. Ramirez was responsible for some of the pretrial delay. (181:2.)

The circuit court denied the supplemental postconviction in an oral ruling on May 16, 2023. (187:2;

App.48.) Regarding the basis for Mr. Ramirez' motion to reconsider, the court stated, "there has been some disconnect between the issue that we are talking about and the context within which the Court intended it." (187:2; App.48.) The court also acknowledged that, with the additional context provided in the supplemental motion, its labeling Mr. Ramirez' request for discovery as "nonexistent or mythical" may have been "somewhat overstated." (187:3; App.49.) The court further acknowledged that while the court "had been told repeatedly that it simply didn't exist, whether there was information in the discovery and it appears that was true that led someone to suspect that there was a missing video." (187:3; App.49.) The court agreed that Mr. Ramirez had a right to request discovery. (187:4; App.50.)

However, that additional information did not change the basis for the court's original ruling,

[b]ecause it appeared to me that every time we got close to some significant event, a motion hearing, a trial date, something along those lines, the Defendant again raised this issue. Hey, where is this video. Hey, where is this video, and we would pause and the District Attorney's Office could look into it and we would get the same answer, there is no video, there is no video, there is no video.

That's all that was ever told to the Court that I can remember. I don't know if there was ever any further debate amongst counsel about what more to it than there might have been.

(187:4; App.50.) The court went on to find that,

From this Court's perspective the straight forward facts here are this and this is the opinion of this Court that the Defendant, frankly, underlined his only speedy demand by making a request, if granted, it would delay the trial beyond the date that it actually happened which supports the Court's prior conclusion that the Defendant's testimony at our hearing related to this was self-serving and mostly not credible,

Which ultimately was the important point that the Court was trying to make in referring to the video in the fashion that I did. It was not to try to say that somehow the Defendant was stuck in this position between choosing to ask for discovery that he is absolutely entitled to versus having a speedy demand and somehow something nefarious was going on and he was being forced inappropriately to have to choose how to proceed.

It is, however, the case that this Court believes that the Defendant's actions in particular again as late as June of 2019 are inconsistent with his testimony, our motion hearing and support the Court's conclusion that the testimony ultimately wasn't particularly credible because of his prior behavior that's inconsistent with it.

(187:6-7; App.52-53.)

Mr. Ramirez now appeals his conviction and the denial of his postconviction motions, on the grounds that his constitutional right to a speedy trial was violated by the delay of over three years and ten months between the filing of complaint and his trial.

ARGUMENT

Application of the *Barker* factors demonstrates that the government’s failure to commence Mr. Ramirez’ trial for three years and ten months after the filing of the complaint violated his constitutional right to a speedy trial

A. Standard of review

“Whether a defendant has been denied his constitutional right to a speedy trial presents a question of law, which this court reviews de novo, while accepting any findings of fact made by the circuit court unless they are clearly erroneous.” *State v. Urdahl*, 2005 WI App 191, ¶ 10, 286 Wis. 2d 476, 704 N.W.2d 324.

B. Constitutional speedy trial violations are determined by balancing the factors established in *Barker v. Wingo*

Both the state and federal constitutions guarantee defendants a speedy trial. U.S. Const. amend. VI; Wis. Const. Art. I, § 7. In *Barker v. Wingo*, the United States Supreme Court first identified the criteria used to evaluate whether the right to a speedy trial has been violated. 407 U.S. 514 (1972). The Court specified four factors which courts should assess in determining whether a particular defendant has been deprived of his right to a speedy trial: (1) length of delay, (2) the reasons for the delay, (3) the defendant’s assertion of his right, and (4) prejudice to the defendant caused by the delay in bringing a speedy trial. *Id.* at 530-32. The right to a speedy trial is not subject to bright-line determinations and must be considered based upon the

totality of circumstances that exist in any specific case. *Id.* at 530-31. Further, the factors are not to be applied as independent criteria but considered together in the form of a balancing test and not as independent criteria. *Id.* at 533 (“We regard none of the four factors...as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial.”).

1. Length of Delay

To trigger a speedy trial analysis, “an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” *Doggett v. United States*, 505 U.S. 647, 651 (1992). Neither state nor federal courts have set an exact standard as to what length of delay is violative of the right to a speedy trial. *See Barker*, 407 U.S. at 521 (“We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.”). The circumstances of each case should be considered, and “the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.” *Id.* at 531.

A post-accusation delay is presumptively prejudicial if the delay approaches one year. *Urdahl*, 2005 WI App 191, ¶ 12. If the delay is presumptively prejudicial, it is necessary to look to the other three factors. *See State v. Borhegyi*, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998).

2. Reasons for the Delay

Delays in bringing a case to trial happen for many reasons, and different reasons are assigned different weights. In evaluating reasons for delay, courts separate

delays “chargeable completely to the state” (the prosecution, clerk’s office, and circuit court) from those that were not its doing. *State v. Ziegenhagen*, 73 Wis. 2d 656, 666-67, 245 N.W.2d 656 (1970). “A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government’s negligence or overcrowded courts, though still counted, are weighted less heavily.” *Urdahl*, 2005 WI App 191, ¶ 26. Even “more neutral reason[s]” than a deliberate tactic to hinder the defense’s case will be weighed against the State (though not as heavily), because “the primary burden [is placed] on the courts and the prosecutors to assure that cases are brought to trial.” *Barker*, 407 U.S. at 529, 531. Thus, even if the delay is caused by “calendar congestion and lack of judicial manpower, such institutional delays must still be charged to the government.” *Hadley v. State*, 66 Wis. 2d 350, 368, 225 N.W. 2d 461 (1975).

3. Defendant’s Assertion of Speedy Trial Right

Although it is one of the factors a court looks at, the U.S. Supreme Court repudiated the application of demand-waiver rule to speedy trial rights: “We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his rights.” *Barker*, 407 U.S. at 528. While a defendant does not waive his right to a speedy trial by failing to demand one, a defendant’s assertion of his speedy trial right “is entitled to strong evidentiary weight.” *Id.* at 531-32.

4. Prejudice to Defendant

The speedy trial provisions of the Constitution were designed to prevent oppressive pretrial incarceration, anxiety and concern by the accused, impairment of defenses, and the elimination of the possibility that concurrent sentences will be imposed. *Green v. State*, 75 Wis. 2d 631, 637-38, 250 N.W.2d 305 (1977). Our Supreme Court has noted that, “[a] reasonable reading of *Barker* leads to the inevitable conclusion that no burden is placed upon the defendant to show he was prejudiced in fact. Moreover, *Barker* holds that the assertion of the right to speedy trial is in itself probative of prejudice.” *Hadley*, 66 Wis. 2d at 364. Additionally, beyond its threshold function, the length of the delay itself is bound up with prejudice: “the presumption that pretrial delay has prejudiced the accused intensifies over time.” *Doggett*, 505 U.S. at 652.

- C. A balancing of the *Barker* factors shows that Mr. Ramirez’s constitutional right was violated and the case should be dismissed

A balancing of the four *Barker* factors demonstrates that Mr. Ramirez’s trial was unreasonably delayed, the delay should be charged to the State, Mr. Ramirez asserted his speedy trial rights, and he was prejudiced by the delay. Each factor weighs towards finding Mr. Ramirez’s speedy trial rights were violated. Because Mr. Ramirez’s constitutional right to a speedy trial was violated, his conviction should be vacated, and the charges dismissed. *Borhegyi*, 222 Wis. 2d at 509-10.

1. Length of Delay

As found by the circuit court, there is “no question” that the length of the time between the filing of the complaint and the commencement of trial was from February 1, 2016 to December 3, 2019 – a total of 1,401 days (or 3 years, 10 months and two days). This delay is well beyond the time frame held to be presumptively prejudicial in other Wisconsin cases. *Urdahl*, 2005 WI App 191, ¶ 12. (delay of one year presumptively prejudicial). The delay in this case is sufficient to be presumptively prejudicial and point to a constitutional violation.

2. Reason for Delay

The circuit court noted that the causes of the delay was “a more complicated consideration.” (161:3; App.39.) In his postconviction motion, Mr. Ramirez acknowledged that several months of delay in the case were due the defense request for a continuance to investigate a potential NGI defense in 2018. (121:8.)⁴ Mr. Ramirez argued that, even subtracting that portion of the delay attributable to the

⁴ Mr. Ramirez argued that the maximum time that should be contributed to the defense is six months and 20 days. (121:8.) Mr. Ramirez also questioned in subsequent briefing, however, whether the full period between March 6, 2018 and September 26, 2018 should be attributed to the defense. (143:4-5.) Mr. Ramirez noted that the case record provided no explanation as to why it took nine months to schedule a new trial date after the defense request for a continuance on March 6, 2018. Although the defense may have triggered this delay, nothing in the record suggests that the defense requested such a lengthy adjournment of the trial.

defense, approximately 3-and-a-half years was attributable to the prosecution and/or the court system itself. (121:8.)

The circuit court did not make specific findings as to the length of delay attributable to either party. It found that “some portion of the delay in addition to what was acknowledged in the Defendant’s briefing” was attributable to Mr. Ramirez requesting additional video evidence that he believed existed and the State maintained did not. (161:3-4; App.39-40.) The court found “[t]here is no way really to tell the count of days associated with that because there were so many other things going on at the time.” (161:4; App.40.)

The circuit court did find that “a collection of issues” not attributable to Mr. Ramirez caused delay, including attorney turn over and reassignments in the District Attorney’s office and issues with courtroom availability in the courthouse. (161:4-5; App.40-41.) These issues “indicate[d] that there is more than necessary period of delay that’s chargeable to the State for there to have been any Constitutional violation.” (161:5-6; App.41-42.) Again, the circuit court did not quantify the amount of delay attributable to the government but did not find it to be “any way near as wide a margin as asserted by the Defendant.” (161:6; App.42.)

Mr. Ramirez sought reconsideration of the circuit court’s decision based on the court’s inaccurate factual finding that the discovery he sought was “nonexistent,” providing support for the fact that his request for the video evidence was based upon information about video evidence contained in law enforcement reports. (167; 168.) Mr.

Ramirez argued that, based on the Fourteenth Amendment's Due Process Clause requirement that criminal prosecutions conform to fundamental notions of fairness, his requests for discovery that had not been provided by the State should not be factored against him as a cause of delay. (167:5-6.)

The circuit court agreed that Mr. Ramirez had a right to request discovery and acknowledged that its label of the video evidence as "nonexistent or mythical" was "somewhat overstated." (187:3; App.49.) However, the circuit court still believed Mr. Ramirez' requests for discovery to be incompatible with his assertion of his speedy trial rights. (187:4, 6; App.50, 52.) The court did change its analysis that some uncalculated portion of delay was attributable to Mr. Ramirez due to his request for the evidence. (187:4-7; App.50-53.)

It was improper for the circuit court to attribute to Mr. Ramirez any delay over the 6 months and 20 days between the defense request for continuance filed on March 6, 2018 and the speedy trial demand made on September 28, 2018. Notably, the court did not point to any specific delay caused by the discovery requests, nor is there any evidence in the record of a set-over due to the discovery request.

Further, to attribute additional delays against Mr. Ramirez because he requested a particular item of discovery that the State had not provided (but the existence of which appeared was supported by law enforcement written reports), on numerous occasions throughout the pendency of the case is to pit his constitutional speedy trial right against his due process rights to a fundamentally fair trial

and his ability to present a defense. See *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528 (1984) (Due Process Clause requires that criminal prosecutions conform to fundamental notions of fairness and that criminal defendants are given “a meaningful opportunity to present a complete defense.”). The Wisconsin Constitution provides the same protections as those in the United States Constitution related to a criminal defendant’s entitlement to evidence. *State v. Luedtke*, 2015 WI 42, ¶ 7, 362 Wis. 2d 1, 863 N.W.2d 592. “The government may not require individuals to choose between two constitutional rights.” *Schwantes v. Schwantes*, 121 Wis. 2d 607, 625, 360 N.W.2d 69 (Ct. App. 1984). The court’s finding that Mr. Ramirez’s discovery demands should be considered delay attributable to Mr. Ramirez, unfairly penalized him for not making the choice between those two constitutional rights.

Additionally, though the circuit court recognized that there was “more than necessary period of delay that’s chargeable to the State for there to have been any Constitutional violation,” (161:5-6; App.41-42), it did not appear to weight the delay sufficiently against the State, by virtue of the ultimate finding that there was no constitutional violation. Even delays that are not due to a “deliberate attempt to delay the trial in order to hamper the defense,” must still be weighed against the state. *Barker*, 407 U.S. at 531. Delay caused by “calendar congestion and lack of judicial manpower, such institutional delays must still be charged to the government.” *Hadley*, 66 Wis. 2d at 368.

Finally, it is not clear from the record that the institutional delays cited by the circuit court are the cause for the full delay in this case. The record demonstrates that

many months-long periods throughout the nearly four years that Mr. Ramirez waited for his trial went by with no action or explanation for the delay. As this court has previously noted, “the State’s failure to even offer an explanation for such a substantial delay exceeds negligence and evinces a cavalier disregard of [the defendant’s] speedy trial right.” *Borhegyi*, 22 Wis. 2d at 513.

The circuit court failed to consider that several time periods within the general delay should be weighed particularly heavily against the state:

- First, the delay from August 4, 2017 through March 5, 2018, a total of 214 days, was due to the trial conflicting with the calendar of the particular prosecutor assigned to the case. There is no evidence in the record as to why a different prosecutor could not be assigned to the case, or why this case was the one to be rescheduled to avoid conflict.
- Second, the delay from March 26, 2019 until the December 3, 2019 start of trial, a total of 253 days, was due to a request for continuance by the State because the case had been transferred to a new prosecutor in the office who stated she needed more time to prepare. Again, there is no evidence in the record as to why a different prosecutor could not handle the case or why the State needed nearly nine additional months to prepare for trial after the case had already been pending for three years.

- Finally, the additional six months delay between the court's denial of the motion to dismiss and the trial was not explained anywhere on the record and can only be explained as "a cavalier disregard of [the defendant's] speedy trial right." *Borhegyi*, 22 Wis. 2d at 513.

Because these delays were not caused by factors intrinsic to the case, they must be charged *fully* to the State. *Ziegenhagen*, 73 Wis. 2d at 668 (emphasis supplied). It was not Mr. Ramirez's responsibility to bring himself to trial speedily; it was the State's. *Hadley*, 66 Wis. 2d at 361 (citing *Barker*, 407 U.S. at 527). That it did not do so indicates a constitutional violation.

3. Defendant's Assertion of Speedy Trial Right

Mr. Ramirez's assertion of his speedy trial right, done by letter to the court filed on September 26, 2018 (59), "is entitled to strong evidentiary weight." *Barker*, 407 U.S. at 531-32. The evidence that Mr. Ramirez attempted to have his speedy trial rights demanded by trial counsel, and the fact that he ultimately made a pro se speedy trial demand and motion to dismiss for speedy trial violation weigh in favor of a constitutional violation.

In denying the postconviction motion, the circuit court found that the fact that Mr. Ramirez made other requests – most notably, for discovery and change of venue – in contradiction of his speedy trial rights precluded him from relief. (161:8-9; 44-45.) Although in some cases, delay can benefit the defense, many cases rejecting speedy trial claims emphasize that the defendants who raised them were

“consciously seeking to avoid the day of reckoning,” *Hadley*, 66 Wis. 2d at 361, the court’s belief that Mr. Ramirez was doing so in his case is not supported by the record. First, Mr. Ramirez did not wait until the last minute only to raise the issue of the missing discovery to delay his trial. As noted by the court, the request was made by Mr. Ramirez throughout the proceedings. Even when made at the same time as the speedy trial demand and motion to dismiss in June 2019, the trial date was still months away. With respect to the change of venue, Mr. Ramirez never filed this motion, so it could not properly be counted against him.

Further, the court’s findings improperly pitted Mr. Ramirez’ various constitutional trial rights against each other. The Due Process Clause of the Fourteenth Amendment requires that criminal prosecutions conform to fundamental notions of fairness and that criminal defendants are given “a meaningful opportunity to present a complete defense.” *Trombetta*, 467 U.S. at 485; *Luedtke*, 2015 WI 42, ¶ 7. When Mr. Ramirez did not receive all video evidence related to his case prior to trial; he was therefore placed in the untenable position of asserting competing constitutional rights – the right to discovery and to present a defense versus his right to a speedy trial. “The government may not require individuals to choose between two constitutional rights.” *Schwantes*, 121 Wis. 2d at 625. By finding that Mr. Ramirez’s discovery demands were inconsistent with his demand for a speedy trial, the court essentially penalized Mr. Ramirez for not making the choice between those two constitutional rights.

As demonstrated by the written discovery, a video *had* existed at some point that had not been provided to law enforcement in a working format, and therefore was never provided to the defense. In opposing the supplemental postconviction motion, the State focused its arguments on whether there was a discovery violation under *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333 (1988).

But the question here is not whether there was a discovery violation; the question is whether Mr. Ramirez' requests for discovery he justifiably believed existed but that he had not received is inconsistent with his demand for a speedy trial. The court's finding that Mr. Ramirez's discovery demands were inconsistent with his demand for a speedy trial, unfairly penalized him for not making the choice between those two constitutional rights.

4. Prejudice to Defendant

In this case, Mr. Ramirez was incarcerated on a prison sentence during the pendency of this case, but that does not mean he was not prejudiced by the lengthy delay. His treatment and classification within the prison were impacted by the pending case, and he faced anxiety and concern throughout this time. (142:6-10, 12-13; App.17-21, 23-24.) The court discredited Mr. Ramirez' testimony about the impacts he felt in prison, finding those impacts could be caused by his conduct record unrelated to this case. (161:7-8, 10; App.43-44, 46.) Given that “[m]inimal prejudice is sufficient to support [a] conclusion that [a defendant] was denied his right to a speedy trial,” *Borhegyi*, 222 Wis. 2d at 514-15, and that “no burden is placed upon the defendant to show he was prejudiced in fact,” *Hadley*, 66 Wis. 2d at

364, the circuit court was wrong to discount the allegations of prejudice made by Mr. Ramirez.

Even accepting that the circuit court did not credit Mr. Ramirez' allegations of prejudice due to his circumstances in the institution, other indisputable facts in the record establish prejudice. The fact that Mr. Ramirez asserted his speedy trial rights on two occasions is evidence that he felt prejudiced – rather than benefited – by the delay. *Hadley*, 66 Wis. 2d at 364 (“*Barker* holds that the assertion of the right to speedy trial is in itself probative of prejudice”). Additionally, the delay of nearly four years is itself evidence of the prejudice to Mr. Ramirez. *Doggett*, 505 U.S. at 652 (“the presumption that pretrial delay has prejudiced the accused intensifies over time”). This factor also weighs in favor of finding a constitutional violation.

CONCLUSION

For the foregoing reasons, Luis Ramirez asks this Court to vacate the Judgment of Conviction and remand this case to the circuit court with an order that the case be dismissed due to the speedy trial violation.

Dated this 7th day of August, 2023.

Respectfully submitted,

Electronically signed by:

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. the length of this brief is 6423words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of August, 2022.

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