STATE OF WISCONSIN

SUPREME COURT

Case No. 22AP2098 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NED GUERRA,

Defendant-Appellant.

PETITION FOR REVIEW OF A ONE-JUDGE DECISION OF THE COURT OF APPEALS FILED JULY 19, 2023.

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STATEMENT OF THE ISSUES

I. Ned Guerra (Guerra) filed a motion to dismiss and argued his constitutional rights to a speedy trial were violated since his trial was repeatedly pushed off for other cases for almost two years from the date he was charged to the date of his trial. The trial court denied the defendant's motion – citing to its congested calendar, and the court of appeals affirmed. The issue presented to this court is whether it is appropriate to impinge on one's constitutional speedy trial rights if there are other cases that can be tried that are older and/or contain more serious charges – even when there is no record the other cases contain a speedy trial demand.

STATEMENT OF REASONS FOR GRANTING REVIEW

Wisconsin Statute 809.62(1r)(c)3 states the Court can review if it will help develop or clarify the law, and the issue is not factual in

nature but rather a question of law that is likely to recur unless resolved by this Court. Wis. Stat. 809.62(1r)(c)3.

Here, Guerra filed a motion to dismiss since his right to a speedy trial was violated. In response, the trial court, and later the appellate court, determined the court's calendar was congested and determined it was acceptable to delay the trial for approximately 21 and a half months. However, as will be shown, this was not a matter of a congested calendar, but rather a cavalier disregard for the defendant's right in which the court prioritized other cases – even though there is no record the defendants in the other cases sought a speedy trial. A review by this Court would help clarify and develop law so that future courts will understand that it is not acceptable to impinge on one's speedy trial rights because it has older and/or more serious cases to try.

STATEMENT OF THE CASE

On May 1, 2020, the State filed a criminal complaint that included one count. (2:1; App. 35). The sole count, disorderly conduct – with a repeater enhancer, contrary to Wis. Stat. § 947.01 and 939.62(1)(a), carried a maximum penalty of two years imprisonment. (2:1; App. 35). Subsequently, the State filed an amended complaint which included counts two and three. (26:1; App. 50). Both of those counts, violate state/county institution laws – with a repeater enhancer, contrary to Wis. Stat. § 946.73 and 939.62(1)(a), carried a maximum penalty of two years imprisonment. (26:1; App.50).

On August 4, 2020, Guerra filed a demand for speedy trial. (11:1; App.37). In said demand, Guerra cited to his federal and state constitutional rights to a speedy trial. (11.1; App.37).

Guerra maintained his speedy trial demand on numerous occasions, and later requested his case be dismissed since his constitutional rights to a speedy trial were not honored. (103:4; App.42; 104:2; App.45; 105:3; App.56; 38:1; 107:3; App.74; 99:2-3; App. 77-78; 100:3; App.84; 101:2-3; App.88-89; 53:1; App.93). Ultimately, though, the court denied his request for dismissal. (108:12; App. 30).

Finally, on February 17, 2022, the defendant was tried. (96:1). After hearing the evidence, the jury found the defendant guilty on all

counts. (82:1). After doing so, the court imposed one and a half years imprisonment and six months extended supervision on each count – concurrent to each other. (82:1-2).

Guerra subsequently argued on appeal that the case should have been dismissed with prejudice, and it asked the case be remanded back to the trial court with directions that the judgment of conviction be vacated. (Brief of Defendant-Appellant at 2, 16). Nonetheless, the Court of Appeals affirmed the trial court's conclusion, and it denied the defendant's appeal. (Court of Appeals Opinion and Order Dated July 19, 2023 at 1; App. 4). As a result, the defendant petitioned this Court to review this matter.

ARGUMENT

I. Supreme Court review is warranted so that future courts will understand that it is not acceptable to impinge on one's speedy trial rights because it has older and/or more serious cases it can try.

A. Standard of Review.

The defendant's claim that he was denied his right to a speedy trial raises a constitutional issue which is reviewed de novo. *State v. Ziegenhagen,* 73 Wis.2d 656, 664, 245 N.W.2d 656 (1975). In reviewing constitutional questions, the trial court's findings of historical facts are subject to the clearly erroneous standard, but the application of those facts to constitutional standards and principles is determined without deference to the trial court's conclusion. *State v. Trammel,* 141 Wis.2d 74, 77, 413 N.W.2d 657 (Ct. App. 1987*).*

B. Facts.

On May 1, 2020, the State filed a one count complaint. (2:1: App.35). In said complaint, the State charged disorderly conduct with a repeater enhancer. (2:1; App.101). On that same date, the court held Guerra's initial appearance, learned he was currently incarcerated on another matter, and imposed a $1,000 signature bond. (102:2). The court then adjourned. (102:3). Notably, Guerra did not sign said signature bond. (5:1; App.99).

On May 26, 2020, Guerra was brought back to court for a potential plea/sentencing hearing. (110:2). At that time, defense

counsel indicated there was no deal reached, and requested the court schedule a jury trial. (110:2). However, after further discussion, the court noted Guerra was also held on a more serious case that is set for trial in September, and, by agreement, this case would be set for a plea/sentencing "sometime in October to see where things are at". (110:3).

On August 4, 2020, the defense filed a demand for speedy trial. (11:1; App.37). In said demand, the defendant cited to his federal and state constitutional rights to a speedy trial. (11:1; App.37). As a result, the court scheduled a plea/sentencing for August 24, 2020, and a jury trial for August 25, 2020. (14:1; App.38; 103:1; App. 39).

On August 21, 2020, the State filed a motion to reschedule the trial. (14:1; App.38). In support, the State indicated a witness was scheduled to attend a training conference on the day of trial. (14:1; App.38). It also noted that the defendant's speedy trial demand was moot because he was also held on another case. (14:1; App.38).

On August 24, 2020, the court addressed the State's motion. (103:4; App.42). At that time, the State indicated the speedy trial demand is not applicable since he was held on another matter. (103:2-3; App.40-41). The defense objected. (103:4; App.42). Nonetheless, the court stated "The Court appreciating that the defendant has a far more serious felony case with very high cash bail and noting, as a matter of law, that he is not in custody for this case before the Court, so those factors do minimize any violation of the speedy trial statute, and further I find good cause exists by the State's motion, given the prepaid training, which the Court appreciates is necessary for job responsibilities, and therefore, the State's motion is granted." (103:4; App.42). It then indicated it would try to schedule as soon as possible, and it scheduled a trial for November 10, 2020. (103:4; App.42; 53:1; App.93).

On November 4, 2020, the State filed a motion. (19:1-2). This motion sought to add two counts to the Complaint. (19:1-2).

On November 9, 2020, the court held a hearing. (104:1; App.110). At that time, the defense indicated it maintained its speedy trial demand. (104:2; App.45). Nonetheless, the court noted the defendant was held on another matter, and it ordered Guerra's trial adjourned since another defendant's case had priority over this case. (104:3-4; App.46-47). It then scheduled a motion hearing for

December 22, 2020, and a trial for March 4, 2021. (53:2; App.94; 98:1).

On December 22, 2020, the court held a hearing to address the State's motion to add counts. (98:13). At that time, the court granted the State's request. (98:13).

On January 8, 2021, the State filed a three count complaint. (26:1; App.50). In said complaint, the State added counts two and three. (26:1; App.50). Both counts, violate state/county institution laws – with a repeater enhancer, contrary to Wis. Stat. § 946.73 and 939.62(1)(a), carried a maximum penalty of two years imprisonment. (26:1; App.50).

On February 4, 2021, the parties appeared to address the new complaint. (95:1). At that time, the defendant entered not guilty pleas, and the court scheduled a March 3, 2021 hearing "in case there are any last minute motions" prior to trial. (95:3).

On March 3, 2021, the parties appeared. (105:1; App.54). At that time, the State noted the defendant's custody was on another case, that it understood the court had other "matters on the Court's calendar", and that it would defer to the Court as to whether the trial should go forward. (105:2-3; App.55-56). The defense stated it desired to have the trial the next day. (105:3; App.56). Nonetheless, the court adjourned again. (105:3; App.56). In doing so, it indicated:

> The Court does appreciate the guarantees for the speedy trial, although the statute does provide the remedy initially would be relief from cash bond, and since this case doesn't have cash bond, and the Court, noting the nature of the charge, penalties as alleged, and the other case is more serious, and also with the Court's calendar and with the COVID-19 operating order, there are certain priorities and congestions on the docket which makes tomorrow's trial date not viable for this case to go forward.

(105:3; App.56). The court then scheduled a plea/sentencing for September 15, 2021, and a trial for September 16, 2021. (53:2; App.94).

On June 4, 2021, the defense filed a motion to dismiss, and on June 7, 2021, the defense filed an amended motion to dismiss. (38:1; 40:1; App.59). In furtherance, the defense argued his constitutional rights to a speedy trial were violated. (38:1-6; 40:1-6; App.59-64).

On June 17, 2021, the Court held a hearing to address the defense's motion. (106:1; App.65). In doing so, it acknowledged the exposure to the charges can be stressful and anxiety provoking, but it had a congested calendar, and it found there was no prejudice since the court did not order a cash bail bond and he was held on another matter. (106:6; App.70).

On September 15, 2021, the parties reconvened. (107:1; App.72). At that time, the State indicated it would defer to the court as to whether the trial should go forward the following day, but it noted "at this point there are other cases on perhaps more serious and also older." (107:2; App.73. In response, defense again reiterated his desire for trial the next day. (107:3; App.74). Nonetheless, the court indicated there were a number of cases set for trial, and it would make a decision later that day whether the trial would be adjourned. (107:3; App.74).

On September 16, 2021, the parties appeared. (99:1; App.76). At that time, the State indicated it recognized there was a speedy trial demand filed, but it believed a more serious and older case took priority over this case, and it asked the court to adjourn. (99:2; App.77). In response, the defense indicated it was ready to try the case, and it asked that the case be dismissed if it is not tried that day. (99:2-3; App.77-78). In response, the Court noted the defendant was held on another case, and that it was giving priority to a different case. (99:3; App.78). The court then scheduled a plea/sentencing for October 4, 2021, and a trial for October 5, 2021. (99:4-5; App.79-80; 53:2; App.94).

On October 4, 2021, the parties appeared. (100:1; App.82). At that time, the State again indicated it would be ready to try the case the following day, it believed that another case had rights to be tried over this case, and it deferred to the court whether the trial should be adjourned. (100:2-3; App.83-84). The defense indicated it previously filed a speedy trial demand, and again noted that it was ready to proceed the next day. (100:3; App.84). Nonetheless, the court indicated there was an older more serious case set for trial the next day, and it would make a decision later that day whether Guerra's trial would be adjourned. (100:3-4; App.84-85).

On October 5, 2021, the parties reconvened. (101:1; App.87). At that time, the State noted it believed another case had higher priority, and it asked the Court to reschedule Guerra's trial. (101:2;

App.88). Defense counsel noted he was previously informed the trial was off the calendar, and he argued he believed the case should be dismissed "on speedy trial grounds". (101:2-3; App.88-89). In reply, the State indicated the defense's motion for speedy trial is moot since he was not in custody on this case, and that dismissal is not appropriate remedy. (101:3-4; App.89-90). After hearing this, the Court denied the motion, and in doing so, stated the defendant was held on a more serious case, there was no prejudice, and that it had a congested calendar. (101:4-5; App.90-91). It ultimately scheduled a trial for February 17, 2022. (96:1).

On January 6, 2022, the defendant filed another motion to dismiss. (53:1; App.93). As a result, the court held a hearing on February 11, 2022. (108:1; App.19). At that time, the court stated the delay had practically no impact on Guerra since he was given a signature bond, he was held on another more serious case, and it was the court's experience the delay and memory issues more impacted the State; further, it had a congested calendar; as a result, it denied Guerra's motion. (108:10-13; App.28-31).

Guerra then had his trial on February 17, 2022. (96:1). Ultimately he was convicted on all counts, and the court imposed a total of one and a half years initial confinement followed by six months extended supervision. (82:1-2).

C. Applicable law.

The Federal and State Constitutions guarantee a defendant the right to prompt resolution of criminal charges. The Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right to a speedy. . . trial". U.S. Const. amend VI. This constitutional requirement is applied to the State through the Fourteenth Amendment. *Barker v. Wingo,* 407 U.S. 514, 515, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972). In addition, the Wisconsin Constitution, art. I, Section 7, provides that, "In all criminal prosecutions the accused shall enjoy the right . . . in prosecutions by indictment, or information, to a speedy public trial". WI Const. article I, Section 7. If one's constitutional right to a speedy trial was violated, the charges much be dismissed. *State v. Urdahl,* 2005 WI App 191, P11, 286 Wis.2d 476, 704 N.W.2d 324.

When a defendant asserts a violation of his constitutional right to a speedy trial, the court uses a four-part balancing test; however,

none of the four factors in of themselves is a necessary condition to make a finding that one's right to speedy trial was violated. *Barker v. Wingo,* 407 U.S. 514 at 533. First, it considers the length of delay. *Id.* at 530. This first factor, length of delay, is a triggering mechanism used to determine whether the delay is presumptively prejudicial. *State v. Urdahl,* 2005 WI App 191 at P12. A post-accusation delay is considered to be presumptively prejudicial when it approaches one year. *Id.* It is only necessary to inquire into the other factors when a delay is presumptively prejudicial. *State v. Borhegyi,* 22 Wis.2d 506, 510, 588 N.W.2d 89 (Ct. App. 1998).

The second factor is the reason for the delay. *State v. Urdahl,* 2005 WI App 191 at P26. The court has elaborated:

> A deliberate attempt by the government to delay the trial in order to hamper the defense is weighted heavily against the State, while delays caused by the government's negligence or overcrowded courts, though still counted, are weighted less heavily. On the other hand, if the delay is caused by something intrinsic to the case, such as witness unavailability, that time period is not counted. Finally, if the delay is caused by the defendant, it is not counted.

Id. at P26. Further, 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. *Green v. State,* 75 Wis. 2d 631, 638, 250 N.W.2d 305 (1977).

The third factor is the defendant's assertion of his right. *Barker v. Wingo,* 407 U.S. 515 at 530. There is no requirement that a defendant demand a speedy trial in order to preserve the right. *Id.* at 528. However, a defendant's assertion of the right to a speedy trial is given strong evidentiary weight in determining whether the right has been violated. *Id.* at 531-532.

The fourth factor is prejudice by the delay in bringing the defendant to trial. *Id.* at 530. In accessing prejudice, the court should examine three interests the speedy trial right was designed to protect: "prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense." *State v. Urdahl,* 2005 WI App 191 at P34. Our United States Supreme Court has added that even if the accused is not incarcerated prior to trial, he is disadvantaged by living under a cloud of anxiety, suspicion, and often hostility. *Barker v. Wingo,* 407 U.S. 514 at 533.

D. The trial court should have granted the defendant's motion to dismiss.

The defendant filed a motion to dismiss and argued his constitutional rights to a speedy trial were violated. (53:1-6; App.93-98). This motion should have been granted.

As noted above, this Court utilizes a four-part balancing test. First, it considers the length of delay. Here, the defendant was charged on May 1, 2020, and he did not get a trial until February 17, 2022. (2:1-2; App.35-36; 96:1). This is approximately 21 and a half months later. As provided above, a post-accusation delay is considered to be presumptively prejudicial when it approaches one year. *State v. Urdahl,* 2005 WI App 191 at P12. Considering such, the delay is presumed prejudicial, and this factor weighs against the State.

The second factor is the reason for the delay. *Id.* at P26. Here, the clock started on May 1, 2020, when the defendant was charged. (2:1; App.35). On May 26, 2020, he was brought back to court for a plea/sentencing hearing. (110:2). This nets 26 days that should be weighed against the State.

On May 26, 2020, although the defense initially requested a trial be scheduled, after further discussion, the court indicated the case would be set for an October date – which is a month after the scheduled trial on Guerra's other file. (110:2-3).

On August 4, 2020, the defendant filed a demand for speedy trial. (11:1; App.37). As a result, the court scheduled a plea/sentencing for August 24, 2020, and a jury trial for August 25, 2020. (14:1; App.38; 103:1; App.39). Considering such, the court didn't address the motion until it held a hearing on August 24, 2020. (103:1; App.39). This nets 21 days that should be weighed against the State.

On August 21, 2020, the State filed a motion to reschedule the trial because one of its witnesses scheduled a training conference the same day as the trial. (14:1; App.38). In said motion, the State noted the defendant's speedy trial demand was moot because he was also held on another case. (14:1; App.38).

On August 24, 2020, the court addressed the State's motion. (103:4; App.42). At that time, the State indicated the speedy trial demand is not applicable since he was held on another matter. (103:2-3; App.40-41). The defense objected. (103:4; App.42). After hearing such, the court stated "The Court appreciating that the defendant has a far more serious felony case with very high cash bail and noting, as a matter of law, that he is not in custody for this case before the Court, so those factors do minimize any violation of the speedy trial statute, and further I find good cause exists by the State's motion, given the prepaid training, which the Court appreciates is necessary for job responsibilities, and therefore, the State's motion is granted." (103:4; App.42). It then canceled the trial, and it set a new trial date for November 10, 2020. (103:4; App.42; 53:1; 159:1). Ultimately, though, it held a hearing on November 9, 2020. (104:1; App.44). Considering such, there was a cavalier disregard of the defendant's right to a speedy trial, and the dates from August 25, 2020 to November 9, 2020 nets 76 days that should be weighed heavily against the State.

On November 9, 2020, the court held a hearing. (104:1; App.44). At that time, the court noted the defendant was held on another matter, and it ordered Guerra's trial adjourned since another defendant's case took priority over this case. (104:3-4; App.47). It then scheduled a trial for March 4, 2021. (53:2; App.94). However, the court subsequently scheduled a hearing for March 3, 2021, and the dates of November 9, 2020 to March 3, 2021, nets 115 days that should be weighed against the State. (105:1; App.54).

On March 3, 2021, the parties appeared. (105:1; App.54). At that time, the State noted the defendant's custody was on another case, that it understood the court had other "matters on the Court's calendar", and that it would defer to the Court as to whether the trial should go forward. (105:2-3; App. 55-56). The defense stated it desired to have the trial the next day. (105:3; App.56). Nonetheless, the court adjourned again. (105:3; App.56). In doing so, it indicated:

> The Court does appreciate the guarantees for the speedy trial, although the statute does provide the remedy initially would be relief from cash bond, and since this case doesn't have cash bond, and the Court, noting the nature of the charge, penalties as alleged, and the other case is more serious, and also with the Court's calendar and with the COVID-19 operating order, there are certain priorities and congestions on the docket which makes tomorrow's trial date not viable for this case to go forward.

(105:3; App.56). The court then scheduled a trial for September 16, 2021. (53:2; App.94). Considering the above, there was a cavalier disregard of the defendant's right to a speedy trial, and the dates of March 3, 2021 to September 16, 2021 nets 198 days that should be weighed heavily against the State.

On September 16, 2021, the parties reconvened. (99:1; App.76). At that time, the State indicated it recognized there was a speedy trial demand filed, but it believed a more serious and older case took priority over this case, and it asked the court to adjourn.[1] (99:2; App.77). Defense objected, and asked the case be dismissed if not tried that day. (99:2-3; App. 77-78). After hearing this, the court noted the defendant was held on another case, and that it was giving priority to a different case. (99:3; App.78). The court then scheduled a trial for October 5, 2021. (99:4-5; App.79-80; 53:2; App.94). Considering such, there was a cavalier disregard of the defendant's right to a speedy trial, and the dates of September 16, 2021 to October 5, 2021 nets 19 days that should be weighed heavily against the State.

On October 5, 2021, the parties appeared. (101:1; App.87). At that time, the State noted it believed another case had higher priority, and it asked the Court to reschedule Guerra's trial.[2] (101:2-3; App. 88-89). The defense indicated it was previously informed the trial was not happening that day, and he asked that the case be dismissed. (101:3; App.89). In reply, the State argued the defendant's motion is moot since he was not in custody on this case, and that dismissal is not an appropriate remedy. (101:3-4; App.89-90). After hearing this, Court noted the defendant was held on a different matter, there would be no prejudice, it had a congested calendar, and it scheduled a trial for February 17, 2022. (96:1; 101:4-5; App.90-91). Considering this, there was again a cavalier disregard of the defendant's right to a speedy trial, and the dates of October 5, 2021 to February 17, 2022, nets 136 days that should be weighed heavily against the State.

In total, 21 months and 17 days elapsed from the date the State charged Guerra to the date he finally received his trial. As noted

[1] The day before, on September 15, 2021, the State indicated it would defer to the court as to whether the trial should go forward the following day, but it noted "at this point there are other cases on perhaps more serious and also older". (107:2; App.73).

[2] The day before, on October 4, 2021, the State indicated it believed that another case had higher priority over this case, and it deferred to the court whether the trial should be adjourned. (100:2-3; App.83-84).

above, the presumption is any time over 12 months is prejudicial. Here, 591 days or approximately 19 and a half months should be weighed against the State – with most of that weighed heavily. Considering such, this factor weighs against the State.

The third factor the Court considers is the defendant's assertion of his right to a speedy trial. *Barker v. Wingo,* 407 U.S. 515 at 530. Here, there is no argument the defendant did not assert said right. On August 4, 2020, the defendant filed his demand for a speedy trial. (11:1; App.37). On August, 24, 2020, the defense objected to the trial getting adjourned. (103:4; App.42). On November 9, 2020, the defendant indicated he maintained his speedy trial demand even though the court again adjourned the trial. (104:2; App.45). On March 3, 2021, the defense stated its desire to have the trial next day. (105:3; App.56). On June 4, 2021, the defense filed a motion to dismiss due to his speedy trial rights being violated. (38:1; 40:1; App.59). On September 15, 2021, the defense indicated it wanted to try the case the next day. (107:3; App.74). On September 16, 2021, the defense indicated it was ready to try the case that day; if not, it renewed his request for dismissal due to his right to a speedy trial being violated. (99:2-3; App.77-78). On October 4, 2021, the defense indicated it previously filed a speedy trial demand, and that it was ready to proceed the next day. (100:3; App.84). On October 5, 2021, defense counsel noted he was previously informed the trial was off the calendar, and he argued he believed the case should be dismissed "on speedy trial grounds". (101:2-3; App.88-89). On January 6, 2022, the defendant filed another motion to dismiss. (53:1; App.93). Considering such, Guerra made his assertion clear as can be. This factor weighs heavily against the State.

Finally, the fourth factor is prejudiced by the delay in bringing the defendant to trial. *Barker v. Wingo,* 407 U.S. 515 at 530. As for prevention of oppressive pretrial incarceration, the defense concedes this factor weighs in favor of the State. Although he was held on this case because he did not sign a signature bond, he was given a signature bond, and he was also held on another case. (5:1; App.99; 102:2; 108:6-7; App.24-25).

As for prevention of anxiety and concern by the accused, this factor is relevant. Initially, Guerra was facing disorderly conduct with a repeater enhancer; this meant he was facing up to two years imprisonment. (2:1; App.35). When Guerra moved for a speedy trial, the court even acknowledged the exposure to the charge can be

stressful and anxiety provoking. (106:6; App.70). Months later, the State added two counts and tripled his exposure to six years incarceration. (26:1; App.50). Thus, the stress and anxiety would have been present. As our United States Supreme Court has stated, even if the accused is not incarcerated prior to trial, he is disadvantaged by living under a cloud of anxiety, suspicion, and often hostility. *Barker v. Wingo,* 407 U.S. 514 at 533

Guerra also wants to address the trial court's reasoning when it was asked in February of 2022, for a final time, to address the defendant's renewed motion to dismiss. At that time, again after the charges had tripled, the court changed its thoughts and now determined Guerra's anxiety concern "is nonexistent for this case" or "de minimis at best". (108:6, 11-12; App.24, 29-30; 26:1; App.50). In doing so, it reasoned that he was also held on the "serious" 19CF541 case. (108:6, 11-12; App. 24, 29-30). It should be noted though that same case was in existence when it earlier stated the one charge can be stressful and anxiety provoking. (108:6, 11-12; App.24, 29-30).

Guerra wants to point out two additional things. First, the fact there was a more serious case in of itself does not prove Guerra would have no concern or anxiety over this case. First, he must be convicted on that case. Perhaps the State's case was not strong, and/or Guerra believed he had a good defense.[3] Second, even if Guerra was convicted, it does not necessarily mean a conviction or convictions on that case meant a long sentence or imprisonment until Guerra's expected life expired should have been expected. Further, without a long sentence or until Guerra's expected life should have expired, this case would be relevant since any conviction or convictions could result in consecutive time to the more serious case. Thus, this case would have been relevant to Guerra and there would have been reason to have stress and anxiety awaiting determination on these cases.

[3] A copy of the judgment on Fond du Lac County Case 19CF541 is not in the record of this case; however, the records for that case on the Consolidated Court Automation Programs website (CCAP) indicate that the case was dismissed on June 13, 2022. (App.100). This court should take judicial notice of that adjudicative fact under Wis. Stat. § 902.01(2)(b) and (4). See *Kirk v. Credit Acceptance Corp.,* 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (CCAP is an online website that contains information entered by court staff of which this court may take judicial notice).

Finally, as for prevention of impairment of defense, this factor is also relevant. As Guerra previously noted in his motion, his defense at trial was self-defense. (53:5; App.97). Further:

> None of the evidence available contains audio evidence of the incident in question. The statements of the parties are integral to Guerra's defense, and it is unreasonable that any parties involved would be able to recall specific statements made almost two years ago.

(53:5; App.97). As Guerra understood at that time, the importance of the memory of these details was important and there was concern of those memories fading every occasion the trial court canceled and rescheduled his trial. (53:5; App.97).

Considering the above, the trial court improperly determined Guerra's speedy trial rights were not violated. Here, as previously discussed, there is a presumption of prejudice since over a year passed from the date of the charges until the date Guerra was tried, Guerra clearly asserted his constitutional rights to a speedy trial, and there was prejudice. With that said though, the trial court was making decisions to delay Guerra's trial based upon the misunderstanding it was appropriate to prioritize older and/or cases with more serious charges. It must be noted that there is no information in the record to suggest those other cases involved cases where the defendant sought a speedy trial. Ultimately, then a review of this case can develop and clarify the law so that future trial courts will know that a defendant who requests a speedy trial gets priority over other cases even if the other cases are older and/or contain more serious charges.

E. The appellate court improperly affirmed the trial court's decision.

In denying the defendant's argument, the appellate court wrote that it, too, was not convinced the case should have been dismissed. (Court of Appeals Opinion and Order Dated July 19, 2023 at 13; App. 16). In doing so, it addressed the four factor test, and it affirmed the trial court's decision. *Id.* at 6-13; App.9-16.

In addressing the first factor, the court stated that the law provided there is a presumption of prejudice if the delay is over a year. *Id.* at 6-7; App.9-10. Here, the delay was for 21 months; thus, the court agreed the presumption is prejudice and this factor weighs in favor of Guerra. *Id.*

As for the second factor, the appellate court concluded this factor weighs in favor of the State - primarily because of trial court case congestion. *Id.* 7-9; App. 10-12. As a preliminary matter, though, the court concluded the August 24, 2020 to November 9, 2020 time should not be counted because it was due to a witness unavailability. *Id.*

In response, the State informed the court the speedy trial demand is inapplicable since he was held on another matter. (103:2-3; App. 40-41). In addition, the witness the State used to reschedule was Detective David Olig (Olig). (14:1; App. 38). In reviewing the trial transcript, Olig was only used for purposes of telling the jury what he saw when he reviewed the jail rules form and the video of the incident. (96:90-107). This witness was unnecessary. Ultimately, the State could have used a correctional officer or another detective. Finally, the constitutional right to a speedy trial is not a moot point. Considering such, the reason the trial was rescheduled was because of the cavalier disregard of Guerra's right to a speedy trial, and the dates from August 25, 2020 to November 9, 2020 netted 76 days that should be weighed heavily against the State.

As for the court congestion, the appellate court concluded the remaining delays were appropriate because the court's calendar was full due to backload of cases because of COVID. (Court of Appeals Opinion and Order Dated July 19, 2023 at 7-9; App. 10-12). However, as previously discussed, the extensions were not because of COVID and a congested calendar. The delays were as a result of a cavalier disregard for Guerra's constitutional right to a speedy trial. As Guerra was asserting his right to a speedy trial, instead of taking steps so that Guerra's right was honored, the State showed little regard to making such right a priority. Instead, it time and again informed the court it did not have to give Guerra a speedy trial because he was given a signature bond, it believed other cases were more important because they were older or more serious, and it even asked for extension for a witness who it could have replaced. The trial court in turn granted the delays for reasons essentially provided by the State.

Ultimately, a constitutional right to a speedy trial should mean something. Perhaps the trial court's decision would be more understandable had it delayed Guerra's trial time and again in lieu of other cases in which the defendants also exercised their constitutional right to a speedy trial; however, there is no record of such here.

Disregarding Guerra's right simply because he was given a signature bond, or because there is an older or more serious case, should not be tolerated; defendants whom assert said right should get priority. In total, 21 months and 17 days elapsed from the date the State charged Guerra to the date he finally received his trial. The presumption is any time over 12 months is prejudicial. Here, 591 days or approximately 19 and a half months should be weighed against the State – with most of that weighed heavily. Considering such, this factor weighs against the State.

As for the third factor, assertion of right, the appellate court agreed this factor weighed in favor of Guerra. *Id.* at 10; App. 13. Ultimately, Guerra asserted his right, and he maintained his speedy trial demand at each hearing thereafter. *Id.* As a result, this factor favors Guerra, with the exception of the time before the demand not being weighed heavily against the State. *Id.*

Finally, as for the fourth factor, the appellate court addressed the three interests the speedy trial right was designed to protect. *Id.* As for the first interest, prevention of oppressive pretrial incarceration, although he was held on this case because he did not sign a signature bond, he ultimately was given a signature bond, and he was also held on another case. (5:1; App.99; 102:2; 108:6-7; App.24-25). The court noted Guerra conceded this interest, and that it favored the State. (Court of Appeals Opinion and Order Dated July 19, 2023 at 10; App. 13).

As for the second interest, prevention of anxiety and concern, the appellate court ruled it agreed with the trial court that little weight should be attributed to this interest because the anxiety and concern due to the delays in this misdemeanor case were minimal as compared to the charged Guerra faced in his other more serious case. *Id.* at 11-12; App.14-15.

However, as previously addressed, there is no telling what would result in the more serious case, and as Guerra previously asked this Court to take judicial notice of, that case was ultimately dismissed; regardless, though, this case added a potential six more years incarceration – which is a large amount of time. There would absolutely be anxiety and concern to have that hanging over one's head. Further, as our Supreme Court has stated, if the accused is not incarcerated prior to trial, he is disadvantaged by living under a cloud of anxiety, suspicion, and often hostility. *Barker v. Wingo,* 407 U.S. 514 at 533.

Finally, as for the final interest, prevention of impairment of defense, the appellate court found the delays did not weaken Guerra's defense since no witnesses expressed any problems with recollection. (Court of Appeals Opinion and Order Dated July 19, 2023 at 12; App. 15).

However, as Guerra previously noted, his defense at trial was self-defense. (53:5; App.97). Memories were important to remain. It is unreasonable that all parties could recall specific statements made almost two years earlier. Further, the mere fact that a witness did not testify he could not recall is not conclusive; there are facts that one simply forgets over time that he will not remember he forgot.

With the above said, the appellate court, too, denied the appeal based upon the understanding it is appropriate for trial court to impinge on one's constitutional right to a speedy trial if there are older and/or cases with more serious charges. As a result, by taking this case, this Court can shed light on the issue so that future courts understand, when a defendant makes a demand for speedy trial, the parties and court should make it a priority, and make every effort to make sure it happens. Ultimately, a case where a defendant exercises his constitutional rights to a speedy trial should not take a back seat because there are other older and/or cases with more serious charges.

CONCLUSION

For the foregoing reasons, the defense respectfully requests this Court grant the petition for review.

Signed:
Electronically signed by Timothy O'Connell

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm), and 809.62(4). The length of this petition is 6,419 words.

Date: August 15, 2023

Signature: Electronically signed by Timothy O'Connell

CERTIFICATION AS TO APPENDIX

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

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

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

Date: August 15, 2023

Signature: Electronically signed by Timothy O'Connell