STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2022AP959-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

LUIS A. RAMIREZ,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN COLUMBIA COUNTY CIRCUIT COURT, THE HONORABLE W. ANDREW VOIGT, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the postconviction court correctly conclude that Luis A. Ramirez's constitutional speedy trial right was not violated based on its findings that Ramirez acted inconsistently with respect to his desire for a speedy trial and that his testimony was not credible?

The postconviction court correctly concluded that the State did not violate Ramirez's constitutional speedy trial right. This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is warranted. The parties' briefs adequately address the relevant facts and law, and the issue presented can be resolved by applying well-settled legal standards to the circuit court's findings.

STATEMENT OF THE CASE

On May 5, 2015, while serving lengthy sentences for felony convictions of armed robbery and battery to law officers, Ramirez attacked a correctional officer by stabbing him in the head and neck with a sharpened pencil, causing puncture wounds and abrasions to the officer. (R. 2:2–3.) At the time of the attack, Ramirez was at Columbia County Correctional Institution on administrative confinement (AC) status (a more restrictive status than that of the general prison population) and living in a disciplinary segregation housing unit. (R. 2:2.)

On February 1, 2016, the State charged Ramirez with battery by a prisoner and disorderly conduct, both with repeater and use-of-a-dangerous-weapon enhancers. *Columbia County Case Number 2016CF31 State of Wisconsin v. Luis A. Ramirez*, Wis. Cir. Ct. Access, https://wcca.wicourts.gov/caseDetail.html?caseNo=2016CF00

0031&countyNo=11&index=0&mode=details#records (last visited Oct. 20, 2023); (R. 2:1–2; R-App. 3).[1] After a two-day trial, which began 46 months later on December 3, 2019, he was convicted of both crimes and received a 15-year sentence to be served consecutively to the sentences that he was already serving. (R. 92:1; 163; 164.)

Ramirez filed a postconviction motion to vacate his conviction and dismiss, alleging that the 46-month delay in bringing him to trial violated his constitutional speedy trial rights. (R. 121.) The postconviction court held a hearing at which Ramirez testified. (R. 142.) Ramirez testified that he was disciplined for the attack by being placed into disciplinary separation for 360 days, through June 2016. (R. 142:6.) After that point, he was placed back on AC status.[2] (R. 142:6.)

Ramirez claimed that a correctional officer at Green Bay Correctional Institution, where he had been transferred during his disciplinary separation period, told him that he had to remain on AC status until his case was resolved, after which point the department would consider returning him to the general population. (R. 142:7–8.) Ramirez claimed that the conditions and limits of his AC status were detrimental to his mental health, caused significant anxiety and stress,

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[1] The State obtains some information on timing from the CCAP record, from which this Court may take judicial notice. *See* Wis. Stat. § 902.01; *State v. Aderemi*, 2023 WI App 8, ¶ 7 n.3, 406 Wis. 2d 132, 986 N.W.2d 306. For the Court's convenience, the State has attached a printout of the CCAP record as an appendix to this brief and cites to the relevant appendix page numbers.

[2] According to Ramirez's testimony, there are different levels of restriction on AC status, with AC4 being one step more restrictive than that of the general prison population, and AC1 being the most restrictive AC status. (R. 142:5–6.) The State does not distinguish in this brief between the different AC levels because, as it understands Ramirez's brief, his argument is that but for the pending criminal charges, he would have been eligible for general-population status.

prevented him from accessing beneficial programming, and caused him to go on new medications for panic attacks. (R. 142:9–12.)

Ramirez also acknowledged at that hearing that he had been on AC status in 2006 and 2007 due to his accruing 80 conduct reports. (R. 142:14–15.) He also admitted that there were other reasons beyond a pending case why a prisoner would be placed on either AC or disciplinary segregation status. (R. 142:18.) Ramirez agreed that he had no documentation supporting his claim that his pending criminal case was what kept him on AC status. (R. 142:22–23.)

In an oral ruling, the postconviction court denied Ramirez relief. The court held that while the length of the delay in this case was presumptively prejudicial, only some of it was chargeable to the State, valid reasons supported the delays, Ramirez's pretrial assertion of his speedy trial right was not credible, and the delay while the case was pending did not prejudice Ramirez. (R. 161:3–10.)

Ramirez moved for reconsideration. (R. 167.) In that motion, he challenged a finding by the postconviction court that one reason it found Ramirez not credible was that he accompanied his speedy trial requests with discovery demands for a nonexistent video. (R. 167:2–3.) Ramirez identified reports noting that law enforcement had reviewed a security video, which reflected that some sort of struggle or fight took place but "does not capture the entire incident and only shows . . the feet or legs" of the victim and of Ramirez. (R. 167:3–4; 168:14.) Ramirez argued that the postconviction court's findings that the video was "nonexistent" was incorrect and that the court's decision unfairly faulted Ramirez for not giving up his right to present a defense when he asked for a speedy trial. (R. 167:3, 5–6.)

The postconviction court followed up with another oral ruling. (R. 187:2–3.) It acknowledged that its previous remark that the video never existed was "somewhat overstated." (R. 187:3.) Nevertheless, the court clarified that whether the video ever existed was irrelevant. It was that every time Ramirez moved for a speedy trial, he also demanded discovery that he had been told multiple times did not exist, and he also suggested that counsel should have moved for a change of venue. (R. 187:5.) Hence, Ramirez undermined his speedy trial request by re-requesting a video that he was told did not exist, and by asserting that he wanted counsel to move for a change of venue. (R. 187:6.) Because litigating those requests, which Ramirez filed pro se despite having counsel, would have delayed the trial more, the court found that Ramirez was "mostly not credible" and that his postconviction testimony was "self-serving." (R. 187:6.)

Ramirez appeals from the judgment of conviction and the order denying postconviction relief. (R. 152:1.)

STANDARD OF REVIEW

Whether a defendant was denied his right to a speedy trial is a constitutional question reviewed de novo, and the circuit court's findings of fact are upheld unless they are clearly erroneous. *State v. Urdahl*, 2005 WI App 191, ¶ 10, 286 Wis. 2d 476, 704 N.W.2d 324.

Ramirez asserts that he is appealing from multiple postconviction decisions. (Ramirez's Br. 17.) Only the circuit court's original postconviction order, (R. 151), is properly before this Court.

After Ramirez filed his notice of appeal, this Court granted his motion to remand to file a motion for reconsideration. *See* Wis. Stat. § 808.075(5). The postconviction court denied the reconsideration motion in an oral ruling. (R. 187.) Ramirez cannot obtain review of the

circuit court's "order" denying reconsideration for two reasons: (1) no written order was entered from that decision, *State v. Brockett*, 2002 WI App 115, ¶ 15, 254 Wis. 2d 817, 647 N.W.2d 357; and (2) Ramirez did not file a "statement of objections" within 14 days of the return of the record. Wis. Stat. § 808.075(8) (setting forth procedure for aggrieved party to perfect appeal of post-remand orders).

If this Court believes that the circuit court's oral ruling denying Ramirez's motion for reconsideration is reviewable, this Court reviews it for an erroneous exercise of discretion. *State v. White*, 2008 WI App 96, ¶ 9, 312 Wis. 2d 799, 754 N.W.2d 214.

ARGUMENT

Ramirez was not denied his constitutional right to a speedy trial.

A. Courts use a balancing test to analyze constitutional speedy trial challenges, and justifiable delays that do not prejudice the defendant do not violate that right.

"Both the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee an accused the right to a speedy trial." *Urdahl*, 286 Wis. 2d 476, ¶ 11. This Court utilizes a four-part test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether a defendant's speedy trial right has been violated. *Urdahl*, 286 Wis. 2d 476, ¶ 11. The only remedy for a constitutional speedy trial violation is dismissal. *Id.*

This Court considers: "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *Urdahl*, 286 Wis. 2d 476, ¶ 11. This is a balancing test "based on the totality of circumstances that exist in the specific case." *Id.* "[T]he test weighs the conduct of the prosecution and the defense and

balances the right to bring the defendant to justice against the defendant's right to have that done speedily." *Id.*

B. The circuit court correctly concluded that Ramirez's constitutional right to a speedy trial was not violated.

On balance, Ramirez failed to show a violation of his constitutional right to a speedy trial. While the delay was presumptively prejudicial, it was not extraordinarily long, only some of it weighed against the State, Ramirez made his speedy trial demands pro se and well into the proceedings, and there is no evidence that the delay prejudiced Ramirez such that vacating his conviction and dismissing the charges would be justified.

1. The length of the delay was presumptively prejudicial, but it was not extraordinary.

The first factor, the length of the delay, plays two roles. "First, it is a triggering mechanism used to determine whether the delay is presumptively prejudicial," i.e., whether this Court need apply the remaining *Barker* factors. *Urdahl*, 286 Wis. 2d 476, ¶ 12. A post-accusation delay of one year is generally considered presumptively prejudicial. *Id.* If the delay in the defendant's trial is presumptively prejudicial, then the length of the delay becomes one factor in the four-factor balancing test. *Id.* This Court then "considers 'the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.'" *Id.* (citation omitted). "[T]he presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett v. United States*, 505 U.S. 647, 652 (1992). For example, an "extraordinary" delay—such as an eight and one-half year delay—weighs heavily against the government, while a shorter delay weighs less heavily. *See id.* at 657–58.

Here, the length of the delay—46 months from the filing of the complaint to the start of trial—was presumptively prejudicial and therefore triggers the *Barker* test. *Urdahl*, 286 Wis. 2d 476, ¶ 12. While the length of the delay in this case was nearly three years longer than the presumptively prejudicial one year, it still was not on par with the "extraordinary" eight-plus-year delay in *Doggett*. Thus, it does not weigh as heavily against the government as would a lengthier delay. *Doggett*, 505 U.S. at 657–58.

2. Though some of the delay was attributable to the State, most of it either does not count or is chargeable to Ramirez.

a. Government-caused delays are assigned weight based on the reasons and motivations, and defendant-caused delays are not counted.

"When considering the reasons for the delay, courts first identify the reason for each particular portion of the delay and accord different treatment to each category of reasons." *Urdahl*, 286 Wis. 2d 476, ¶ 26. Yet not all delays are weighed equally. Only "deliberate attempt[s] by the government to delay the trial in order to hamper the defense is weighted heavily against the State." *Id.* "[D]elays caused by the government's negligence or overcrowded courts . . . are weighted less heavily." *Id.*

Some delays carry no weight at all. "[I]f the delay is caused by something intrinsic to the case, such as witness unavailability, that time period is not counted." *Id.* Other valid reasons for delays include those "attributed to the ordinary demands of the judicial system." *Norwood v. State*, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976); *see also Scarbrough v. State*, 76 Wis. 2d 87, 100–02, 250 N.W.2d 354 (1977) (holding that the "period of time necessarily required

for the hearing and disposition of pretrial motions, whether made by prosecution or defense, [is] not to be considered as delays caused by either party"). Valid reasons for delay "should be understood as 'a factor in the government's favor, to be weighted in considering the length of the delay, the prejudice to the accused, and the accused's assertion of right.'" *United States v. Schreane*, 331 F.3d 548, 555 (6th Cir. 2003) (citation omitted).

Finally, "if the delay is caused by the defendant, it is not counted." *Urdahl*, 286 Wis. 2d 476, ¶ 26. "[G]enerally, 'delays caused by defense counsel are properly attributed to the defendant.'" *State v. Provost*, 2020 WI App 21, ¶ 39, 392 Wis. 2d 262, 944 N.W.2d 23 (citation omitted).

b. At worst, less than one-third of the 46-month delay was attributable to the State, and valid reasons supported the delays.

Here, as the circuit court found, while some delays were attributable to the State, none weighed heavily against it, and most of the delays were not attributable to either side; that is, they were the result of valid reasons such as witness unavailability and the ordinary demands of the judicial system.

Again, the criminal complaint was filed on February 1, 2016. (R. 2; R-App. 3.) Ramirez's trial began on December 3, 2019. (R. 163.) The breakdown of the delays over those 46 intervening months and the reasons for them is as follows:

February 1, 2016 to August 4, 2016—Filing of the complaint to the preliminary hearing. The first six months of this case involved delays due to the ordinary demands of the judicial system and other circumstances that are not attributable to the State. There was an initial appearance on February 11, 2016, (R. 108), and a preliminary

hearing within a week of that, which Ramirez opted to reschedule until he obtained counsel. (R. 101:4–5.) Counsel was appointed March 15, 2016. (R. 13.) A return hearing was set for May 10, 2016, but counsel asked for an adjournment because he "still need[ed] discovery"; the court set the next hearing for July 20, 2016. (R-App. 16.)

In the meantime, Ramirez was appointed a new public defender on July 5, 2016. (R. 19.) Though there is nothing to suggest that Ramirez was personally responsible for that change, Ramirez's new counsel requested a reset at the July 20 hearing due to his recent appointment. (R-App. 16.) The court scheduled, and ultimately held, the preliminary hearing on August 4, 2016. (R. 109.) After the court bound over Ramirez, it set the arraignment for October 26, 2016, after Ramirez requested it be set "at a later time" to allow him to pursue possible motions in the meantime. (R. 109:14–15.)

In all, the first six months all involved delays that had valid reasons or that could be chalked up to the ordinary demands of the justice system. This period does not count against either side.

August 4, 2016 to September 26, 2017—the preliminary hearing to the second trial date. The parties appeared to be making effort to move the proceedings along for the next 13 months. As noted, the arraignment occurred almost three months after the preliminary hearing, on October 26, 2016, (R. 104), and in December 2016, the court set a date for a one-day trial, April 13, 2017. (R. 31.)

In February and March 2017, the State asked that the jury trial be reset due to witness unavailability and the changed expectations that trial would require three days, not one. (R. 32; 33; 34.) The prosecutor indicated that Ramirez's counsel did not object to resetting the trial date. (R. 32; 34.) In late March, the court rescheduled the trial for September 26 to 28, 2017. (R-App. 15.)

Thus, the three months between the preliminary hearing and the arraignment were by Ramirez's request; hence, those do not count. Though the State requested the adjournment of the first trial in April, the reason was witness unavailability and a changed estimate of the time needed, which means the six-month time period is not counted. *Urdahl*, 286 Wis. 2d 476, ¶ 26.

September 26, 2017 to September 26, 2018—the second trial date to Ramirez's pro se speedy trial demand. About a month before the September 26 trial date, the prosecutor alerted the circuit court that Ramirez's trial, as scheduled, overlapped with a second case, because the prosecutor could not appear at two trials simultaneously and because the courthouse at that point had only one courtroom able to accommodate a jury. (R. 37.) The State gave no preference as to which of the two trials needed to be rescheduled. (R. 37.) It noted that Ramirez's case was older than the second case, but the trial in the second case had been set before Ramirez's was. (R. 37.) The State also indicated, correctly, that neither Ramirez nor the defendant in the second case had a speedy trial demand. (R. 37.) At a scheduling conference, the court set a new trial date for April 4, 2018. (R-App. 15.)

Ramirez requested the next continuance on March 6, 2018. (R. 50.) Counsel explained that he was waiting to receive Ramirez's health records from the Department of Corrections (DOC), and that Ramirez did not object to a continuance. (R. 50.) At a hearing on the motion a week later, the State did not object. (R-App. 14.) The court removed the trial date and scheduled a status conference. (R-App. 14.) Subsequently, there appeared to be two status conferences—one in May, the other in August—though they were not transcribed and there are no notes indicating their content in the CCAP record. (R-App. 14.) On September 26, 2018, Ramirez filed a pro se speedy trial motion and also asked the

court to order the State to turn over videos from the incident that he claimed the DOC had. (R. 59.)

In total, the first delay between the September 2017 and April 2018 trial date should not weigh against either side. The court had mistakenly scheduled two trials in the sole courtroom it had available. And even if that six-month delay is attributable to the State, it should not weigh heavily against it under circumstances where there was only one courtroom available to hold a jury trial.

Moreover, the six-month delay between April 2018 and September 2018 is attributable to Ramirez, since his counsel requested the delay, and there was no indication until September 26, 2018, that Ramirez wished to make a speedy trial demand. Hence, the time between September 2017 and September 2018 is at best a wash, with each party bearing responsibility for six months' worth of delays justified by valid reasons.

September 26, 2018 to December 3, 2019—Ramirez's pro se speedy trial motion to the first day of trial. Over the next 14-month period, there still were no indications that the State was engaging in deliberate delay tactics or neglect. Notably, September 26, 2018, is the first of any assertion by Ramirez of his speedy trial right. (R. 59.) The court held a telephone conference shortly after that, and a note in CCAP indicates that counsel informed the court that he would meet with Ramirez on October 11 and report the "status" after that date. (R. 62; R-App. 13.) The next conference appeared to occur on December 5, 2018, at which point the court scheduled trial for April 3 to 4, 2019. (R-App. 13.)

The next events occurred in late March 2019. Defense counsel filed motions in limine and the State requested an adjournment because the original prosecutor handling the case had retired, resulting in a new prosecutor taking over.

(R. 67.) The assistant district attorney told the court that neither Ramirez's counsel nor the victim objected to the request. (R. 67.) On April 3, 2019, the court scheduled the trial for December 3 to 4, 2019. (R-App. 13.)

On April 15, 2019, Ramirez filed a pro se motion to dismiss, complaining that his counsel would not file a motion to change venue, did not provide him a witness list, did not file a motion to dismiss, and did not file a speedy trial motion. (R. 70.) The court ultimately addressed that motion on June 17, 2019, and interpreted the motion as alleging a statutory speedy trial request. (R. 110:7.) At that hearing, counsel explained that he did not file a speedy trial motion for Ramirez because release from bond, i.e., the remedy for a statutory violation, was unavailable to Ramirez since he was serving a prison term. (R. 110:2.) The court agreed and denied Ramirez's motion. (R. 110:7.)

The court also addressed a discovery issue that Ramirez raised, which was that he wanted the State to turn over the video from a particular camera in the room where Ramirez assaulted the victim. (R. 110:4.) When Ramirez's counsel first sought the video, the State told him that it did not exist. (R. 110:5–6.) Ramirez insisted that it did exist. (R. 110:8–9.) The State reiterated that the particular camera and angle that Ramirez was requesting did not and never existed. (R. 110:5–6.)

Finally, Ramirez also asserted that he wanted counsel to file a motion to change venue. (R. 110:3.) Ramirez's counsel stated that there was no basis to seek a new venue, but he stated that he would reconsider and file a motion if there was a reason to do so. (R. 110:11.) Counsel never filed a change-of-venue motion. And neither CCAP nor the appellate record reflect any filings or additional proceedings until the start of trial on December 3, 2019.

Of this 14-month period, the first six months (from late September 2018 to late March 2019) are not chargeable to either side. In late March 2019, the State requested the next adjournment due to the former prosecutor's retirement. Accordingly, the State was responsible for the eight-month delay between April 3, 2019 and trial on December 3, 2019. Nevertheless, the State had a valid reason for requesting an adjournment, it did so without objection from Ramirez's counsel, and at that point, the only request for a speedy trial had been a pro se motion filed by Ramirez eight months earlier with no indication from counsel that Ramirez was seriously seeking a prompt disposition.

Other considerations regarding delays. The postconviction court noted that other factors caused delays in this case to which it was difficult to quantify or assign responsibility. (R. 161:3.) For one, Ramirez "was not frequently a participant in the many off-the-record status conferences that were held in this case in an effort to try to keep it moving." (R. 161:3.) The court recalled that some delay was due to Ramirez's insistence that there was additional undisclosed video of the incident. (R. 161:3–4.) To that end, "[m]ore than once, those discussions revolved around getting commitment from the defense attorney about whether or not [Ramirez] wanted to have his trial sooner or wanted to have his trial with what we now know . . . is nonexistent additional video evidence." (R. 161:4.)

The court explained that there was no way to count how many days those discussions took because other events contributed to the delays, including the district attorney's retirement, necessitating a new prosecutor to step in. (R. 161:4.) In addition, "the courthouse moved [its] entire operation to a temporary location and back" and despite being a three-judge courthouse, it had "only one courtroom that could accommodate a jury trial for almost a full year" during renovations that occurred while Ramirez's case was pending.

(R. 161:4.) The court clarified that neither the DA's retirement nor the court's temporary limited operations were Ramirez's responsibility, but it made clear that all of those things unavoidably affected when the court could schedule the trial. (R. 161:4–5.)

Accordingly, those factors make the delays in this case difficult to quantify and assign to either party. For example, if the courthouse was not limited to one jury courtroom between its three judges, the trial dates possibly could have been set sooner than five to nine months out. It's possible the trial could have been set before the district attorney retired. Nevertheless, as of six months before trial, Ramirez appeared to be more concerned about obtaining the allegedly missing video or having counsel move to change the venue than he was about having the trial occur sooner than it did.

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In all, the State was responsible for less than a third of the 46-month delay. It requested the first six-month delay from the first trial date to the second, but that does not count because it was due to something intrinsic to the case, i.e., witness unavailability. *See Urdahl*, 286 Wis. 2d 476, ¶ 26. The fact that the second trial date was impossible due to double-scheduling by the court and limited courtroom availability weighs against the State, *see Hadley v. State*, 66 Wis. 2d 350, 363, 225 N.W.2d 461 (1975), and that delay was seven months, until the third trial date. Those seven months of delay were justified by valid reasons, however, and occurred before Ramirez even asserted his speedy trial rights. Finally, the State was responsible for the eight-month delay from when the district attorney retired until the trial in December 2019. In all, the State was at worst responsible for 15 of the 46 months of delay between the filing of the complaint and trial. Only eight of those months came after Ramirez made pro se demands for a speedy trial, and none of those delays should weigh heavily against the State.

c. Ramirez's arguments lack support in the law.

Ramirez complains that the postconviction court counted more delays against him than were warranted. He asserts that effectively *all* the time that passed (other than the six months and 20 days attributed to his request for a continuance up until his first pro se speedy trial request) should have been attributed to the State and should have weighed heavily against it. (Ramirez's Br. 24–27.) His position ignores case law holding that it is primarily deliberate efforts by the government to delay the trial to hinder the defense that weigh heavily against the State. *Urdahl*, 286 Wis. 2d 476, ¶ 26. Mere negligence by the government or "overcrowded courts" weigh "less heavily" against the State. *Id.* So, witness unavailability and the "ordinary demands of the justice system," i.e., the time required for courts to hold hearings and address pretrial motions, mean that those time periods do not count against either side. *Id.*; *Norwood*, 74 Wis. 2d at 354; *Scarbrough*, 76 Wis. 2d at 100–02. As argued above, the postconviction court did not count any unwarranted time periods against Ramirez. To the extent it counted time against the State, all of that time was accompanied by valid reasons that meant those time periods weighed less heavily against the government.

Ramirez claims that the postconviction court's remarks about his demands for the allegedly missing video accompanying his speedy trial demand forced him to choose between his right to present a complete defense and his right to a speedy trial. (Ramirez's Br. 24–29.) But as the postconviction court explained in its decision addressing Ramirez's motion for reconsideration, Ramirez appeared to not be trying to assert two rights at once, but rather raising and re-raising the video issue, which undermined both his speedy trial requests, because it would only further delay the trial if granted, and his credibility generally. (R. 187:5–6.)

Ramirez asked multiple times for the video, the State checked again for the video, and it informed Ramirez and the court that it didn't exist. (R. 187:5–6.)

But importantly, the postconviction court was not allocating time periods devoted to the fruitless requests and search for the video against Ramirez in this second step of the *Barker* analysis. It simply was saying that under the *third* step, Ramirez's speedy trial requests were contradictory and incredible because he simultaneously re-raised claims that would have prevented a speedy trial. The court was not forcing Ramirez to choose between rights; it was simply saying that his continually reraising what appeared to have been a resolved (and preserved) claim made his pro se requests for a speedy trial disingenuous. Nothing about the court's decision made Ramirez choose between rights.

Ramirez complains that the postconviction court should have, but did not, weigh several time periods heavily against the government. (Ramirez's Br. 24–27.) He asserts that there was no explanation why, as of August 4, 2017, another prosecutor could not have been assigned to remedy the fact that the late September 2017 date conflicted with another trial that the same district attorney was handling. (Ramirez's Br. 26.) But as the postconviction court explained, appointing a new prosecutor was not a solution, because there was only one courtroom that could accommodate a jury trial. (R. 161:5.)

Ramirez also complains that there was no explanation why his trial, not the newer case, was rescheduled from that late September date. (Ramirez's Br. 26.) To be sure, all that the record tells us is that one of the trials had to be rescheduled, the State expressed no preference as to which it should be, and the rescheduled trial ended up being Ramirez's. While Ramirez's was the older of the two cases, it had been scheduled for trial after the newer case had been. But there is also nothing in the record supporting Ramirez's view that the other case, not his, necessarily should have been

rescheduled. As of August 2017, Ramirez had not asserted his speedy trial rights, and there is nothing in the record to suggest that Ramirez's counsel objected to rescheduling the trial.

Finally, Ramirez insists that the postconviction court should have weighed heavily against the government the fact that the trial dates were rescheduled five to nine months out from the previous dates, instead of sooner. (Ramirez's Br. 25–27.) He invokes *Hadley* for its language stating that delays due to judicial calendar congestion and lack of courthouse staffing "must still be charged to the government." (Ramirez's Br. 20, 25.) Ramirez ignores that case law clearly providing that delays caused by court congestion are *not* weighted heavily against the government. *Barker*, 407 U.S. at 531 ("[O]vercrowded courts should be weighted less heavily . . . ."); *Urdahl*, 286 Wis. 2d 476, ¶ 37 (stating that no part of a nearly 21-month delay attributed to the State was "weighted heavily against [it] because [the delays were] due to the court's congested calendar"). Moreover, here, the calendar congestion was not due to negligent or chronic court understaffing, which was the situation in *Hadley*, 66 Wis. 2d at 369. Rather, the congestion was due to courthouse renovations that, for about a year, temporarily reduced the available jury courtrooms from three to one, and that required the court to move its operations twice. (R. 161:4.) Accordingly, even if the delays between trial dates can be quantified and weighted against the government, that weight is minimal.

3. Ramirez did not promptly, effectively, or credibly assert his speedy trial rights.

The third factor is whether the defendant asserted his right to a speedy trial. *Urdahl*, 286 Wis. 2d 476, ¶ 11. A "defendant's complete failure or delay in demanding a speedy trial will be weighed against him." *Provost*, 392 Wis. 2d 262,

¶45 (quoting *Hatcher v. State*, 83 Wis. 2d 559, 568, 266 N.W.2d 320 (1978)).

Here, Ramirez's assertions of his right do not support the conclusion that there was a speedy trial violation for three reasons. First, his initial assertion came two years and eight months after the original charges were filed. That delay in asserting his right weighs against Ramirez. *See id.*

Second, Ramirez's assertions were pro se filings when he was represented by counsel. Circuit courts have no obligation to address such motions. *State v. Wanta*, 224 Wis. 2d 679, 699, 592 N.W.2d 645 (Ct. App. 1999). Nevertheless, it appears that the court and parties held a telephone conference shortly after Ramirez filed his first pro se motion in September 2018, and counsel stated that he was going to confer with Ramirez around two weeks after that filing. (R-App. 13–14.) That date passed, and counsel never filed a speedy trial motion on Ramirez's behalf. Ramirez then filed a second pro se motion in April 2019, which the court, at a later hearing explained that it did not have to address (because litigants have no right to file pro se motions while represented). (R. 110:7.) It nevertheless denied the motion since any possible relief was unavailable to Ramirez. (R. 110:7.) So, when Ramirez asserted his rights in September 2018 and April 2019, he did not do so in way that required the court to take notice.

Third, Ramirez accompanied his pro se assertions with requests that were inconsistent with a credible desire for a speedy trial. As the postconviction court found, Ramirez's "assertion of his right [didn't] weigh as heavily in his favor as it might otherwise" because Ramirez at the same time was asserting a meritless requests to change venue and obtain a video that he had been repeatedly told did not exist. (R. 161:6–7; 187:4–5.) Those additional requests were "patently inconsistent with someone whose only goal is to get to trial as quickly as possible, which is essentially what [Ramirez] is

now asserting." (R. 161:7; 187:7.) Accordingly, the circuit court soundly determined that Ramirez's assertion of his speedy trial right was not credible and that that factor did not support the conclusion that his rights were violated.

Ramirez claims that *Barker* holds that his pro se assertions of his speedy trial right are "entitled to strong evidentiary weight." (Ramirez's Br. 27.) His arguments ignore that his assertions came over two and a half years into the proceedings, they came after multiple trial postponements to which Ramirez did not object, they were made pro se while represented, and they were accompanied by claims that were inconsistent with a desire for a prompt trial. This factor does not weigh in Ramirez's favor.

Ramirez suggests that counsel's failure to file the motions on his behalf forced him to file the motions pro se. (Ramirez's Br. 27.) But if that was true, Ramirez should have asserted postconviction that counsel was ineffective for not alerting the circuit court to Ramirez's desire for a prompt disposition. He has not. And, notably, even after Ramirez filed two pro se motions demanding a speedy trial, counsel conferred with Ramirez and never filed an assertion on his behalf. The absence of any follow up by counsel supports the postconviction court's findings that at the time, Ramirez had no serious desire to go to trial quickly. (R. 161:7; 187:4–5, 7.)

Finally, Ramirez reiterates his above argument that the postconviction court improperly forced Ramirez to choose between two constitutional rights and penalized him for exercising his right to "a complete defense," i.e., his right to obtain the missing video, at the same time that he asserted his speedy trial right. (Ramirez's Br. 27–29.) But as discussed, the postconviction court did not pit the two rights against each other. Its comments were simply that Ramirez's additional motions were inconsistent with a desire for a prompt disposition, and that rendered his request for a speedy trial disingenuous and not credible. Moreover, the court did

not force Ramirez to choose between rights or waive his right to present a complete defense in order to exercise his speedy trial right. Rather, Ramirez's claim that the State withheld an additional video was litigated and preserved for appeal.

4. Ramirez did not demonstrate any prejudice resulting from the delays.

"Courts consider the element of prejudice with reference to the three interests that the right to a speedy trial protects: prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense." *Urdahl*, 286 Wis. 2d 476, ¶ 34 (citing *State v. Ziegenhagen*, 73 Wis. 2d 656, 671, 245 N.W.2d 656 (1976)). The third interest, prevention of impairment of defense, "is the most significant because 'the inability of a defendant [to] adequately . . . prepare his case skews the fairness of the entire system.'" *Id.* (alterations in original) (citation omitted).

To start, neither the first nor third interest, i.e., oppressive pretrial incarceration or any impairment of Ramirez's defense, are relevant here. Ramirez was incarcerated in state prison while the case was pending, so there was no relevant "oppressive pretrial incarceration" of an otherwise free citizen. *See, e.g.*, *Watson v. State*, 64 Wis. 2d 264, 271, 219 N.W.2d 398 (1974) (no oppressive pretrial incarceration for defendant who was already serving a prison sentence on a different conviction). Moreover, Ramirez has no basis to argue that his defense was hampered. He was the only witness for the defense; there was nothing to suggest that the delay negatively impacted his testimony or prevented him from offering other evidence to support his defense. *See, e.g.*, *id.* (no hampered defense where the defense had only one witness whose testimony was not affected by the delay).

Rather, Ramirez argues the second interest, i.e., that he experienced anxiety and concern, because while in prison he was on AC status solely because this case was pending. (Ramirez's Br. 29.) But that claim disregards that his crime here—attacking a prison guard—was a major rule violation and the type of violent act that would prompt more restrictive institutional confinement. Logically, the department placed additional restrictions on Ramirez at this time primarily because he attacked correctional staff—which occurred while he was on AC status to begin with—not because his trial was pending.

The record also establishes that AC was not a new status for Ramirez in prison. Ramirez admitted that at the time of his offense, he was on AC status. (R. 142:5.) Further, Ramirez had received numerous conduct reports over the years—80 as of 2006 and 2007—that had resulted in his serving years of some level of AC status. (R. 142:15.) And to the extent Ramirez claimed that being on AC status required new medication to address his stress, frustration, and panic attacks, Ramirez also acknowledged that he had been on psychotropic medication since he first arrived in prison in 1998. (R. 142:21.) Ramirez also failed to introduce any evidence, other than his own testimony, that the sole reason he was on AC status was because his criminal case was pending. (R. 142:21–23.)

In all events, the postconviction court found incredible Ramirez's testimony that it was solely the pending nature of his case that caused him to be on AC status. In the court's view, given "the number of conduct reports and disciplinary history that [Ramirez] has [had] while in the prison system, it is impossible for this Court to conclude the harms [Ramirez] claimed to have suffered simply because this case was open could be true." (R. 161:8.) Those credibility findings are entitled to deference, they are not reversible, and they

support the conclusion that Ramirez failed to show any prejudice due to the delays in bringing his case to trial.[3]

With the postconviction court finding Ramirez not credible, and the record supporting those findings, Ramirez cannot persuasively argue for a different outcome on appeal. *See State v. Sloan*, 2007 WI App 146, ¶ 21, 303 Wis. 2d 438, 736 N.W.2d 189 ("The [circuit] court is the sole arbiter of credibility issues and will be sustained if facts in the record support the court's conclusions."). Beyond his self-serving testimony, Ramirez offered no evidence that the delays in trying his case caused his AC status in prison and any anxiety resulting from living on that status. Where there is no loss of freedom attributable to the pending charges, the generalized anxiety present in every criminal case causes only "minimal" prejudice. *Urdahl*, 286 Wis. 2d 476, ¶ 35.

Ramirez instead asserts that the law recognizes that only minimal prejudice supports a conclusion that a defendant's constitutional right was denied and that defendants need not show that they were prejudiced in fact. (Ramirez's Br. 29–30.)

[3] The postconviction court's findings are not clearly erroneous and are almost surely correct. Unlike disciplinary separation, AC status is not imposed as discipline for a discreet rules infraction or based on pending criminal charges. Moreover, unlike periods of disciplinary segregation, a prisoner's AC status does not automatically expire. Rather, a committee within the DOC reviews a prisoner's AC status every six months to determine whether he is still a risk to be placed in the general population. Under the circumstances, Ramirez had no likelihood of release from AC status at any six-month review while this case was pending, given that he attacked an officer while he was already on AC status. This is true regardless of the existence or status of his criminal case. *See* Wis. Admin. Code § DOC 308.04(10).

But the cases Ramirez cites do not support his arguments. For example, in *Borhegyi*, a showing of minimal prejudice sufficed because the State there so "cavalierly ignore[d]" Borhegyi's request such that the first three *Barker* factors each weighed heavily against it. *State v. Borhegyi*, 222 Wis. 2d 506, 520, 588 N.W.2d 89 (Ct. App. 1998). In contrast, in *Urdahl*, only "minimal" prejudice did not suffice when the other three factors did not weigh heavily against the State. *Urdahl*, 286 Wis. 2d 476, ¶ 37.

And while *Hadley* says that there is "no burden . . . placed upon the defendant to show he was prejudiced in fact," *Hadley*, 66 Wis. 2d at 364, that language does not supplant the prejudice factor of the *Barker* test. Indeed, the presumption of prejudice from the first *Barker* factor "cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria," including the prejudice factor. *Doggett*, 505 U.S. at 655–56. Given that Ramirez cannot link any of his anxiety or concern to the new charges he faced, and that there is no evidence that the delay hindered Ramirez's ability to defend himself, the glaring lack of prejudice here similarly weighs against the conclusion that there was a speedy trial violation.

Finally, Ramirez claims that his assertions of his right and that the delay itself was nearly four years should both be enough to show prejudice as a matter of law. (Ramirez's Br. 30.) As discussed, Ramirez's "assertions" of his right were never advanced through counsel, and they were not credible.

5. Balancing all four factors together reflects that there was no constitutional speedy trial violation.

The conclusion that there was no speedy trial violation here is on all fours with *Urdahl*. There, this Court found that 20.5 months (out of a total 30.5-month delay) were attributable to the State, which was "a long period of time, but

not extraordinarily long." *Urdahl*, 286 Wis. 2d 476, ¶ 37. No part of that 20.5-month delay weighed heavily against the State. *Id.* And the remaining factors weighed in favor of finding no violation: Urdahl's speedy trial demand occurred late in the proceedings, after a trial had been scheduled. *Id.* ¶ 33. Urdahl also showed no impairment of his defense or other significant prejudice. *Id.* ¶ 36. On balance, this Court concluded that the 20-plus-month delay attributable to the State did not violate Urdahl's speedy trial right under the circumstances. *Id.* ¶ 37.

Again, at worst the State was responsible for 15 months of delay (compared to 20.5 months in *Urdahl*), which was less than a third of the total time period between the filing of the complaint and Ramirez's trial (compared to two-thirds in *Urdahl*). Just as in *Urdahl*, none of those delays weigh heavily against the State. Ramirez's speedy trial demands—which the court had no obligation to address since Ramirez made them pro se while represented—came years into the proceedings and were accompanied by other requests inconsistent with a desire for a prompt resolution. And Ramirez showed no prejudice resulting from the delays. The postconviction court's credibility and factual findings are not clearly erroneous, and its conclusion that there was no speedy trial violation is correct.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying Ramirez's postconviction motion.

Dated this 23rd day of October 2023.

Respectfully submitted,

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FORM AND LENGTH 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 7270 words.

Dated this 23rd day of October 2023.

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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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 23rd day of October 2023.

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