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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP959-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

LUIS A. RAMIREZ,

Defendant-Appellant-Respondent.

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

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# RESPONSE BRIEF OF THE DEFENDANT-APPELLANT-RESPONDENT

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Ramirez was charged with, and 46 months later, convicted by a jury of one count of battery by prisoner and one count of disorderly conduct, arising out of a single incident. (1; 92.). Ramirez's trial was scheduled and rescheduled four times, three at the request of the State. (32; 34; 37; 67.) Only once was State's request for a reason even arguably "intrinsic to the case," the others were due to scheduling and turn over in the prosecutor's office. (*Id.*) Each request for continuance was granted with no additional record made, and trial dates were scheduled for approximately six months later, with no record as to why that amount of time was necessary.

Two years into the case, after the defense requested a continuance and the case was removed from the trial calendar completely, and only off-the-record hearings took place, without Ramirez appearing. (*See* Pet-App. at 81.) Ramirez demanded a speedy trial. (59.) The trial scheduled six months after his speedy trial demand was again rescheduled due to the prosecutor's schedule. (67.) Ramirez then filed a pro se motion to dismiss on speedy trial grounds, which was denied. (70:3-5; 110:11.) Even then, the trial did not commence until almost six months after the motion to dismiss was denied. (163; 164.)

I. Was Ramirez's constitutional right to a speedy trial violated by a delay of over 46 months between the filing of complaint and the trial?

The circuit court denied Ramirez's motion to dismiss and postconviction motion, both of which argued his speedy trial rights were violated.

The court of appeals reversed, finding Ramirez's constitutional right to a speedy trial was violated. *State v. Ramirez*, 2024 WI App 28, ¶ 2, 412 Wis. 2d 55, 8 N.W.3d 74. The court held that, although Ramirez had not demonstrated significant prejudice in fact, the total delay was extreme, the "vast majority" of delay was caused by government actors and therefore attributable to the State, and the State's failure to explain substantial portions of delay indicated a cavalier disregard for Ramirez's speedy trial rights. *Id.* Further, the court held that the circuit court's determination that Ramirez's actions during the pretrial proceedings were inconsistent with a desire for prompt resolution of the case was clearly erroneous. *Id.*

This court should affirm the decision of the court of appeals and conclude that the delay of nearly four years to commence Ramirez's trial, much of which was unexplained by the State or within the court record, and including over one year *after* he demanded a speedy trial, violated his constitutional right to a speedy trial.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, oral argument and publication are warranted.

## STATEMENT OF CASE AND FACTS

### *Pretrial Proceedings*

The court of appeals divided the pretrial period into eight periods in engaging in the speedy trial analysis, and this brief does the same.

1. The complaint is filed and preliminary hearing scheduled (17 days)

On February 1, 2016, the State filed a complaint charging Ramirez with one count of battery by prisoner and one count of disorderly conduct, both with repeater and dangerous weapons enhancers, arising out of a May 5, 2015 incident. (1.) At an initial appearance on February 11, 2016, Ramirez did not waive his right to a preliminary hearing within 20 days. (108:5-6.) The preliminary hearing was scheduled for February 18, 2016.

2. The preliminary hearing is adjourned until August 4, 2016 (168 days)

Preliminary hearings were scheduled but set over on February 18, 2016 and March 3, 2016, due to a delay in the State Public Defender appointing counsel for Ramirez. (101; 102.) Given the choice of proceeding without an attorney or waiving the time limits for his preliminary hearing, Ramirez waived the time limits. (102:3.)

On March 15, 2016, a staff attorney from the State Public Defender's Office was appointed to represent Ramirez. (13.) That attorney was replaced by another staff attorney on July 7, 2016. (19.) There is nothing in the record to indicate that Ramirez was responsible for the change of attorneys. The preliminary hearing was held on August 4, 2016. (109.)

3. August 4, 206 through the first scheduled trial date: April 13, 2017 (8 months)

Arraignment was held on October 26, 2016. (104.) On December 21, 2016, the case was scheduled for a jury trial on April 13, 2017. (31.)

On February 17, 2017, the State requested a new trial date because a necessary witness was unavailable for the April 13th trial. (32.) Before the court ruled on the State's request, the State again requested a setover on March 3, 2017, because it had concluded three days, rather than one, would be necessary to try the case. (34.)

On March 30, 2017, the jury trial was rescheduled for September 26, 2017. (37.)

4. April 13, 2017 through the second scheduled trial date: September 26, 2017 (166 days)

On August 4, 2017, the State informed the court that it had two cases, of which Ramirez's case was the older, scheduled for jury trial at the same time and requested one be rescheduled. (37.) The jury trial was rescheduled for April 4, 2018. (50.) No record was made as to why Ramirez's case was the one to be rescheduled or why it was scheduled out another six months.

5. September 26, 2017 through the third scheduled trial date: April 4, 2018 (190 days)

On March 6, 2018, defense counsel moved for a continuance of the April 4th jury trial date to investigate a potential NGI defense. (50.) At a March 12, 2018, hearing on the defense's motion, the April 4th trial date was removed from the calendar. (Pet-App. 82.) The case was set for a status conference on May 21, 2018; a new trial date was not scheduled. (*Id.*) Ramirez did not appear at this hearing, due to difficulties in connecting to video between the court and the prison system. (*Id.*)

6. April 4, 2018 through September 26, 2018: No trial date is scheduled (6 months)

After the defense continuance, a status conference was held on May 21, 2018, and a scheduling conference on August 6, 2018. (Pet-App. 82) The hearings were held without Ramirez's appearance and were not reported, nor do minutes appear in the record. (*Id.*) No trial date was scheduled after these hearings; the only case activity was another scheduling conference scheduled for December 5, 2018. (*Id.*)

7. September 26, 2018: Ramirez's speedy trial demand through the fourth scheduled trial date: April 3, 2019 (189 days)

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

On October 1, 2018, a telephone conference was scheduled for October 3, 2018. (Pet-App. 82) This hearing also occurred without Ramirez, off the record, and the case record contains no minutes from the hearing. (*Id.*) On October 8, 2018, defense counsel advised the court that "the earliest telephone conference I could set with Mr. Ramirez is… October 11th, …I will report on the status of the case after that conference." (62.)

On November 1, a scheduling conference was scheduled for December 5, 2018, at which the case was scheduled as a two-day jury trial for April 3-4, 2019. (Pet-App. 81.)

8. April 3, 2019 through the fifth scheduled trial date: December 3, 2019 (244 days)

Ramirez filed motions in limine on March 26, 2019 (65; 66.) That same day, the State requested the jury trial be

adjourned because a new prosecutor had recently been assigned to the case. (67.) The State's request indicated that defense counsel did not object to the request for continuance; however, defense counsel represented otherwise during a hearing on June 17, 2019, stating, "I had advised the Court and parties my recollection is that my client would object." (110:2.)

On April 15, 2019, Ramirez filed a pro se motion to dismiss due to violation of his constitutional speedy trial rights. (70:3-5.) In a cover letter to the motion, Ramirez indicated his unhappiness with trial counsel for failing to file several motions, and that he had told trial counsel "no continuances." (70:1-2.) In the motion, Ramirez stated that he "never withdrew his motion for speedy trial, nor gave consent for it to be withdrawn." (70:4.)

The court addressed the motion at a hearing on June 17, 2019. (110:2-11.) Trial counsel stated that Ramirez's speedy trial demand "at one point was abandoned or set aside because I was pursuing an NGI defense." (110:2.) However, counsel stated that in his last conversation with Ramirez, "he made clear we would abandon the NGI defense and our intent, if I'm on the case, is to go to a jury trial with his testimony." (110:2-3.)[1]

The State argued only that Ramirez was not prejudiced by the recent set over of his trial because he was

[1] As argued further below at C.1, trial counsel's statement regarding Ramirez abandoning his speedy trial demand to pursue an NGI defense is contradicted by the timeline in this case (the speedy trial demand was made six months *after* trial counsel informed the court it was investigating a potential NGI defense), by Ramirez's statements, and by later representations by the State regarding the December 5, 2018 hearing. (70:1-2, 4; 110:6-7; 149:1-2.)

serving a separate sentence. (110:3-4.) Ramirez addressed the court and maintained he never abandoned his demand for a speedy trial. (110:6-7.)

The circuit court denied the motion to dismiss on the basis that it was not an appropriate remedy for a statutory speedy trial violation. (110:7-8, 11.)

The jury trial began December 3, 2019. (163.)

*Postconviction Proceedings*

Ramirez filed a postconviction motion arguing that the circuit court erred in denying his pretrial motion to dismiss on constitutional speedy trial grounds and that the additional six months delay between the court's denial of the motion to dismiss and the trial only compounded the constitutional violation. (121.)

An evidentiary hearing was held on November 29, 2021, during which Ramirez testified regarding the factual basis for his claims that he was prejudiced by the delay in bringing him to trial. (142.) Ramirez testified that he was placed in more restrictive housing while he was waiting for trial and that he was told by prison staff that he would remain in that restrictive housing this case was resolved. (142:5-8, 12-13.) He testified that he did not have access to services or programs during that time and he experienced stress, anxiety, and panic as a result. (142:9-11.)

Ramirez was the only witness at the postconviction motion hearing.[2] The State presented no evidence at the

[2] The State's brief incorrectly states that trial counsel testified at the postconviction motion hearing. (Br. at 29-30.) The State cites to

postconviction stage regarding reasons for delays. Additionally, due to the State's failure to comply with postconviction briefing deadlines, the circuit court did not consider "in any meaningful way" the arguments made in the State's opposition in making its decision. (161:2-3.)[3]

The circuit court denied the postconviction motion. (161.) The court found "no question" about the length of the delay, but considered the causes of the delay, "a more complicated consideration…largely because this Court and the Defendant are the only ones who experienced this case from start to finish" and because frequent off-the-record status conferences were held that Ramirez did not attend while he was in custody. (161:3.) For these off-the-record status conferences, the court stated that it based its findings on its own recollection and notes. (161:3.)

The court found "some portion" of the delay was attributable to Ramirez, due to "his insistence that additional video evidence of this incident existed and was available and had not been disclosed by the State." (161:3-4.) As to a specific length of time, the court determined, "[t]here is no way really to tell the count of days associated with that because there were so many other things going on at the same time." (161:4.)

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trial counsel's statements to the court during the June 17, 2019 motion hearing. (*Id.*) Trial counsel never testified in this case.

[3] The State's pleading only addressed delays after Ramirez made his speedy trial demand on September 26, 2018. (149:1-2.) It claimed no knowledge of why the April 3, 2019 trial was rescheduled, despite it being at the State's request, and incorrectly suggested that it was because the defense was not prepared due to its request for discovery. (149:2.)

The court also found that other delays were attributable to the retirement of the District Attorney and new prosecutors being assigned at least twice, as well as "the courthouse moved its entire operation to a temporary location and back. We operated in a three judge courthouse with only one courtroom that could accommodate a jury trial for almost a full year during this time." (161:4.) The court acknowledged that, "this collection of issues indicate that there is more than necessary period of delay that's chargeable to the State for there to have been any Constitutional violation," but not "any way near as wide a margin as asserted by the Defendant." (161:5-6.)

The court did not weigh Ramirez's assertion of his right to a speedy trial heavily in his favor, because, at the June 17, 2019 hearing on Ramirez's motion to dismiss for speedy trial violation, "even at that late date, the Defendant was still insistent that discovery was missing, this same mythical additional video..." (161:6-7.) The court found Ramirez's request for discovery and his discussion of a change of venue at this hearing were "patently inconsistent with someone whose only goal is to get to trial as quickly as possible." (161:7.)

Finally, the court described Ramirez's testimony regarding prejudice to him caused by the delay as "facially incredible." (161:7-8.)

Ramirez filed a supplemental postconviction motion[4] requesting that the circuit court reconsider its

[4] The supplemental postconviction motion was filed because appellate counsel belatedly became aware of information that called into question the circuit court's factual findings relating to the defendant's postconviction motion. (166.) However, this was not "later-discovered

denial of his postconviction motion as the ruling was based in part on inaccurate information about the discovery. (167.) The motion supplemented the record regarding the discovery issue by demonstrating that the video sought by Ramirez had, in fact, existed and that the circuit court's factual finding that the video evidence being requested by Ramirez prior to trial was "nonexistent" and "mythical" was contradicted by several law enforcement reports contained in the discovery. (167:3-5; 168.) Ramirez argued that the court's finding that he was responsible for some of the pretrial delay due to his requests for discovery unfairly pitted his constitutional due process rights against his constitutional speedy trial rights. (167:5-7.)

The State opposed the supplemental motion, arguing only that there was no discovery violation. (179:2-3.) In reply, Ramirez argued that the circuit court's factual finding that the video evidence being requested by Ramirez prior to trial was "nonexistent" and "mythical" is inaccurate and cannot support the court's determination that Ramirez was responsible for some of the pretrial delay. (181:2.)

The circuit court denied the supplemental postconviction. (187:2.) The court acknowledged that "there was information in the discovery…that led someone to suspect that there was a missing video," and that Ramirez had a right to request discovery. (187:3-4.) However, that additional information did not change the basis for the court's original ruling, because the determined that Ramirez undermined his speedy trial demand "by making a request [for discovery], if granted, it would delay the trial beyond the date that it actually happened…" (187:4, 6.)

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evidence" as suggested by the State, (Br. at 11), as it was available to both the State and to trial counsel when discovery was originally provided.

*Court of Appeals Decision*

Ramirez appealed. Applying the four *Barker* factors, the court of appeals found that Ramirez's constitutional right to a speedy trial was violated:

> Although Ramirez has not demonstrated significant prejudice in fact from the delay, the total delay in this case was extreme—the longest of any published Wisconsin constitutional speedy trial case decided since Barker—and presumptively prejudicial. The vast majority of the delay was caused by government actors and is therefore attributable to the State. The State identifies neutral reasons for some of the delays, but it provides no explanation for other substantial portions of the delay, which may be taken as indicating a "cavalier disregard" for Ramirez's speedy trial rights. Ramirez twice asserted his right to a speedy trial and was not promptly brought to trial following his assertions. There is no evidence that Ramirez deliberately sought to delay the trial, and the circuit court's finding that Ramirez's actions during the pretrial proceedings were inconsistent with a desire for prompt resolution of the matter is clearly erroneous.

*State v. Ramirez*, 2024 WI App 28, ¶ 2.

## STANDARD OF REVIEW

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

clearly erroneous if it is "against the great weight and clear preponderance of the evidence." *State v. Anderson*, 2019 WI 97, ¶ 20, 389 Wis. 2d 106, 935 N.W.2d 285.

## ARGUMENT

### The Court of Appeals Correctly Applied the *Barker* Factors to Find that a 46-Month Delay Between Charging and Trial Violated Ramirez's Constitutional Right to a Speedy Trial.

Both the state and federal constitutions guarantee defendants a speedy trial. U.S. Const. amend. VI; Wis. Const. Art. I, § 7. This constitutional right has "its roots at the very foundation of our English law heritage" and is "as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967).

In *Barker v. Wingo*, the United States Supreme Court established the criteria used to evaluate whether the right to a speedy trial has been violated: (1) length of delay, (2) the reasons for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant caused by the delay in bringing a speedy trial. 407 U.S. 514, 530-32 (1972). The right to a speedy trial is not subject to bright-line determinations and must be considered based upon the totality of circumstances that exist in any specific case. *Id.* at 530-31. The factors are not to be applied as independent criteria but considered together as a balancing test. *Id*. at 533. No single factor is determinative or necessary, rather all four are considered to determine if a violation has occurred. *Id*.

A. The 46-month delay in bringing Ramirez to trial is both presumptively prejudicial, triggering further application of the *Barker* factors, and weighs in favor of finding a constitutional violation

The first *Barker* factor plays two roles. *Urdahl*, 286 Wis. 2d 476, ¶ 12. First, to trigger a speedy trial analysis, "an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." *Doggett v. United States*, 505 U.S. 647, 651 (1992). A post-accusation delay is presumptively prejudicial if the delay approaches one year. *Urdahl*, 286 Wis. 2d 476, ¶ 12. If the delay is presumptively prejudicial, it is necessary to look to the other three factors. *State v. Borhegyi*, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998). The delay in this case between the filing of the complaint and the commencement of trial was from February 1, 2016 to December 3, 2019 is sufficient to be presumptively prejudicial and point to a constitutional violation.

In addition to triggering application of the remaining three *Barker* factors, the length of delay is a factor to be considered in the balancing the factors. *Doggett*, 505 U.S. at 652 ("if accused makes this showing [of presumptively prejudicial delay], the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim"); *Urdahl*, 286 Wis. 2d 476, ¶ 12. The circumstances of each case should be considered, and "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531.

Before the appellate court, the State conceded the delay was presumptively prejudicial but argued that the length of delay was not "extraordinary", and therefore should be weighed less heavily, because it did not reach the eight-and-a-half year delay present in *Doggett*. (Ct. App. Resp. at 10-11.) Now, the State argues that the length of delay "does not independently 'weigh' for or against either party," and that the court of appeals erred by concluding that the length of delay in this case was extreme and weighed heavily against the State. (Br. at 15.)

The court of appeals correctly applied *Doggett* and *Urdahl* when it considered the total time of 46 months between the filing of complaint and the commencement of Ramirez's trial as a factor to be weighed in assessing whether there was a constitutional violation. The court of appeals correctly found the total delay of 46 months in this case to be "extreme," and not simply because it is the longest delay of any published constitutional speedy trial case from Wisconsin post-*Barker*. *Ramirez*, 2024 WI App 28, ¶ 23 & n.5, n.6. Rather, the totality of the circumstances of this case – involving two relatively simple counts arising out of one incident, in which no pretrial litigation occurred outside of the speedy trial issue and discussions about discovery – demonstrate that the nearly four year delay weighs in favor of finding a constitutional violation.

B. The court of appeals neither heightened nor applied "impractical" standards in determining that the second *Barker* factor weighed in favor of a constitutional violation

In evaluating reasons for delay, courts separate delays "chargeable completely to the state" (the prosecution, clerk's office, and circuit court) from those that

were not its doing. *State v. Ziegenhagen*, 73 Wis. 2d 656, 666-67, 245 N.W.2d 656 (1970) ("the government as an institution is charged with the duty of assuring a defendant a speedy trial"). Delays that constitute "[a] deliberate attempt by the government to delay the trial in order to hamper the defense," are weighed heavily against the State. *Urdahl*, 2005 WI App 191, ¶ 26. Also weighed heavily against the State is "cavalier disregard toward a defendant's speedy trial rights." *Borhegyi*, 22 Wis. 2d at 513.

Even "neutral reason[s]" will be weighed against the State (though not as heavily), because "the primary burden [is placed] on the courts and the prosecutors to assure that cases are brought to trial." *Barker*, 407 U.S. at 529, 531. Delays caused by the government's negligence or overcrowded courts, "calendar congestion and lack of judicial manpower," are weighed against the State. *Hadley v. State*, 66 Wis. 2d 350, 368, 225 N.W. 2d 461 (1975); *Urdahl*, 2005 WI App 191, ¶ 26.

Delays that are not counted against the State are those caused by the defendant or by "valid reasons" – those that are "intrinsic to the case itself," such as addressing pretrial motions or determining a defendant's competency, *State v. Norwood*, 74 Wis. 2d 343, 354-57, 246 N.W.2d 801 (1976), or the unavailability of a witness is intrinsic to the case. *Urdahl*, 286 Wis. 2d 476, ¶ 26. The time "required for the orderly administration of criminal justice" is not weighed against the State, but courts must still ensure that the "orderly administration" moves "expeditiously without delay." *Scarbrough v. State*, 76 Wis. 2d 87, 100-101, 250 N.W.2d 354 (1977) *citing Norwood*, 74 Wis. 2d at 354 (attributing pretrial proceedings that "were all carried out expediently" to the ordinary demands of the justice system).

1. The State bears the burden of bringing a defendant to trial and of showing the reasons for delays in doing so – here, the State failed to explain most of the delays attributable to it.

"If the delay can be attributed to the [S]tate, then the [S]tate must justify the delay…[or] that period must be considered in deciding the issue of lack of speedy trial." *Norwood*, 74 Wis. 2d at 354. A failure to explain the delay will weigh against the State. *Id.* at 357 (weighing delay "that the state either inexplicably or without valid reason caused"). "The State's inability to explain any of these circumstances weighs heavily against the State in determining this issue." *Borhegyi*, 22 Wis. 2d at 513.

Here, most delays were not caused by ordinary demands of the judicial system. Aside from motions in limine addressed the morning of trial, there were no pretrial motions to litigate. Instead, delays were caused by turnovers in the District Attorney's Office and the failure of the circuit court system to provide sufficient physical space for jury trials during courthouse renovations. (161:4.) Because these delays were not caused by factors intrinsic to the case, they must be charged fully to the State. *State v. Ziegenhagen*, 73 Wis. 2d 656, 668, 245 N.W. 2d 659 (1976).

Beyond these institutional delays, however, the problem in this case is not just that lengthy time periods passed between each adjourned and rescheduled trial date, but that no record was made as to why those lengthy time periods were necessary – neither at the time of rescheduling, nor by the State in opposing Ramirez's speedy trial claims. The court of appeals did not create a new standard for the

State's burden on this factor, and it did not err in weighing unexplained delays more heavily against the State.

The State failed to explain the delays when the speedy trial issue was before the circuit court. (110:3-4; 161:2-3.) On appeal, the State labeled the institutional delays as "valid" and/or "ordinary" and argued against weighing those delays at all. (Ct. App. Resp. at 12-18.) The State now argues that it "offered valid and neutral explanations for the delays," therefore "no delay should have weighed heavily against it." (Br. at 15.) Further, the State requests that this court "clarify requirements for the State's explanations for delay." (Br. at 8.) While such clarification may be helpful for future cases, in this case, where the State provided no explanations, the court of appeals properly found a constitutional violation.

Specifically, the court of appeals found the following periods of delay were unexplained by the State and properly weighed against the State:

- October 26, 2016-April 13, 2017 (169 days): the State failed to explain why no court activity took place, beyond the setting of the first trial date, between the arraignment and the first scheduled trial date. *Ramirez*, 2024 WI App 28, ¶ 41. The court weighed this time heavily against the State. *Id.* ¶

- April 13, 2017-September 26, 2017 (166 days): the State failed to demonstrate that its request to continue to the trial was for "valid" reason where the record did not demonstrate that the unavailability witness was a necessary witness. Nor did the State cite to authority to support its contention that a prosecutor's

reassessment of the number of days needed for trial was a "valid" reason for delay. *Id.*, ¶¶ 45-46. However, the court found these were neutral reasons and weighed them less heavily against the State. *Id.*, ¶ 47.

- Within the above time frame, the court of appeals concluded that "at least some portion of this period is unexplained and weighs heavily against the State," because it did not explain why the circuit court adjourned the trial for more than five months – "a significant time period in and of itself." *Id.*, ¶¶ 48-49.

- September 26, 2017-April 4, 2018 (190 days): within this time period in which the trial was set-over due to the prosecutor and courtroom being double-booked, the State failed to explain why trial could not be scheduled more promptly than six months later. Thus, "some portion" weighs more heavily against the State. *Id.*, ¶¶ 52, 55.

- September 26, 2018-April 3, 2019 (189 days): the State offered no explanation for the delay between Ramirez's speedy trial demand and the next-scheduled trial date. *Id.*, ¶ 61. Thus, the entire period was weighed heavily against the State. *Id.*, ¶¶ 59, 61.

- April 3, 2019-December 3, 2019 (244 days): while the State provided a neutral reason for the continuance, a new prosecutor on the case, this explanation "[did] not fully account for the full eight months that passed" before the next trial date, a failure that was "especially

> salient…after Ramirez had twice asserted his right to a speedy trial." *Id.*, ¶ 66. The court weighed "the latter portion" of this period heavily against the State. *Id.*, ¶ 62.

The court of appeals correctly applied extant precedent in holding that unexplained portions of delay during which no court activity occurred, which the State failed to explain and which are not explained within the court record, be weighed against the State. *Ziegenhagen*, 73 Wis. 2d at 666 ("It is irrelevant whether the delay occurred in the clerk's office, the prosecutor's office, or the judiciary. The delay…is to be charged against the State of Wisconsin"); *Norwood*, 74 Wis. 2d at 354 ("If the delay can be attributed to the state, then the state must justify the delay).

First, the decision below appropriately weighed a portion of delay more heavily against the State where it did provided little explanation regarding an unavailable witness. Contrary to the State's argument, (Br. at 26), the decision below does not conflict with *Urdahl*. In *Urdahl*, the preliminary hearing was delayed by fourteen days due to a material witness being on vacation; the court did not weigh the delay against the State. 286 Wis. 2d 476, ¶¶ 3, 27. In contrast to the current case, there the record reflected the reason for the unavailable witness, the hearing was promptly rescheduled, and the rescheduled hearing was the preliminary hearing not the trial. *Id.* Rather than creating heightened standard for unavailable witnesses, the court of appeals weighed these delays against the State because they were unexplained.

Regarding the other delays, the State now argues that they are all explained by "the ordinary-demands reason,"

and that case law does not "require the ordinary-demands reason to be acceptable only if accompanied by undefined 'expeditious activities' between filings and scheduled hearings." (Br. at 23.) The State ignores that reviewing courts accepted delays as "valid" or "ordinary demands" only upon finding that the cases were moving at an appropriate speed. *See Norwood*, 74 Wis. 2d at 354 (attributing pretrial proceedings that "were all carried out expediently" to the ordinary demands of the justice system); *Scarbrough*, 76 Wis. 2d at 100 (proceedings carried out "expeditiously without delay"). The court system "has great responsibility to see to it that what resources it has operate as efficiently and as justly as possible." *Hadley*, 66 Wis. 2d at 369. Therefore, the court must determine based on the record before it, whether the time taken between hearings or scheduled trial dates, was actually necessary to carry out the ordinary demands of justice given the specific circumstances of the case in question.

Here, the record does not support a determination that the repeated setting over of Ramirez's trial by five to eight months at a time was necessary for the "ordinary demands of justice." Again, the State cites no substantive motions or evidentiary hearings[5] taking place during this time that would require such a lengthy schedule. Simply arguing that the passage of time is explained by the ordinary demands of justice is insufficient to satisfy the State's burden of providing a valid, or even neutral, explanation of the delays.

[5] Though this did not affect the court of appeals' analysis, it incorrectly labeled the June 17, 2019 hearing on Ramirez's motion to dismiss an evidentiary hearing. *Ramirez*, 2024 WI App 28, ¶ 64. In fact, no evidence was produced by either party at the hearing, though Ramirez did make a statement to the court regarding the video evidence he was requesting from the court.

As an example of the State's failure to explain, consider its argument that the 17 days between the March 27, 2018 status conference to address the State's first request to continue the trial, and the original trial date of April 13, 2018. The State argues that "[h]ad trial occurred on that date–a year and two months after the complaint was filed–Ramirez could not have reasonably complained a constitutional speedy trial violation," and therefore, "these 17 days do not count in the analysis." (Br. at 22.) Unsurprisingly, the State offers no legal support for its assertion that *if* a trial *had* been held on that date, the trial would satisfy constitutional speedy trial rights, therefore that time should not count as delay when the trial *is not* in fact held.

2. The totality of the circumstances in this case, including the repeated setting over of Ramirez's trial dates for unexplained lengthy periods, evidence cavalier disregard for his speedy trial rights

While some of the above delays may be weighed less heavily against the State as general institutional delays, the lack of explanation by the State or circuit for the adjournments and/or not scheduling continued trial dates more promptly should weigh more heavily against the State. The record demonstrates that many months-long periods throughout the nearly four years that Ramirez waited for his trial went by with no action or explanation for the delay.

The court of appeals correctly placed the burden of advancing a reason for the delay on the State and weighed "its silence on the topic" heavily against the state. *Ramirez*, 2024 WI App 28, ¶ 24. "The State's inability to explain any

of these circumstances weighs heavily against the State in determining this issue." *Borhegyi*, 22 Wis. 2d 506, 513, 588 N.W.2d 89 (Ct. App. 1998). In *Borhegyi*, the court of appeals found that delays in rescheduling a trial that was rescheduled to accommodate a juvenile case with statutory time limits, and then another rescheduling of the trial without explanation where again a new trial date was not scheduled promptly, "exceeds negligence and evinces a cavalier disregard of [the defendant's] speedy trial right. *Id.*

Here, like in *Borhegyi*, Ramirez's trial was continued without explanation, and the record contains no explanation for why new trial dates were not scheduled more promptly. Most egregious is the additional six months delay between the court's denial of Ramirez's motion to dismiss on speedy trial grounds and the trial, which was not explained anywhere on the record. "Cavalier disregard toward a defendant's right to a speedy trial is an element of delay that is to be weighed most heavily against the State." *Id. citing State v. Green*, 75 Wis. 2d 631, 638, 250 N.W.2d 305 (1977).

The decision below does not conflict with *Borhegyi's* holding that the State acts with "cavalier disregard" when it provides no explanation for an adjournment and failure to promptly reschedule a trial. 222 Wis. 2d at 513. It's true that a speedy trial demand was made by the defendant prior to the adjournment. *Id.* That speedy trial demand plays into the balancing of the *Barker* factors in that case. It does not, however, limit the State's burden in cases where a speedy trial demand has not been made – to find otherwise would violate *Barker*'s admonition that "none of the four factors…[is] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." 407 U.S. at 533.

Even if *Borhegyi* did require a speedy trial demand be made to find cavalier disregard for Ramirez's speedy trial rights, that would still support weighing heavily the 433 days (over 14 months) from his speedy trial demand on September 26, 2018 through his trial on December 3, 2019 given the additional unexplained delays after his speedy trial demand was made.

3. The circuit court's factual findings attributing delay to Ramirez due to his discovery demands are clearly erroneous

The circuit court failed to make specific factual findings regarding the length of delay attributable to either party. It found that "some portion of the delay in addition to what was acknowledged in the Defendant's briefing" was attributable to Ramirez requesting additional video evidence that he believed existed and the State maintained did not. (161:3-4.) The court found "[t]here is no way really to tell the count of days associated with that because there were so many other things going on at the time." (161:4.) Even after Ramirez moved for reconsideration and provided evidence that the video he requested had existed, the circuit court still found Ramirez's requests for discovery to be incompatible with his assertion of his speedy trial rights and did not change its analysis that some uncalculated portion of delay was attributable to Ramirez due to his request for the evidence. (187:4-7.)

The court of appeals found that, "[a]part from those generalized findings, …the court did not explicitly separate out any specific time periods or identify the reasons for the delay in any such time period. In the absence of particularized findings by the circuit court, we consider the record in its entirety." *Ramirez*, 2024 WI App 28, ¶¶ 28-29.

The record does not support the circuit court's assignment of any portion of delay to Ramirez based on his request for video discovery. The State made no record regarding its attempts to locate the video, how those requests could have delayed the prosecution of Ramirez's case, and if so for how long. The circuit court found that, "More than once, those discussions revolved around getting commitment from the defense attorney about whether or not Defendant wanted to have his trial sooner or wanted to have his trial with what we now know I believe is nonexistent additional video evidence." (161:4) This finding is unsupported by the record and clearly erroneous. The record does not support any specific delay caused by the discovery requests, nor is there any evidence in the record of a set-over due to the discovery request, or of any discussion in which Ramirez indicated a desire to delay his trial to get the video.

Further, to attribute additional delays against Ramirez because he requested a particular item of discovery that the State had not provided, on numerous occasions throughout the pendency of the case is to pit his constitutional speedy trial right against his due process rights to a fundamentally fair trial and his ability to present a defense. *See California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528 (1984) (Due Process Clause requires that criminal prosecutions conform to fundamental notions of fairness and that criminal defendants are given "a meaningful opportunity to present a complete defense"); *State v. Luedtke*, 2015 WI 42, ¶ 7, 362 Wis. 2d 1, 863 N.W.2d 592. "The government may not require individuals to choose between two constitutional rights." *Schwantes v. Schwantes*, 121 Wis. 2d 607, 625, 360 N.W.2d 69 (Ct. App. 1984). The court's finding that Ramirez's discovery demands should be considered delay attributable to

Ramirez, unfairly penalized him for not making the choice between those two constitutional rights.

C. Because Ramirez asserted his speedy trial right twice, he never abandoned the right, and the record demonstrated his desire to go to trial, the court of appeals correctly weighed this factor in favor of a constitutional violation

The notion that "a defendant who fails to demand a speedy trial forever waives his rights," has been rejected by the United States and Wisconsin Supreme Courts. *Barker*, 407 U.S. at 528; *Day v. State*, 61 Wis. 2d 236, 245-46, 212 N.W.2d 489 (1973). The question for the court in addressing this factor then is whether the defendant actually wanted the speedy trial or was instead "consciously seeking to avoid the day of reckoning," *Hadley*, 66 Wis. 2d at 361. In addressing this question, a defendant's assertion of his speedy trial right "is entitled to strong evidentiary weight." *Barker*, 407 U.S. at 531-32.

1. The State's assertion that Ramirez "abandoned" his first demand for a speedy trial is unsupported by the record

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

On April 15, 2019, Ramirez filed a pro se motion to dismiss on the basis that his constitutional speedy trial rights

had been violated. (70:3-5.) In a cover letter to the motion, Ramirez indicated his unhappiness with trial counsel for failing to file several motions, and that he had told trial counsel "no continuances." (70:1-2.) In the motion, Ramirez stated that he "never withdrew his motion for speedy trial, nor gave consent for it to be withdrawn." (70:4.)

The court addressed the motion at a hearing on June 17, 2019. (110:2-11.) Trial counsel informed the court,

> He also refers to a speedy trial demand of his, which at one point was abandoned or set aside because I was pursuing an NGI defense. In the history of this case, when I last spoke or one of the last times I'd spoken with Mr. Ramirez, he made clear we would abandon the NGI defense and our intent, if I'm on the case, is to go to a jury trial with his testimony…

(110:2-3.) Ramirez addressed the court and maintained he never abandoned his demand for a speedy trial, stating "I called a motion for speedy trial because I wanted my attorney to file it for about four months. I gave never any consent for that motion to remove." (110:6-7.)

The State argues that trial counsel's comments are evidence that Ramirez abandoned his demand for a speedy trial and it therefore does not weigh in his favor. But trial counsel's errant statement conflicts with the timeline in this case, as the speedy trial demand was made six months *after* trial counsel informed the court it was investigating a potential NGI defense. The State represented to the circuit court in its postconviction briefing that trial counsel had informed the court as of December 5, 2018, that Ramirez did not intend to pursue the NGI defense. (149:1-2.) According to case events listed on CCAP, this hearing was

the first time trial counsel appeared on Ramirez's behalf after Ramirez filed the speedy trial demand and counsel conferred with Ramirez. (Pet-App. 81-82.) And Ramirez was clear in his correspondence to the court, his pro se motion, and his statements at the hearing, that he did not abandon the demand. (70:1-2, 4; 110:6-7.)

2. The circuit court's finding that Ramirez did not wish to go to trial was an incorrect application of *Barker* and clearly erroneous fact finding

In denying the postconviction motion, the circuit court found that the fact that Ramirez made other requests – most notably, for discovery and change of venue – in contradiction of his speedy trial rights precluded him from relief. (161:8-9; 44-45.) The circuit court's finding that Ramirez made requests to delay his trial is not supported by the record. These actions did not support a finding that Ramirez was "consciously seeking to avoid the day of reckoning," *Hadley*, 66 Wis. 2d at 361. They are evidence that Ramirez was preparing to contest the charges at trial.

The State argues that Ramirez's assertions of his speedy trial rights do not support a finding there was a violation because they were "combined with requests inconsistent with a credible desire for a speedy trial." (Br. at 36-39.) The court of appeals properly found that the circuit court's factual findings in this regard were clearly erroneous because they were unsupported by any evidence in the record. *Ramirez*, 2024 WI App 24, ¶¶ 80-83.

First, Ramirez did not wait until the last minute only to raise the issue of the missing discovery to delay his trial. Even when made at the same time as the speedy trial demand and motion to dismiss in June 2019, the trial date

was still months away. There is no evidence in the record that a request for missing discovery – a request commonly made prior to trial – would have added to the delays. Further, the fact that Ramirez made requests for outstanding discovery as trial dates approached do not contradict his desire for trial – such requests are commonly made as trial approaches. With respect to the change of venue, Ramirez never filed this motion, so it could not properly be counted against him.

Beyond the specific speedy trial demand made, Ramirez's pro se filings provided additional evidence that he actually wished to go to trial as soon as possible. Ramirez expressed concerns about trial counsel's performance and whether he would receive a fair trial without a change of venue, yet he never pursued those issues by filing formal motions on those issues like he did on the speedy trial. Ramirez could have requested a new attorney or filed a formal motion to change venue, both of which would have caused additional delays, but he did not – thus demonstrating that the speedy trial was his primary concern.

3. The court of appeals correctly weighed this factor in favor of a constitutional violation

The State argues that Ramirez's assertions of his speedy trial rights do not support a finding there was a violation because they came late in the proceedings, were make pro se while he was represented by counsel. The State fails to refute the court of appeals' finding that Ramirez's pro se filings "unambiguously asserted his right to a speedy trial." This weighs in favor of a constitutional violation. *Barker*, 407 U.S. at 531-32. "The repeated assertion of the right to a speedy trial puts [the defendant] completely out of

the category of defendants who are consciously seeking to avoid the day of reckoning." *Hadley*, 66 Wis. 2d at 361.

The court of appeals weighed this factor less heavily in favor of a constitutional violation because Ramirez did not assert the right until over two years into the case. However, contrary to the State's argument (Br. at 34-35), this does not mean this factor does not weigh in favor of Ramirez at all.

This case is distinct from *State v. Provost*, 2020 WI App 21, 392 Wis. 2d 262, 944 N.W.2d 23. There, no trial date was set for the first 20 months, during which time the defendant did not make a speedy trial nor make any request for a trial date. *Id.*, ¶ 8 & n.4. Once a trial date was set, the defendant failed to appear at the pretrial conference, so the trial was removed from the calendar. *Id.*, ¶ 9. The defendant was later arrested on a bench warrant, a new trial date was set, and only then did the defendant demand a speedy trial. *Id.*, ¶¶ 9-10. It was based on these circumstances, and additional delays caused by the defendant, that the court did not weigh the defendant's speedy trial demand in his favor. *Id.*, ¶¶ 29, 45. Perhaps the biggest distinction between this case and *Provost* is that Provost did not challenge the court's finding that "the entirety of delay" occurred to accommodate the defense. *Id.*, ¶ 29.

Ramirez's repeated assertions of his speedy trial right demonstrate that he actually did want a speedy trial. In this case, trial dates were scheduled then rescheduled multiple times. In this case, Ramirez's initial delay in asserting his right to a speedy trial can be understood as his reliance on those scheduled trial dates occurring. He finally made a formal demand when the trial was removed from the calendar and not rescheduled. This is evidence that he

wanted to go to trial, not evidence that he was seeking to avoid it. This factor weighs in favor of finding a constitutional violation.

D. The court of appeals correctly held that the extreme length of delay in bringing Ramirez to trial prejudiced him

"A reasonable reading of *Barker* leads to the inevitable conclusion that no burden is placed upon the defendant to show he was prejudiced in fact. Moreover, *Barker* holds that the assertion of the right to speedy trial is in itself probative of prejudice." *Hadley*, 66 Wis. 2d at 364. Beyond its threshold function, the length of the delay itself is bound up with prejudice: "the presumption that pretrial delay has prejudiced the accused intensifies over time." *Doggett*, 505 U.S. at 652.

The circuit court discredited Ramirez's testimony about treatment and classification within the prison were impacted by the pending case. (161:7-8, 10.) Given that "[m]inimal prejudice is sufficient to support [a] conclusion that [a defendant] was denied his right to a speedy trial," *Borhegyi*, 222 Wis. 2d at 514-15, and that "no burden is placed upon the defendant to show he was prejudiced in fact," *Hadley*, 66 Wis. 2d at 364, the circuit court discounting the allegations of prejudice made by Ramirez does not prevent a finding of a constitutional violation. The fact that Ramirez asserted his speedy trial rights on two occasions is evidence that he felt prejudiced – rather than benefited – by the delay.

Additionally, the delay of nearly four years is itself evidence of the prejudice to Ramirez. *Doggett*, 505 U.S. at 652 ("the presumption that pretrial delay has prejudiced the accused intensifies over time"); *Hadley*, 66 Wis. 2d at 364

("after a protracted period of time, 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"). This factor also weighs in favor of finding a constitutional violation.

The State attempts to define a five-year requirement to presume prejudice based on the length of delay, (Br. at 41), but neither state nor federal courts have set an exact standard as to what length of delay is violative of the right to a speedy trial. "Any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Barker*, 407 U.S. at 522.

The court of appeals properly considered the totality of circumstances in this case to find that the extremely lengthy delay and the lack of explanation by the State was sufficient to presume that Mr. Ramirez was prejudiced.

## CONCLUSION

For the reasons set forth above, Luis Ramirez respectfully requests that the court affirm the decision of the court of appeals and remand this case to the circuit court with an order that the case be dismissed due to the speedy trial violation.

Dated this 30th day of December, 2024.

Respectfully submitted,

*Electronically signed by:*

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## CERTIFICATION AS TO FORM/LENGTH

I certify that this response meets the form and length requirements of Rules 809.19(8)(b)-(c) for a brief produced with a proportional serif font. The length of this brief is 8,417 words.

Dated this 30th day of December, 2024.

Signed:

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