STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP959-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

LUIS A. RAMIREZ,

Defendant-Appellant.

ON REVIEW FROM A DECISION OF THE COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION AND POSTCONVICTION ORDER ENTERED IN COLUMBIA COUNTY CIRCUIT COURT, THE HONORABLE W. ANDREW VOIGT, PRESIDING

OPENING BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

The court of appeals held that a 46-month pretrial delay justified reversing with prejudice Luis Ramirez's conviction for battery by a prisoner. While no one disputes that the delay here was long, the court of appeals' application of the *Barker* factors to the circumstances was flawed and, as a result, created unworkable and inconsistent precedent for Wisconsin courts going forward.

This case ultimately asks this Court to demonstrate the correct application of the facts here to the speedy-trial analysis under *Barker v. Wingo*.[1] In doing so, however, this Court should clarify and limit confusing, impractical, and incongruent standards developed by the court of appeals here and in its other constitutional speedy-trial precedent from the past three decades.

ISSUE PRESENTED

Under *Barker v. Wingo*, a claim of a constitutional speedy trial violation for a delay of over one year requires a circuit court to balance the reasons for the delay; the defendant's assertion of his right; and prejudice resulting from the delay. Here, the court of appeals dismissed Ramirez's conviction based on the following four fundamental errors in applying *Barker*: (1) It "heavily weighed" the first factor against the State when that factor mainly functions as a threshold for whether the remaining factors should be considered; (2) it required far more explanation from the State for delays than the law requires or practicality allows; (3) it gave significant credence to Ramirez's years-delayed pro se speedy trial demands that the circuit court found were not credible requests; and (4) it elevated the presumption of prejudice, a threshold question in the first factor, into

[1] *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

"presumptive prejudice" under the fourth factor, the latter of which normally only applies to cases involving longer delays and egregious government negligence. Based on the cumulation of those errors, each of which presents sub-questions that require this Court's input and clarification, this case presents one overarching issue:

Was Ramirez denied his constitutional speedy trial right under the principles in *Barker*?

This Court should say no and reverse the court of appeals. It should also do the following:

(1) clarify requirements for the State's explanations for delay under the second *Barker* factor, specifically the following three related concepts:

(a) what constitutes the "ordinary demands of the judicial system" as a reason for a delay;

(b) whether "cavalier disregard" is an enforceable subcategory of assigning weight for perceived unexplained delays; and

(c) whether the State, in addition to providing a reason for delays, must also explain why new dates did not occur more promptly;

(2) clarify application of the third *Barker* factor and deference due to the trial and postconviction court's factual findings and credibility determinations; and

(3) distinguish and clarify presumptive prejudice under the fourth factor and *Doggett v. United States*,[2] from the presumption of prejudice under the first *Barker* factor.

[2] *Doggett v. United States*, 505 U.S. 647 (1992).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court normally publishes its decisions and hears oral arguments. Both are appropriate in this case.

STATEMENT OF THE CASE

On May 5, 2015, as an inmate at Columbia County Correctional Institution serving lengthy sentences for felony convictions of armed robbery and battery to law enforcement officers, Ramirez attacked a correctional officer by stabbing him in the head and neck with a sharpened pencil. (R. 2:2–3.)

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. (R. 2.) After a two-day trial on December 3 and 4, 2019, Ramirez was convicted of both crimes and received a consecutive 15-year sentence. (R. 92:1; 163; 164.)

Ramirez filed a postconviction motion 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.) The focus of that hearing was for Ramirez to establish that he was prejudiced by the delay. Ramirez testified that the long-pending charges caused health issues and placement on restricted status in prison. (R. 142:7–12, 18, 22–23.)

The postconviction court denied Ramirez relief. (R. 11:9.) The court held that the delay in the case was lengthy and that more than a year of it was chargeable to the State. (R. 161:3–6.) However, neutral explanations supported those chargeable delays, and some delays were of Ramirez's making. (R. 161:4–5.) Additionally, accounting for the delays was challenging because the court held "many off-the-record status conferences . . . in an effort to try to keep [the case] moving," and other circumstances factored into the delays:

> To the [c]ourt's recollection and certainly consistent with my own notes from those status conferences, at least some portion of the delay . . . was due to [Ramirez] himself at his insistence that additional video evidence of this incident existed and was available and had not been disclosed by the State.
>
> More than once, those discussions revolved around getting commitment from [counsel] about whether . . . [Ramirez] 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. Among them the retirement of the District Attorney, the new [prosecutor] assigned . . . , [and] 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.
>
> None of those issues are in any way the responsibility of [Ramirez], but it is safe to say that certainly this case more than any other was [not] operating in a vacuum.

(R. 161:3–5.) Accordingly, the court agreed that while there was a "more than necessary period of delay that's chargeable to the State," how that delay weighed against the State compared with how it weighed against Ramirez was not in "any way near as wide a margin" as Ramirez argued. (R. 161:5–6.)

Additionally, the court determined, Ramirez's pretrial assertion of his speedy trial right did not weigh heavily in his favor. (R. 161:6.) It highlighted a hearing five months before trial at which Ramirez made a pro se speedy trial demand, while reviving a previously litigated issue involving an "additional video" that Ramirez insisted was missing from discovery, and also while stating that he wanted a change of venue. (R. 161:6–7.) Those requests, in the court's view, 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.)

Finally, the postconviction court determined that Ramirez's testimony regarding prejudice was "facially incredible." (R. 161:7–8.) It acknowledged that when a defendant fails "so miserably" to show prejudice as Ramirez had done here, "that causes the Court substantial concern that it is somehow being played." (R. 161:8.)

The court then balanced the factors. It summarized that while the delay was long and a sizeable portion of it was the State's responsibility, Ramirez "sometimes overtly and more subtly work[ed] against his own stated interest in getting to that trial date," and was now arguing "that [the] Court should have figured out his speedy trial was really what was most important to him" at the time. (R. 161:8–9.) The court summed up:

> [Ramirez] can't have it both ways. He can't insist repeatedly on other things happening and then complain that while we try to figure out how those other things might happen, that somehow he was then prejudiced because of the delay that he effectively participated in requesting.

(R. 161:9.) That was especially so where Ramirez could not show any arguable prejudice from the delay. (R. 161:9–10.)

Ramirez moved for reconsideration. He challenged the postconviction court's emphasis on Ramirez's efforts to obtain a "nonexistent" video, when later-discovered evidence showed that the video did exist. (R. 167:2–3.) The postconviction court denied reconsideration. It conceded that Ramirez was correct about the video's existence. (R. 187:2–3.) Nevertheless, the court's point remained that Ramirez's attempts to relitigate the video issue were relentless and inconsistent with a desire for a prompt resolution: "[I]n this case . . . discussion of that video had taken on almost a special status . . . . [E]very time

we got close to some significant event . . . [Ramirez] again raised this issue [of] . . . . where is this video." (R. 187:3–4.) Those requests would cause the prosecutor to recheck with Corrections and give the same answer, which was "there [was] no video." (R. 187:4.) The issue, the court clarified, was not that Ramirez exercised his rights by making other requests, but that those other requests, if Ramirez was serious about them, would have added to the delays. (R. 187:5–6.) Accordingly, the court determined that based on his inconsistent actions and "self-serving" postconviction testimony, Ramirez was "mostly not credible" in his desire for a speedy trial. (R. 187:6.)

Ramirez appealed. The court of appeals reversed the judgment of conviction and remanded for the circuit court to dismiss the complaint. (Pet-App. 41.) In a 39-page published decision, the court of appeals agreed that Ramirez had failed to show any "significant prejudice in fact" from the delay. (Pet-App. 4.) Nevertheless, in its view, the State failed to explain substantial portions of the delays and evinced "cavalier disregard" for Ramirez's rights, even though Ramirez first made his speedy trial demand two years into the proceedings. (Pet-App. 4.)

The State petitioned this Court, which granted review. The State addresses additional facts in the argument section below.

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. The circuit court's credibility findings are also reviewed under the clearly erroneous standard, which reflects the superior position of the circuit court to assess witness credibility. *See State v. Byrge*, 2000 WI 101, ¶¶ 44–46, 237 Wis. 2d 197, 614 N.W.2d 477.

ARGUMENT

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

The State is asking this Court to do four things in this case: (1) correctly apply the facts here to the speedy-trial analysis under *Barker*; (2) clarify and limit the heightened and impractical standards to which the court of appeals held the State under the second *Barker* factor; (3) clarify application of the third *Barker* factor and deference due to the postconviction court's factual and credibility findings in these matters; and (4) explain the applicability of presumptive prejudice under the fourth *Barker* factor. It organizes the argument by addressing each of the *Barker* factors in order, discussing how to apply the facts to those factors, and specifically addressing the errors and problematic precedent created by the court of appeals that require this Court's attention and clarification.

A. The *Barker* test assists courts in analyzing constitutional speedy trial challenges.

"[T]he 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*, 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." *Id*. Courts then balance those factors "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 first factor is a threshold question that informs the prejudice analysis under the fourth factor.

The first factor plays two roles. "First, it is a triggering mechanism used to determine whether the delay is presumptively prejudicial," i.e., whether this Court needs to apply the remaining *Barker* factors. *Id.* ¶ 12. A post-accusation delay of one year is considered presumptively prejudicial. *Id.* Second, when the length of the delay is beyond that bare minimum of one year, any delay exceeding that minimum is relevant to the prejudice analysis under the fourth factor. *Doggett v. United States*, 505 U.S. 647, 652, 657 (1992) ("[T]he presumption that pretrial delay has prejudiced the accused intensifies over time."). For example, in *Doggett*, the Court determined that there was presumptive prejudice based on the government's inexplicable negligence in causing an 8.5-year-delay between Doggett's indictment and his arrest. *See id.* at 657–58.

Here, the length of the delay—46 months from the filing of the complaint to the start of trial—carries the presumption of prejudice and therefore triggers the balancing test of the

remaining *Barker* factors. *Urdahl*, 286 Wis. 2d 476, ¶ 12. However, this factor does not carry independent weight in the balancing test. *See, e.g.*, *United States v. Kalady*, 941 F.2d 1090, 1095 (10th Cir. 1991) ("The length of delay is a threshold factor; only if the period is 'presumptively prejudicial' need we inquire into the other factors." (citation omitted)). Rather, this first factor has no additional significance until the prejudice analysis under the fourth *Barker* factor. *Doggett*, 505 U.S. at 653–54.

The court of appeals erroneously concluded at the outset of its decision that the length of the delay was "extreme" and weighed "heavily against the State." (Pet-App. 14.) That conclusion reflects a misapplication of *Barker* and *Doggett*. While this delay was indisputably long enough to trigger the remaining factors, it does not independently "weigh" for or against either party.[3] Rather, it helps inform whether presumptive prejudice applies under the fourth *Barker* step.

C. Under the second factor, the State offered valid and neutral explanations for the delays; no delay should have weighed heavily against it.

"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. *Barker* and its progeny identify

[3] The court of appeals emphasized three times that the 46-month delay in this case was "the longest of any Wisconsin constitutional speedy trial case decided since *Barker*." (Pet-App. 4, 14, 40.) How the overall delay compares to other appellate decisions (and whether those other decisions were published) is not a factor, nor should it be, given the highly fact-intensive nature of the *Barker* analysis.

three categories of government-caused reasons for delay: valid, neutral, and deliberate.

Periods of delay explained by valid reasons do not count. "[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 . . . [is] not to be considered as delays caused by either party"). Finally, a delay caused by the defendant or defense counsel functions as a valid government-supplied reason for the delay and does not count. *State v. Provost*, 2020 WI App 21, ¶ 39, 392 Wis. 2d 262, 944 N.W.2d 23 (citation omitted); *Urdahl*, 286 Wis. 2d 476, ¶ 26. [4]

Delays caused by neutral reasons count, but are not weighed heavily against the government. Neutral reasons include "delays caused by the government's negligence or overcrowded courts." *Urdahl*, 286 Wis. 2d 476, ¶ 26.

Delays caused by deliberate or bad-faith conduct also count and are weighed heavily against the government. *Id.* ("[D]eliberate attempt[s] by the government to delay the trial in order to hamper the defense [are] weighted heavily against the State."). In addition, the Wisconsin Court of Appeals has fashioned a "cavalier disregard" subcategory for situations in

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[4] The court of appeals correctly suggested that delays attributable to Ramirez could have weighed against him in the second step. (Pet-App. 21–22.) In the State's view, it is the same as saying that defense-caused delays do not count. *See State v. Urdahl*, 2005 WI App 191, ¶ 26, 286 Wis. 2d 476, 704 N.W.2d 324. To simplify the second step's fact-heavy and potentially confusing analysis, the State treats the portions of delay here as either weighing against it in some manner or not counting at all.

which the State supplies no reasons for delays following a defendant's prompt and active speedy-trial demand. *State v. Borhegyi*, 222 Wis. 2d 506, 513–14, 588 N.W.2d 89 (Ct. App. 1998). Delays resulting from such "cavalier disregard" are weighed as heavily against the State as deliberate delays are. *Id.*

Here, valid and neutral reasons explained the delays in this case, such that no period of delay should have weighed heavily against the State under this factor. Again, the total amount of time here is the 46 months (or 1,401 days) between when the criminal complaint was filed on February 1, 2016, and when Ramirez's trial began on December 3, 2019. (R. 2; 163.) The State generally follows the court of appeals' breakdown of the total delay into eight periods expressed as days.[5]

1. February 1 to February 18, 2016—filing of the complaint to the first preliminary hearing (17 days).

The 17 days between the filing of the complaint and the first preliminary hearing resulted from the ordinary demands of the judicial system and, as the court of appeals concluded, do not count in the analysis. (Pet-App. 16.)

2. February 18 to August 4, 2016—the first to the second preliminary hearing (168 days).

The next delay, which involved requests by Ramirez and the passage of time between scheduled hearings also does

[5] Many of the pretrial events here were "off-the-record status conferences." (R. 161:3.) Timing information from those conferences is from the CCAP record, which is in the Appendix, and 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.

not count. At the February 18 preliminary hearing, Ramirez asked to reschedule until he obtained counsel. (R. 101:4–5.) Counsel was appointed March 15. (R. 13.) Though a hearing was set for May 10, counsel requested adjournment and the court set the next preliminary hearing for July 20. (Pet-App. 84.) A new public defender was appointed on July 5; the record does not indicate why that change occurred. (R. 19.) At the July 20 hearing, counsel requested an adjournment. (Pet-App. 84.) The court set the preliminary hearing for August 4. (R. 109.) The court of appeals correctly held that that 168-day period did not count. (Pet-App. 19–20.)

Though that conclusion is correct, three aspects of the court of appeals' rationale stray from *Barker* and other precedent interpreting it.

First, the court rejected the State's position that the time passing between scheduled hearings during this period were attributable to the ordinary demands of the judicial system. (Pet-App. 20.) In the court of appeals' view, the ordinary-demands reason only applies to periods of "expeditious activities" necessary for an orderly judicial process, and it does not apply when, as here, "all circuit court activity appears to have ceased" between the first adjournment of the preliminary hearing and when the preliminary hearing finally took place. (Pet-App. 20.)

That reasoning was factually wrong. "[A]ll circuit court activity" did not "cease" over those 168 days; rather, as discussed, the court set hearings, the parties made filings, and the preliminary hearing ultimately occurred. The court of appeals cited *State v. Ziegenhagen*, 73 Wis. 2d 656, 666, 245 N.W.2d 656 (1976), to hold that "periods of inactivity are attributed to the State." (Pet-App. 20.) But the inactivity in *Ziegenhagen* was worlds away from this case: it was 20 months during which literally nothing occurred—no filings, no status conferences, no scheduled hearings—between the judge being assigned and a speedy trial demand.

Ziegenhagen, 73 Wis 2d at 666. Here, in contrast, there was activity.

Second, the court of appeals also appeared to narrow the ordinary-demands reason to mean "expeditious activities" in administering justice. (Pet-App. 20.) Yet what "expeditious activities" means is unclear, and it is not based in the law. *Scarbrough* and *Norwood*, the cases the court of appeals cited for this point, did not limit the ordinary-demands reason to "expeditious activities," and did not weigh the passage of time between scheduled hearings or activities in a case against the State. *See Scarbrough*, 76 Wis. 2d at 101; *Norwood*, 74 Wis 2d at 354. In *Norwood*, for example, the court did not fault the State for the 90 days that passed between when the trial court scheduled a trial date and that date. *Norwood*, 74 Wis. 2d at 354; *see also Scarbrough*, 76 Wis. 2d at 101 (declining to count four months between arraignment and when the court scheduled a trial date). To be sure, in both of those cases, the time between hearings was generally limited to shorter time periods than those in this case. But neither case holds that only periods of days or weeks (and not more) between hearings are attributable to the ordinary demands of the judicial process.

Third, the court of appeals stated in dicta that it was favoring the State with a "significant assumption" by not weighing against it the portion of the time it took to appoint counsel based on the statewide shortage of attorneys willing to take public-defender appointments. (Pet-App. 19–21.) But affording any weight against the State for that time would have been wholly inappropriate. Ramirez was appointed counsel within six weeks of the charges being filed. That amount of time was not significant or unreasonable. Further, the only circumstance where delays in appointing a public defender could possibly weigh against the State are those due to "a systemic 'breakdown in the public defender system.'" *Vermont v. Brillon*, 556 U.S. 81, 94 (2009) (citing *Polk County*

v. Dodson, 454 U.S. 312, 324–25 (1981)). There is no argument or evidence that such a systemic breakdown exists here.[6]

3. August 4, 2016 to April 13, 2017—the preliminary hearing to the first trial date (252 days).

The next time period covers the 252 days between the preliminary hearing and the first trial date of April 13, 2017. As the court of appeals correctly held (Pet-App. 22), the first 83 days between the preliminary hearing (August 4) and arraignment (October 26) does not count because Ramirez requested the delay. (R. 109:14–15.)

The court of appeals, however, incorrectly weighed the next 169 days "heavily" against the State, when that period should not have counted at all.

a. The 169 days between the arraignment and the first trial date.

The State breaks this 169-day period into smaller spans identified in the running headers below and then, in Part C.3.b., addresses the court of appeals' misinterpretations of the facts and law.

The 56 days between the arraignment (October 26) and the next scheduling conference (December 21). At the arraignment, the court accepted Ramirez's not-guilty pleas and said that it would set the matter for trial. (R. 104:4.) On December 21, the circuit court set a date for a one-day trial for April 13, 2017. (R. 31:1.) Though the record is silent on why time passed between the arraignment and when the

[6] Ramirez did not move to dismiss for lack of personal jurisdiction due to an untimely preliminary hearing without stating good cause for the delay under *State v. Lee*, 2021 WI App 12, ¶¶ 59–61, 396 Wis. 2d 136, 955 N.W.2d 424.

court scheduled trial, there is nothing about such a two-month gap, especially early in pretrial proceedings when both parties are still preparing for trial or a change of plea, that is beyond the pale in how courts normally proceed. Notably, in that 56-day period, Ramirez never asked the court to schedule trial or asserted his speedy trial rights. Accordingly, this 56-day period is "attribute[able] to the ordinary demands of the judicial system," *Norwood*, 74 Wis. 2d at 354, and it does not count.

The 58 days between the scheduling order (December 21) and the State's first motion for continuance (February 17, 2017). In its December 21 scheduling order, the court set deadlines for proposed verdicts and jury instructions (one week before trial), proposed media evidence (at least 10 days before trial), and motions requiring testimony (at least 20 days before trial). (R. 31:1.) It also ordered the parties to request a continuance as soon as they became aware of any conflicts, such as another trial, an unavailable witness, or change of counsel. (R. 31:2.)

On February 17, 2017—58 days after the scheduling order and nearly two months before trial—the State requested a continuance due to witness unavailability, noting that Ramirez's counsel did not object. (R. 32.) The 58 days that passed between the court's scheduling order and that request, during which both parties by all appearances were preparing for trial, was likewise attributable to the ordinary demands of the judicial process, *see Norwood*, 74 Wis. 2d at 354, and it does not count.

The 17 days between the State's first motion (February 17) and the court's scheduling order (March 6). On March 3, the State requested adjournment for a second reason: the one day set for trial was not long enough. (R. 34.) Ramirez's counsel did not object to a continuance. (R. 34.) On March 6, the court scheduled a status conference for March 27. (Pet-App. 83.) The 17 days between when the State filed

its first motion for a continuance and the court's order scheduling a status conference constitute time "required for the hearing and disposition of pretrial motions," and do not count. *Scarbrough*, 76 Wis. 2d at 101.

The 21 days between the court's scheduling order (March 6) and the status conference (March 27). The 21-day delay between the scheduling order and the status conference is attributable to the ordinary demands and orderly administration of the justice system. *Scarbrough*, 76 Wis. 2d at 101; *Norwood*, 74 Wis. 2d at 354. Moreover, the order and the conference occurred within the time period that the parties had initially expected to be preparing for Ramirez's trial. Simply because time passed during a period in which the parties expected time to pass leading up to trial cannot constitute negligence or deliberate delay by the State.

The 17 days between the status conference (March 27) and the original trial date (April 13). Recall that no one objected when the circuit court first set trial for April 13, 2017. Had trial occurred on that date—a year and two months after the complaint was filed—Ramirez could not have reasonably claimed a constitutional speedy trial violation. None of the delays between the complaint and that trial date were due to anything other than time passing between scheduled hearings, and Ramirez had not requested a speedy trial during that period. Hence, like all the preceding days accounted above, these 17 days do not count in the analysis.

b. The court of appeals misinterpreted the facts and misapplied the law in weighing the 169 days heavily against the State.

The court of appeals treated the entire 169-day period as unexplained because, between the arraignment and the

first trial date, "all court activity in this case appears to have ceased." (Pet-App. 22.) As outlined above, the record reflects multiple filings during that time and contradicts the court's observation. Moreover, there is no suggestion that Ramirez's case was ignored or forgotten. Again, a two-month gap between an arraignment and order setting trial is not unusual. And that there was no significant activity in the case until around eight weeks before trial conformed with the expectations in the court's scheduling order.

Additionally, the court of appeals strayed from *Barker*'s principles when it faulted the State for offering "no explanation" for the entire period between the arraignment and the first trial date, called that perceived nonexplanation "cavalier disregard," and weighed that period heavily against the State. (Pet-App. 22–23.)

As for the "no explanation," the State offered the ordinary-demands reason. The court of appeals' implicit rejection of that reason appears to be based on its improper limitation of the ordinary-demands reason from when it assessed the previous period and remarked that "all circuit court activity appears to have ceased." (*Compare* Pet-App. 20–21, *with* Pet-App. 22.) As argued above, there is nothing in *Barker*, *Norwood*, *Scarbrough*, or other cases requiring the ordinary-demands reason to be acceptable only if accompanied by undefined "expeditious activities" between filings and scheduled hearings.

As for "cavalier disregard," this Court should limit this subcategory based on a perceived nonexplanation to the facts of *Borhegyi*. "Cavalier disregard" is not based in *Barker* or cases discussing the application of the second *Barker* prong, and it adds a confusing element to the analysis. The phrase originates in this Court's decision in *Green v. State*, 75 Wis. 2d 631, 250 N.W.2d 305 (1977). There, this Court wrote that in balancing the *Barker* factors, the "elements of delay that are to be weighed most heavily against the state are (1)

intentional delay designed to disadvantage the defendant's defense, (2) a cavalier disregard of the defendant's right, (3) missing or forgetful witnesses, and (4) prolonged pretrial incarceration." *Id.* at 638. Though at least some of those elements appear to align with the interests identified in *Barker* under its prejudice prong, *see Barker*, 407 U.S. at 532, this Court did not identify a source for the "cavalier disregard" language or explain its meaning. *Id.*

In *Borhegyi*, the court of appeals adopted *Green*'s "cavalier disregard" language to establish a subcategory within the reasons-for-delay step beyond the recognized categories of valid, neutral, and deliberate reasons. *Borhegyi*, 222 Wis. 2d at 513–14. There, the court labeled wholly unexplained time periods *after Borhegyi's clear speedy-trial demand* to reflect "cavalier disregard" (i.e., the equivalent of a deliberate or bad-faith delay) by the State:

> The State's inability to put forth any reasons for the seventeen-month delay (with the exception of the rescheduling of the July trial date) suggests that Borhegyi's speedy trial demand was not considered in scheduling his trial. Such cavalier disregard for Borhegyi's speedy trial right after his prompt demand was filed weighs most heavily against the State . . . .

Id. at 518–19.

Two things are key to *Borhegyi*'s cavalier-disregard subcategory: (1) the State's complete failure to explain delays, and (2) the fact that those unexplained delays occurred after Borhegyi's prompt and continuing speedy trial demand. Importantly, the court in *Borhegyi* did not hold that any portion of a silent record regarding continuances at any point in pretrial proceedings reflects cavalier disregard equivalent to deliberate delays.

Here, the court of appeals overextended *Borhegyi* to reject the State's ordinary-demands reasons for the delay, to label the State's reason as a nonexplanation, and to weigh

time passing between scheduled hearings as cavalier disregard weighing heavily against it. (Pet-App. 22–23.) That was an unreasonable interpretation of *Borhegyi* and of *Barker*'s principles that will result in confusion and misunderstanding in lower courts. This Court should limit the cavalier disregard subcategory in *Borhegyi* to the facts of that case.

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In sum, the entire 252 days between Ramirez's first continuance request and the first trial date do not count.

4. April 13 to September 26, 2017—the first trial date to the second trial date (166 days).

The continuance of the April 13 trial was supported by valid reasons—witness unavailability and longer trial time needed—and was without objection by Ramirez. (Pet-App. 83.) The 166 days between the first and second trial date do not count. Witness unavailability is well understood to be a valid reason that excludes the resulting delay from the analysis. *Urdahl*, 286 Wis. 2d 476, ¶ 26. While there are no cases holding that the prosecutor's changed estimate of the time required for trial is a "valid" reason, it is difficult to reconcile how such a reason is not "intrinsic to the case" itself. *Id*. Both the prosecution and the defense in the weeks leading up to trial are typically continuing to investigate, preparing their evidence, and reviewing witnesses; a case that looks like a one-day trial at first blush can easily change once the parties review and investigate further. The 166 days between the first and second trial date do not count.

The court of appeals wrongly concluded that the State's reasons were merely neutral and, additionally, that "at least some portion of this [166-day] period is unexplained and weighs heavily against the State." (Pet-App. 25.)

As for rejecting witness unavailability as a valid reason, the court of appeals improperly limited that justification to situations where witnesses are either ill or cannot be subpoenaed to appear. (Pet-App. 24.) That limitation contradicted its own precedent holding that a delay due to a witness's vacation causing their unavailability did not count. *See Urdahl*, 286 Wis. 2d 476, ¶¶ 3, 26–27. The court of appeals also faulted the State for not establishing why the witness was unavailable. (Pet-App. 24.) Though the State agrees that providing such details generally would create a better record, the lack of such information is not fatal because it is simply not required under *Barker*.

The court of appeals declined to hold that the need for a longer trial was valid because there was no authority recognizing it as such. (Pet-App. 24.) If a reason for delay is valid only after an appellate court has so recognized it, there would be no valid reasons. Rather, the question is whether the reason is "intrinsic to the case" itself. *Urdahl*, 286 Wis. 2d 476, ¶ 26. When the time set for trial is too short, that is akin to preventing the testimony of necessary witnesses for both parties. A party's recognition that a longer time for trial is required (especially when made without objection, before the first trial date, and in good faith) should be considered "intrinsic to the case" and valid. *Accord Williams v. Bartow*, 481 F.3d 492, 506 (7th Cir. 2007) (declining to charge government with a delay due to a missing witness where there was no evidence that it was a deliberate attempt to harm the defense).

Finally, the court of appeals incorrectly weighed "some portion" of the delay heavily against the State because it did not explain why the new trial was set for five months later and not sooner. (Pet-App. 24–25) But requiring the why-not-sooner explanation is problematic for the same reasons as requiring "expeditious activities" to support the ordinary-demands reason, or deeming perceived nonexplanations as

cavalier-disregard: the why-not-sooner explanation is not based in the law and it is an amorphous standard.

As for the law, nothing in *Barker* requires a why-not-sooner explanation. The only legal authority for this type of explanation is language in *Borhegyi*, where the court faulted the State because it did not "explain why a trial date was not scheduled more promptly after" an adjournment. *Borhegyi*, 222 Wis. 2d at 513. Yet, in *Borhegyi*, the court of appeals did not explain what it considered to be an acceptably prompt new trial date or identify how the government could explain why a new date was the earliest available. Rather, this comment appeared to be driven by the circumstances of the case: the State offered nearly zero reasons for the continuances occurring after Borhegyi had made an almost-immediate speedy trial request, which supported an inference that the government ignored Borhegyi's demand when scheduling trial. *Id.* at 513–14.

This Court should clarify that *Borhegyi* is limited to its facts and that the government does not need to provide two reasons for a continuance (i.e., both explaining why the continuance occurred and why the new date was not a "more prompt" one). Requiring two explanations is far more than what *Barker* demands. Further, in *Barker*'s second step, the focus is on the *reason* for a continuance, whereas the *duration* of delays comes into focus in the first and fourth steps. *See Barker*, 407 U.S. at 531–32. Asking the State to explain why a new hearing does not happen sooner confusingly misplaces the analytical focus.

The why-not-sooner explanation is also amorphous and virtually impossible for the State to adequately provide, because it is not clear what amount of time between hearings is reasonable and what requires additional justification. Even the court of appeals recognized that what it was asking the State to explain was vague when it wrote that "at least some portion of this period is unexplained and weighs heavily

against the State." (Pet-App. 25.) Without knowing what this panel of judges thought was a reasonable amount of time between trial dates (a standard that would seemingly vary greatly depending on the county, the case, and other countless factors), the State has no idea what portion of that time period that it was required to explain or how it could explain it.

In sum, requiring two explanations from the State when only one was required was wrong. The 166 days between the first trial date and the second trial date do not count.

5. September 26, 2017 to April 4, 2018—the second trial date to the third trial date (190 days).

Eight weeks before the September 26 trial date, the prosecutor alerted the circuit court that Ramirez's trial would overlap with another trial scheduled in the same courtroom. (R. 37.) Accordingly, the court had to reschedule one of the trials because the prosecutor could not try both simultaneously and there was only one courtroom able to accommodate a jury.[7] (R. 37.) The State had no preference as to which trial should move; nor was there an obvious candidate. (R. 37.) Neither defendant had a speedy trial demand, and though Ramirez's case was older, the trial in the second case had been set first. (R. 37.) On August 16, the court set Ramirez's trial for April 4, 2018. (Pet-App. 82.) There is no indication that Ramirez objected to the continuance or the new trial date.

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[7] While Ramirez's case was pending, "the courthouse moved [its] entire operation to a temporary location and back" and though it normally was a three-judge courthouse, there was "only one courtroom that could accommodate a jury trial for almost a full year" due to renovations. (R. 161:4.) As the postconviction court noted, those temporary limited operations affected its ability to schedule Ramirez's trial in nonquantifiable ways. (R. 161:4–5.)

The court of appeals correctly concluded that the reasons for this adjournment were neutral. (Pet-App. 27.) Still, the court of appeals erroneously confused matters by weighing "at least some portion" of the 190-day delay "more heavily against the State" based on *Borhegyi*. (Pet-App. 28.) Again, that was an overexpansion of *Borhegyi*. Thus, though this 190-day period weighs against the State, that weight is minimal since Ramirez had neither made a speedy trial demand nor objected to the continuance.

6. April 4 to September 26, 2018—third trial date to Ramirez's first pro se speedy trial demand (175 days).

Ramirez requested the next continuance because counsel was waiting to receive Ramirez's health records from Corrections. (R. 50.) The court removed the April 4 trial date and scheduled a status conference. (Pet-App. 82.) Two off-record conferences—one in May, the other in August—appeared to occur. (Pet-App. 81.) On September 26, Ramirez filed a pro se speedy trial demand and also asked the court to order the State to turn over additional video footage from the incident. (R. 59.)

As the court of appeals correctly concluded (Pet-App. 28–29), those 175 days are attributable to Ramirez and do not count.

7. September 26, 2018, to April 3, 2019—Ramirez's pro se speedy trial motion to the fourth trial date (189 days).

The court held a telephone conference shortly after it received Ramirez's pro se filing. (Pet-App. 81.) On October 8, counsel told the court that he was going to meet with Ramirez on October 11 and that he would update the court afterward. (R. 62; Pet-App. 81.) There is nothing in the CCAP record reflecting that counsel followed up, though counsel testified

at the postconviction hearing that Ramirez agreed to abandon that speedy trial claim because counsel was investigating an NGI defense at the time. (R. 110:2–3.) On November 1, the court set a scheduling conference for December 5; at that conference, the circuit court scheduled trial for April 3 and 4, 2019. (Pet-App. 81.) Though the Dec 5 conference was off-record, the State indicated in a postconviction filing that the April trial date was "the first date that all parties were available for trial" and that at that conference, counsel "informed the [c]ourt that it would not be proceeding with an NGI plea." (R. 149:1–2.)

None of this 189-day period counts. It is either "attributed to the ordinary demands of the judicial system," *Norwood*, 74 Wis. 2d at 354, or attributed to Ramirez, given that counsel was still exploring an NGI defense between September 26 and December 5, and the April 3 trial date was the earliest date that could be set for trial.

The court of appeals wrongly concluded otherwise, calling this delay "caused by government actors" and faulting the State for a lack of explanation. (Pet-App. 29–30.) Yet the record reflects that the circuit court promptly addressed Ramirez's pro se motion, counsel followed up with his client, and Ramirez appeared to abandon the request to permit counsel to explore an NGI defense. Once it was clear that an NGI defense was off the table, the court set the new trial for the earliest date that the parties were available. This all occurred without any objection or speedy trial demand from Ramirez. This period does not count in the analysis.

8. April 3 to December 3, 2019—the time between the fourth trial date and the fifth and final trial date (244 days).

Just before the April 3 trial date, the State requested an adjournment because the prosecutor was retiring and the newly assigned prosecutor needed additional time to prepare.

(R. 67.) The new prosecutor told the court that Ramirez's counsel did not object to the continuance request. (R. 67.) On April 3, the court rescheduled the trial for December 3 and 4, 2019. (Pet-App. 80.)

On April 15, 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 addressed Ramirez's motion on June 17. (R. 110:7.) At that hearing, counsel explained that he did not file a speedy-trial motion for Ramirez because the remedy for a statutory violation (release from bond) was unavailable. (R. 110:2.) The court agreed and denied Ramirez's motion. (R. 110:7.)

The court also addressed a discovery issue that Ramirez contemporaneously raised, which was that he wanted the State to provide video from a particular camera in the room where the assault occurred. (R. 110:4.) When Ramirez first sought the video, the State said that it did not exist, and Ramirez disagreed. (R. 110:5–6, 8–9.) The State reiterated that the particular video that Ramirez was requesting did not and had never existed. (R. 110:5–6.)

Finally, Ramirez also told the circuit court that he wanted a change of venue. (R. 110:3.) Counsel stated that there was no basis to seek a new venue, but said that he would reconsider and file such a motion if the court wished. (R. 110:11.) Counsel never filed a change-of-venue motion. And there were no filings or additional conferences or hearings until the day before trial began on December 3, 2019. (Pet-App. 80.)

The State requested the adjournment of the fourth trial date. Its reasons—the need to assign a new prosecutor due to the district attorney's retirement—were neutral, as the court

of appeals correctly determined. (Pet-App. 30–31.) This 244-day delay weighs against the State, though not heavily.[8]

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In all, of the 1,401 days that passed between the filing of the complaint and the first day of Ramirez's trial, 434 days—the 190 days between the second and third trial date, and the 244 days between the fourth and final trial dates totaling less than one-third of the total delay—count in the analysis. Because those time periods were supported by neutral reasons, those 434 days and this factor as a whole does not weigh heavily against the State.

D. Under the third factor, Ramirez agreed to the delays and he did not effectively or promptly assert his speedy trial demands.

1. The defendant is responsible for asserting his right.

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)). While the absence of a speedy-trial demand is not a waiver, a defendant nevertheless bears some responsibility for asserting his right. *Barker*, 407 U.S. at 528. The *Barker* test envisions that in this step, a reviewing court will assign weight based on the surrounding circumstances and the quality of the objection. *Id.* at 528–29. Thus, reviewing courts should:

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[8] This was another period in which the court of appeals faulted the State for omitting a why-not-sooner explanation. (Pet-App. 29, 32.) As argued, that reasoning was incorrect because such an additional explanation is neither required nor sensible.

> attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely pro forma objection.

Id.

Federal courts have held that when a defendant is represented by counsel, a pro se assertion carries little weight; "some formal motion should be made to the trial court or some notice given to the prosecution" for the "assertion of the right" factor to weigh significantly in the defendant's favor. *Hakeem v. Beyer*, 990 F.2d 750, 765 (3d Cir. 1993). Additionally, a speedy trial demand that a defendant later waives or abandons can also weigh against the defendant. *See, e.g.*, *United States v. Drake*, 543 F.3d 1080, 1086 (9th Cir. 2008). And requests for a speedy trial weigh less when the defendant's other conduct reflects an unwillingness for a prompt disposition. *See, e.g.*, *United States v. Loud Hawk*, 474 U.S. 302, 314–15 (1986) (holding that defendants' speedy trial demands commanded little weight when they were accompanied by frivolous and time-consuming motions and petitions for other relief); *Hakeem*, 990 F.2d at 765 ("Where, through contrary actions, a defendant evidences an unwillingness to commence with the trial requested, the request carries minimal weight."); *Kalady*, 941 F.2d at 1095 (stating that weight of a speedy trial motion is diminished by a defendant's contradictory conduct).

2. Ramirez's requests favor him only minimally.

Here, the third factor favors Ramirez only minimally for three reasons: (1) his assertions were significantly delayed; (2) his pro se motions were not effective; and (3) the postconviction court made factual findings and credibility

determinations showing that Ramirez did not want a speedy trial because he made other requests that were inconsistent with a desire for a prompt disposition.

a. Ramirez's assertions were significantly delayed.

First, Ramirez's delays "in demanding a speedy trial will be weighed against him." *Provost*, 392 Wis. 2d 262, ¶ 45 (citation omitted). The first time Ramirez asked for a speedy trial was through a pro se filing on September 26, 2018, 32 months after the charges were filed. (R. 59:1.) The second time Ramirez asked for a speedy trial came in another pro se filing on April 15, 2019, 39 months after charges were filed. (Pet-App. 80.) Even if those demands were effective (and they were not), they were significantly delayed.

The court of appeals acknowledged that Ramirez's assertions were "somewhat delayed," yet nevertheless weighed Ramirez's requests against the State.[9] (Pet-App. 35–38.) The adjective "somewhat" is inapt to describe assertions that came 32 months and 39 months into proceedings. Though there are no bright-line rules as to timing, courts generally downgrade assertions first made six months (and sometimes fewer) to a year following the attachment of the right. *See, e.g.*, *United States v. Garcia*, 59 F.4th 1059, 1068–69 (10th Cir. 2023) (weighing against defendant assertion made after eight months); *United States v. Summage*, 575 F.3d 864, 876 (8th Cir. 2009) (assertion after two years was "not prompt"); *United States v. Parker*, 505 F.3d 323, 330 (5th Cir. 2007) (14-month delay in asserting weighed against defendant); *see also United States v. White*, 443 F.3d 582, 591 (7th Cir. 2006)

[9] The court of appeals suggested that the 14 months it took the State to bring Ramirez to trial after his first request countered Ramirez's lengthy delays in asserting his rights. (Pet-App. 35–36.) Nothing in *Barker* or cases interpreting it support that reasoning under the third factor of the analysis.

(assertion made after three months weighed "not strongly" for defendant).

The court of appeals' decision on this point was unreasonable and unsupported. Ramirez's 32- and 39-month delays in asserting his right were significant and detract from any weight that those assertions carry in his favor.

b. Ramirez's pro se filings were not effective.

Both of Ramirez's motions were pro se when he had counsel; hence, the circuit court had no obligation to entertain them. *State v. Wanta*, 224 Wis. 2d 679, 699, 592 N.W.2d 645 (Ct. App. 1999). Their pro se nature minimizes any weight favoring Ramirez. *See Hakeem*, 990 F.2d at 766 (defendant's informal correspondence asserting right does not weigh heavily in his favor).

In his first demand, Ramirez wrote, "I want a speedy trial. I've been asking for my counsel to put a motion for this for months. I would also like this court to order the D.A. to give us the other 3 videos from the bay room for 5-5-15. They are withholding evidence that will prove I'm not guilty of this crime." (R. 59:1.) Though that request was unambiguous, Ramirez abandoned it to allow counsel to investigate an NGI defense.[10] (R. 110:2–3.) Since Ramirez abandoned the first motion, it cannot arguably weigh in his favor. *See, e.g.*, *Drake*, 543 F.3d at 1086.

Ramirez's second pro se motion filed on April 15, 2019, was also ineffective. In that motion, Ramirez listed numerous complaints:

[10] The State corroborated that counsel was investigating an NGI defense at the time; it noted that on December 5, 2018, counsel told the circuit court that Ramirez would not be proceeding with an NGI plea. (R. 149:1–2.)

> This case is all messed up my attorney is not giving me updates on the case. I am filing the attached motion because of the following reason.
>
> I have aske[d] my attorney to put in a change of trial location. He did not do it.
>
> I asked him to get me a list of names so I could get witnesses. He did not do it.
>
> I told him to put in a motion to dismiss. He did not do it.
>
> I told him for 6 months to put in a motion for speedy trial. He did not do it.
>
> So I filed on in the fall of 2018 but the court has not honored it so I a[m] filing this motion because my attorney is refusing to do anything on this case. I told him no continuance but as you see there was one.

(R. 70:1–2.) Ramirez also attached a motion to dismiss on speedy trial grounds, arguing that the court violated his right by not holding his trial within 90 days of his first motion. (R. 70:3–4.)

Though Ramirez did not abandon this second demand, it carries little weight in his favor because it was pro se, counsel never formalized it or asked for trial to occur sooner than December 2019, and Ramirez filed it just seven months before his trial began. *See Provost*, 392 Wis. 2d 287, ¶ 45 (that trial occurred less than eight months after Provost's delayed demand weighed against Provost).

c. The demands were accompanied by requests that were inconsistent with a desire for a speedy trial.

Finally, the postconviction court, which also was the trial court, found that Ramirez did not want a speedy trial, in part because his requests were accompanied by other requests (such as a desire for a change in venue) that either relitigated issues, lacked factual support, and if pursued would have

significantly delayed the trial. (R. 161:6–9; 187:4–7.) Those findings permitted the court to assign even less weight in Ramirez's favor. *Loud Hawk*, 474 U.S. at 314–15.

The court of appeals erred in rejecting those findings. (Pet-App. 36–38.) Appellate courts defer to the circuit court's factual findings and credibility determinations. "[A] factual finding is not clearly erroneous merely because a different fact-finder could draw different inferences from the record." *State v. Wenk*, 2001 WI App 268, ¶ 8, 248 Wis. 2d 714, 637 N.W.2d 417. Thus, while a court's "independent view of the evidence" may support a different result, appellate courts "are bound to accept the trial court's inferences unless they are incredible as a matter of law." *Id.*

Here, the postconviction court's findings were well supported. Ramirez's second pro se filing accompanied his speedy-trial demand with a litany of complaints about counsel's representation, including counsel's refusal to file a motion to change the venue. All of those potentially time-consuming requests, taken together, supported the postconviction court's inferences that Ramirez's priority was not a speedy trial. (R. 70:1–2.)

At a hearing, the circuit court considered Ramirez's requests accompanying his second speedy trial demand. As for the change of venue issue, Ramirez told the circuit court he still wanted a new venue "because I don't believe I will get a fair jury trial in this county. That's what I need is change of location for the trial." (R. 110:11–12.) Ramirez also reraised a previously litigated discovery request for a particular video of the incident. (R. 110:4–5.) The court took more information from Ramirez about the alleged recording; it directed the prosecutor to again follow up with Corrections "to see if this recording exists." (R. 110: 5–6, 8–11.)

Those additional requests, the postconviction court reasonably determined, meant that Ramirez's "assertion of his right [didn't] weigh as heavily in his favor as it might otherwise." (R. 161:6–7; 187:4–5.) They were "patently inconsistent with someone whose only goal is to get to trial as quickly as possible, which is essentially" what Ramirez was asserting postconviction. (R. 161:7; 187:7.)

The court of appeals rejected those findings because Ramirez never followed up on those requests and none of them actually delayed the trial. (Pet-App. 36–38.) That was error and a misapplication of the standard of review for two related reasons.

First, Ramirez's accompanying claims did not need to actually have caused delays for them to contradict or diminish the force of a speedy trial demand. Even so, had Ramirez actually caused such delays, those delays would be tallied under the second *Barker* step.

Second, the court of appeals improperly viewed the effect of the additional requests based on hindsight (i.e., the fact that Ramirez never followed up and caused actual delay). (Pet-App. 36–38.) By the court of appeals' faulty reasoning, the postconviction court somehow should have known at the time of the hearing addressing Ramirez's requests which requests it should have taken seriously (i.e., the speedy trial request) and which it could ignore (i.e., the discovery request, his desire for a new venue, and his other complaints about counsel's performance).

By employing that hindsight-based reasoning, the court of appeals wrongly failed to defer to the postconviction court. *Wenk*, 248 Wis. 2d 714, ¶ 8. And here, the postconviction court soundly found, as the judge considering Ramirez's filings at the time, that Ramirez's second request for a speedy trial was not credible:

> even at that late date [of the July 2019 hearing], [Ramirez] was still insistent that discovery was missing . . . and was insisting at that time that his attorney . . . file a motion to change venue of the trial even though he provided his attorney with no factual basis for why such a thing was necessary or . . . appropriate. That is 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.)

The postconviction court's inference that Ramirez's conduct did not reflect a genuine desire for a speedy trial had support in the record and was not incredible as a matter of law. *Wenk*, 248 Wis. 2d 714, ¶ 8.It soundly exercised its discretion in finding that Ramirez's other demands were inconsistent with a genuine desire for a speedy trial. It correctly declined to assign any significant weight in his favor under this factor.

To be sure, this is not a case where the defendant never asserted his speedy trial right. Ramirez's pro se assertions, especially his second one, were not weightless. But considering their significant lateness, their pro se nature, his abandonment of his first demand, and the timing and context of his second demand (which was followed by trial within seven months), Ramirez's speedy-trial demands carry minimal weight in his favor under the third *Barker* factor.

E. Under the fourth step of *Barker*, there was no actual or presumptive prejudice.

The fourth factor under *Barker* requires courts to consider if the delay resulted in prejudice. "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 *Ziegenhagen*, 73 Wis. 2d at 671).

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.'" *Barker*, 407 U.S. at 532. (alterations in original). This interest is particularly difficult to prove and "can rarely be shown." *Id.* Thus, a defendant's inability to show actual prejudice does not dispose of a speedy trial claim. *Moore v. Arizona*, 414 U.S. 25, 26 (1973) (per curiam) (calling it "fundamental error" for a court to require "an affirmative demonstration of prejudice" for a defendant to prove a constitutional speedy trial claim).

This is where "presumptive prejudice" and the length of delay from the first *Barker* step is a consideration. In cases involving extreme delay, a defendant need not prove actual prejudice to obtain relief. *Doggett*, 505 U.S. at 655–56. Instead, courts may determine that there was presumptive prejudice—i.e., that the defense was impaired—based on egregious governmental negligence resulting in an extraordinary delay. *Id.* at 657. Still, presumptive prejudice can be persuasively rebutted or extenuated, such as when the defendant does not object to continuances or where the record reflects that the defendant did not genuinely want a speedy trial. *See id.* at 658; *Barker*, 407 U.S. at 535–36.

To be clear, "presumptive prejudice" in the fourth step is not the same as the threshold "presumption of prejudice" in the first *Barker* step.[11] "A presumption of prejudice" under the

[11] In this brief, the State uses "presumptive prejudice" to refer to the *Doggett* analysis under the fourth *Barker* factor and "a presumption of prejudice" to refer to the threshold question under the first factor. They are not terms of art, and their similar phrasing underscores why the presumptions in the first and the fourth factors are easily muddled.

first *Barker* factor opens the door to analysis of the remaining factors and serves as one factor among many under the fourth factor. "Presumptive prejudice" under the fourth step comes from *Doggett*: there may be presumptive prejudice as a matter of law from an extraordinarily long delay (informed by the first *Barker* factor) caused by egregious government negligence (informed by the second and third *Barker* factors). Presumptive prejudice as a matter of law forgives a defendant's inability to show actual prejudice under the fourth *Barker* factor.

Unlike the one-year threshold in the first *Barker* factor, there is no bright-line rule for what length of delay supports presumptive prejudice under the fourth *Barker* step. That said, many courts use as a guide the time periods in *Doggett*, 505 U.S. at 649–50, 652–53, 657–58 (presumptive prejudice from an 8.5-year delay), and *Barker*, 407 U.S. at 534–36 (insufficient prejudice for relief based on a 5.5-year delay). Based on those cases, federal courts generally require the government to have been at fault for at least five years of delay in a speedy trial case "before finding that the delay gives rise to [presumptive] prejudice with respect to the fourth *Barker* factor." Brian R. Means, Postconviction Remedies § 38:9 (Aug. 2024 ed.)[12] On occasion, a shorter delay accompanied by egregious negligence or the other *Barker*

[12] *See, e.g.*, *United States v. Seltzer*, 595 F.3d 1170, 1180 n.3 (10th Cir. 2010) (generally delays of less than six years do not support presumptive prejudice); *United States v. Mendoza*, 530 F.3d 758, 763–64 (9th Cir. 2008) (presumptive prejudice where government was responsible for eight of the ten-year delay); *Maples v. Stengall*, 427 F.3d 1020, 1031 (6th Cir. 2005) (no presumptive prejudice where government fault is less than five-and-a-half years); *Rashad v. Walsh*, 300 F.3d 27, 42 (1st Cir. 2002) (no presumptive prejudice in nearly six-year delay); and *United States v. Serna-Villarreal*, 352 F.3d 225, 232 (5th Cir. 2003) (presumptive prejudice only when delays exceed five years).

factors weighing heavily against the government will establish the presumption. *Id.*[13]

Facts supporting presumptive prejudice are not present here. As the postconviction court inferred, while there was a long delay, with more than a year of which was attributed to the government, the delay did not weigh heavily against the State and Ramirez did not promptly demand or genuinely want a speedy trial. Unlike in *Doggett*, and unlike in cases with shorter delays in which egregious government neglect follows a defendant's early and effective speedy trial demand, Ramirez is not entitled to presumptive prejudice here.

Thus, the court of appeals erred in holding that there was presumptive prejudice as a matter of law in this case. Its decision was driven by its mistaken views that the first *Barker* factor, on its own, weighed "heavily" against the State (Pet-App. 14); that the State was responsible for 958 days of the delay with significant portions weighing heavily against it (Pet-App. 33–35); and that Ramirez's speedy trial right weighed against the State (and that weight was mitigated only by his "somewhat delayed" demands) (Pet-App. 38).

The court of appeals also erroneously relied on language from this Court's decision in *Hadley v. State*, 66 Wis. 2d 350, 364, 225 N.W.2d 461 (1975), quoting that "most interests of a defendant are prejudiced as a matter of law whenever the delay, not the result of the defendant's conduct, is excessive." (Pet-App. 39.) *Hadley* maintains limited precedential value on the question of presumptive prejudice because it was decided

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[13] *See, e.g.*, *United States v. Battis*, 589 F.3d 673, 683 (3d Cir. 2009) (presumptive prejudice where government was responsible for 35 months of a 45-month delay); *United States v. Eres-Luna*, 560 F.3d 772, 780 (8th Cir. 2009) ("serious" governmental negligence resulting in three-year delay supported presumptive prejudice); *United States v. Ingram*, 446 F.3d 1332, 1339 (11th Cir. 2006) (egregious negligence causing two-year delay following a prompt demand supported presumptive prejudice).

before *Doggett*. Also, *Hadley* is factually distinguishable. That case involved an 18-month delay where Hadley asserted a speedy demand within a month of the charges being filed, he never withdrew that demand, and he reasserted it at least four more times. *Hadley*, 66 Wis. 2d at 360. Moreover, the delays in Hadley's case were either unexplained and due to overburdened and dangerously underfunded judicial and prosecutorial offices across the state. *Id.* at 355–56, 363, 368–39. Here, in contrast, no continuances were unexplained and to the extent delays were caused by an overburdened court (due to courthouse renovations) and prosecutorial office (due to retirement), those issues were temporary and discrete.

This Court should reverse the court of appeals' holding that presumptive prejudice applies in this case and clarify, consistent with *Doggett*, the distinctions between the threshold presumption of prejudice in step one of *Barker* and presumptive prejudice under step four.

F. The court of appeals' balancing of the factors and its conclusion was fundamentally flawed.

The *Barker* test is an hoc balancing test. *Barker*, 407 U.S. at 530. Accordingly, any missteps in assessing the individual factors are amplified when the court balances the factors together. Further, achieving the correct balance is essential, because the "remedy of dismissal of the indictment when the right has been deprived" is "unsatisfactorily severe." *Id.* at 522.

Here, the court of appeals' holding that on balance, the factors supported granting Ramirez relief from his conviction was based on its erroneous conclusions that: (1) the State acted in "cavalier disregard" for Ramirez's speedy trial rights for "sizeable portions" of the delay; (2) Ramirez's speedy trial demands were credible and wholly effective; (3) it took "14 months to bring [Ramirez] to trial after his initial assertion of

right" for a speedy trial; and (4) there was presumptive prejudice as a matter of law. (Pet-App. 38–41.)

That decision was based on errors in assessing and weighing the *Barker* factors. As argued above, the correct balancing of the factors follows:

Of the 1,401 days that passed between the filing of the complaint and the first day of Ramirez's trial, 434 days count in the analysis and weigh against the State, though not heavily. Ramirez's assertions of his speedy trial right only minimally favor him. And Ramirez has neither shown actual prejudice nor is entitled to presumptive prejudice. Under all of those circumstances, the extreme remedy of dismissal is not warranted in this case.

CONCLUSION

This Court should reverse the decision of the court of appeals.

Dated this 6th day of December 2024.

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 10,794 words.

Dated this 6th day of December 2024.

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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.

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