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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2023AP002414 - CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORDERO D. COLEMAN,

Defendant-Appellant.

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On Appeal from the Judgment of Conviction and  
Decision and Order Denying Postconviction Relief,  
Entered in the Dane County Circuit Court, the  
Honorable John D. Hyland, Presiding

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BRIEF OF  
DEFENDANT-APPELLANT

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## ISSUES PRESENTED

1. Nearly three years elapsed between the charge against Cordero Coleman and the resolution of the case via a jury trial. Did this protracted delay deprive Mr. Coleman of his constitutional right to a speedy trial?

The circuit court said no. This Court should reverse the circuit court's order denying Mr. Coleman's postconviction motion, vacate the judgment of conviction, and dismiss this case with prejudice.

2. Trial counsel failed to assert Mr. Coleman's constitutional right to a speedy trial and did not advise Mr. Coleman of that right. The sole remedy for such a violation of Mr. Coleman's constitutional right to a speedy trial is dismissal with prejudice, but trial counsel failed to take any action enforcing that right. Did this render trial counsel ineffective?

The circuit court said no. If this Court finds that Mr. Coleman's first claim would otherwise fail for want of a speedy trial demand, this Court should find that the lack of such a demand was the result of ineffective assistance of counsel. This Court should then reverse the circuit court's order denying Mr. Coleman's postconviction motion, vacate the judgment of conviction, and dismiss this case with prejudice.

## **POSITION ON ORAL ARGUMENT AND PUBLICATION**

Publication is requested. No published case or statute addresses an individual's constitutional right to a speedy trial in the context of jury trial delays during Covid shutdowns. Resolution of this issue could be dispositive of the constitutional question presented in this case. Oral argument is not requested.

## **STATEMENT OF THE CASE AND FACTS**

This case revolves around the time that passed between the state's filing of the complaint against Mr. Coleman and the jury trial. Given the lengthy delays between these events, it is necessary to parse each event that caused delay and the party responsible for those delays. In order to more effectively detail those events and delays, this brief presents a detailed history of the case in a timeline rather than in a narrative form.

First, the overview of the case is as follows.

On June 14, 2019, the state charged Mr. Coleman with repeated sexual assault of a child, contrary to Wis. Stat. § 948.025(1)(b). (1:1). The complaint alleged that on or between January 1, 2019 and June 1, 2019, Mr. Coleman committed at least three assaults of MAJ. (1:1).

On June 25, 2019, Attorney Jason Gonzalez was appointed to represent Mr. Coleman. (9). Attorney

Gonzalez would represent Mr. Coleman throughout the case.

While Mr. Coleman posted bond shortly after being charged, the first nine months of proceedings saw jury trial dates scheduled and then rescheduled—from January 6-8, 2020 until April 13-15, 2020. (17; 30; 38). This initial delay pushed the case into the unprecedented era of Covid delays and the temporary suspension of jury trials. (173; 174).

From July 23, 2019 until March 8, 2021, not a single substantive hearing took place in the case. (134; 139). On March 8, 2021, the circuit court conducted a brief hearing at which it determined that Mr. Coleman no longer needed to participate in pretrial GPS services in light of his compliance with bond conditions over the long period of time. (139:12).

For almost an entire year after that hearing, there was not a single on-the-record hearing in Mr. Coleman's case. (139; 136). Nearly three years after charges were filed, the case proceeded to a jury trial, from February 7-9, 2022. (136; 137; 138).

At trial, MAJ's father testified that during the timeline of the allegations, he and MAJ lived in his brother's one-bedroom apartment and that this was the same complex where Mr. Coleman and his brother lived in a one-bedroom apartment with their mother Brenda Tompkins. (137:98-99; 138:77). MAJ testified that the incidents took place in either of these two apartments. (137:222-230). The remainder of the state's evidence consisted of MAJ's friends or family

members and law enforcement who testified that MAJ had reported the incidents around the time of the charges. A pediatric sexual assault report showed no abnormalities. (70).

Regarding the repeated nature of the allegations, the criminal complaint listed four allegations with two occurring at Ms. Tompkins' apartment and two at MAJ's father's brother's apartment. (1:5). The state seemed unclear when trying to summarize how many incidents happened and where they took place, stating that one occurred at each apartment and then vaguely mentioning two other incidents without giving a theory as to where they happened. (138:305-307).

In the middle of that jury trial, the parties argued about Ms. Tompkins and her unavailability to testify. (136:110-111; 138:168-171). Ms. Tompkins passed away on September 22, 2021, about five months before the trial. (138:253). Through the testimony of Mr. Coleman's brother and Mr. Coleman himself, defense witnesses testified that Ms. Tompkins was in very poor health during the timeline of alleged events, as she was nearly bedridden and would only leave her apartment very occasionally for dialysis treatments. (138:196-197, 264).

Of note, the record indicates that Ms. Tompkins would have said that she was present virtually all of the time that either Mr. Coleman or his brother were present in the apartment and did not witness any of the alleged incidents. (136:84-85, 110-111). In

discussions with law enforcement, Ms. Tompkins stated that she could not believe the allegations and immediately asked where they occurred. (177:3). Ms. Tompkins was in disbelief that some of the events could have taken place in her apartment because she was always present with MAJ and in the same room with her when MAJ was at her apartment. (177:3). Upon further suggestions from law enforcement that “sometimes things happen in a split moment[,]” law enforcement noted that “Brenda advised me she wanted to make clear that she is always there whenever [MAJ] is there and does not believe she would have fallen asleep [if MAJ] was in her care.” (177:3).

After the state had already rested its case, Attorney Gonzalez complained that the court system in Dane County stayed shut down longer than that of other counties and that the delays had violated Mr. Coleman’s speedy trial rights, with the resulting prejudice rendering Ms. Tompkins unavailable. (138:157, 169-170). Attorney Gonzalez further stated that he did not file a speedy trial demand or any motion related to speedy trial rights even though Mr. Coleman’s right to a speedy trial was violated. (138:170). The state responded by stating that defense counsel did not object to any of the requested adjournments throughout the course of the proceedings. (138:182). Ultimately, the circuit court did not allow the defense to present any testimony about what Ms. Tompkins would have stated. (138:176-177).

The jury found Mr. Coleman guilty, and the circuit court sentenced him to 32 years, consisting of a 25-year period of confinement and a 7-year term of extended supervision. (138:364; 128:17; 122:1).

In postconviction proceedings, Mr. Coleman asked the court to reverse his conviction and have the case dismissed with prejudice. (153). In particular, Mr. Coleman argued that his constitutional right to a speedy trial was violated by the three-year delay between charging and the jury trial. (153:3-11). Alternatively, Mr. Coleman argued for the same relief in light of the ineffective assistance of trial counsel in failing to assert the right. (153:11-13). During postconviction litigation, Attorney Gonzalez made it clear that he had never contemplated or discussed raising a claim regarding the violation of Mr. Coleman's constitutional speedy trial rights. (166:33). Mr. Coleman also stated that he wanted to go to trial as soon as possible and that had Attorney Gonzalez discussed that right with him, Mr. Coleman would have wanted to pursue it. (166:36-37).

Following a *Machner* hearing<sup>1</sup> and a round of briefing, the circuit court denied Mr. Coleman's postconviction motion. (166; 172; 178; 179). Specifically, the circuit court held that Mr. Coleman was not deprived of his constitutional right to a speedy trial. (179:12). The circuit court also held that Attorney Gonzalez was not ineffective because it

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<sup>1</sup> See *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

would have denied a motion for dismissal of the criminal action on speedy trial grounds had such a motion been filed. (179:14).

This appeal follows.

### **CASE TIMELINE**

The following timeline is divided into three relevant segments: (1) pre-Covid delays during which charges were filed and trial was rescheduled; (2) Covid delays that shutdown or otherwise delayed jury trials across the state and Dane County; and (3) post-Covid delays following the “re-opening” of courthouses through the beginning of the jury trial.

While this timeline does not necessarily include everything that happened in this case, it errs on the side of overinclusion. The question as to whether the delay of nearly three years violated Mr. Coleman’s constitutional right to a speedy trial is solved by scrutiny of this substantial post-accusation delay.

**I. Pre-Covid Delays: June 14, 2019 through  
March 12, 2020**

- 6/14/19 Criminal complaint filed. (1).  
Complaint offered a potential date range for the acts between January 1, 2019 and June 1, 2019. (1:1).
- Initial appearance. (7) Bond set at \$15,000 and parties did not stipulate to waiving the time limits for a preliminary hearing. (7).
- 6/20/19 Adjourned preliminary hearing. (133).
- No attorney appeared with Mr. Coleman, and court set over the preliminary hearing. (133:2).
- 6/25/19 Attorney Jason Gonzalez is appointed to represent Mr. Coleman. (9).
- 6/28/19 Motion for reduction of bail. (12).
- 7/2/19 Adjourned preliminary hearing. (135).  
State asked for the matter to be set over due to witness unavailability. (135:2-3). Defense objected to the set over request. (135:3-4). Court found good cause to set over until July 11, 2019. (14:1; 135:4). Court reduced bond to \$2,000. (135:9).
- 7/8/19 Mr. Coleman posted bond. (17).

- 7/9/19 Preliminary hearing again rescheduled because proper notice was not effectuated,. (19); see App. 21.
- 7/23/19 Preliminary hearing and arraignment. (134). Court bound Mr. Coleman over for trial. (134:11). State filed information. (22).
- 9/30/19 Jury trial scheduled for January 6-8, 2020. (30); App. 18-19.
- 10/30/19 Status conference. Attorney Gonzalez asked for an additional status conference to speak with the assigned prosecutor and for the trial dates to remain on the calendar. App. 18.
- 12/13/19 State requested setting over trial dates, which court grants with no objection from defense. (36); App. 18.
- 1/2/20 Jury trial scheduled for April 13-15, 2020. (38).
- 1/28/20 Status conference. App. 17. Case remains on trial calendar.
- 3/6/20 Status conference. App. 17. Case remains on trial calendar.

## II. Covid Delays: March 12, 2020 through June 1, 2021

- 3/12/20 Dane County Circuit Court suspended jury trials from March 16, 2020 through April 17, 2020. (173:1, 5).
- 3/16/20 Jury trial dates to be rescheduled due to Dane County pandemic precautions. App. 17.
- 3/22/20 Supreme Court of Wisconsin order suspending jury trials through at least May 22, 2020. (174:3).
- 5/29/20 Status conference. (42). Trial dates to be set.
- 7/30/20 Status conference. (46). Trial dates to be set.
- 10/8/20 Status conference. App. 16.
- 3/8/21 Hearing in which court terminates GPS bond conditions. (139:12).
- 5/21/21 Supreme Court of Wisconsin order giving circuit courts local control over Covid restrictions. (175).
- Status conference. App. 15.

### **III. Post-Covid Delays: June 1, 2021 through February 7, 2022**

- 6/1/21 Dane County Circuit Court order rescinding prior Covid jury trial operational policies. (176).
- 6/22/21 Jury trial scheduled for February 7-9, 2022. (53).
- 2/3/22 Jury status hearing. App. 14.
- 2/7/22 Jury trial begins. (136).

### **OVERVIEW OF ARGUMENT**

Two years, seven months, and 25 days passed between the filing of charges against Mr. Coleman and the beginning of the jury trial. Due to a mix of delays caused by the state, the courts, and Covid, Mr. Coleman's constitutional right to a speedy trial was violated as he lived under the cloud of a pending felony case this entire time and saw a key defense witness pass away just five months prior to the trial. This alone is enough for this Court to reverse the conviction and dismiss the case against Mr. Coleman.

Still, in the midst of this long delay, defense counsel Jason Gonzalez never asserted Mr. Coleman's right to a speedy trial. Attorney Gonzalez plainly stated that he had never given any consideration to raising the right, nor had he discussed it with Mr.

Coleman. (166:33). Still, Attorney Gonzalez decided to argue the right to a speedy trial in the middle of the trial when the state had already rested its case. (138:157, 169-170). It made no sense for Attorney Gonzalez to raise this violation for the first time at this point after nearly three years of delays. There was no risk in seeking dismissal earlier—the worst-case scenario was the status quo, and the potential reward was a firm end to the prosecution against Mr. Coleman. Counsel’s continuous inaction rendered him ineffective.

Speedy trial claims implicate interests far beyond the protections afforded to the accused: “While it is important from a defendant’s point of view that he be tried promptly so that his future status is put to rest,” the “paramount interest is society’s concern that all criminal cases be disposed of speedily.” *See State v. Hadley*, 66 Wis. 2d 350, 365, 225 N.W.2d 461 (1975). The societal interests that justify enforcement of speedy trial rights thus dovetail, at times, with those of defendants—even though dismissal with prejudice can be a tough pill for society to swallow. As the Wisconsin Supreme Court has put it, a “speedy trial is a constitutional right, guaranteed to the public as well as to a defendant, which the courts have the ultimate obligation to re-affirm whenever the necessity becomes apparent.” *Id.* at 367. Such necessity is apparent here.

## ARGUMENT

### **I. The lengthy post-accusation delay in this case deprived Mr. Coleman of his constitutional right to a speedy trial.**

Mr. Coleman's constitutional right to a speedy trial was violated when he awaited trial for nearly three years. Even if COVID delays are subtracted from that total, Mr. Coleman awaited trial for roughly 524 days in between the date he was charged on June 14, 2019, and the start of his jury trial on February 7, 2022. (1:1; 136). As a result of this delay, Mr. Coleman's defense was prejudiced when the jury never heard information that bore on a critical issue—whether or not there was even an opportunity for this crime to happen.

#### A. Standard of review and applicable legal standards

Both the state and federal constitutions guarantee defendants a speedy trial. *See* U.S. Const. amend. VI; Wis. Const. Art. I, § 7<sup>2</sup>. Whether a particular delay infringed on this guarantee turns on four factors: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his speedy trial right, and (4) whether the delay was prejudicial to the defendant. *State v. Urdahl*, 2005 WI

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<sup>2</sup> In addition to constitutional speedy trial rights, Wisconsin law contains a statutory right to a speedy trial. *See* Wis. Stat. § 971.10(4). To be clear, Mr. Coleman does not argue that his statutory right was violated.

App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. None of these factors is always necessary or always enough; courts must “engage in a difficult and sensitive balancing process,” giving the weight to each factor that the circumstances warrant. *Barker v. Wingo*, 407 U.S. 514, 533 (1972). And while engaged in this process, they must be mindful that “a fundamental right of the accused” is at stake. *Id.*

This court will decide whether that right was violated here by accepting the circuit court’s findings of fact unless they’re clearly erroneous but reviewing de novo whether the facts establish a constitutional violation. *See Urdahl*, 286 Wis. 2d 476, ¶10. The relevant facts are uncontested. Instead, the issue is whether the delay adds up to a failure to get Mr. Coleman to trial speedily as demanded by the Constitution.

#### B. Speedy trial factors

Three of the above factors point to a constitutional violation in this case, while the fourth and final factor will be further addressed in Mr. Coleman’s second claim. Under the *Barker* test, this Court should find such a violation.

##### 1. Length of the delay

The length of the delay serves two functions in the speedy trial analysis. It first dictates whether the court will engage in the balancing test at all—a trial is speedy if it follows only trivial delays, so a short post-accusation wait will not merit further inquiry. *See*

*State v. Borhegyi*, 222 Wis. 2d 506, 510, 588 N.W.2d 89 (1998). If a delay is long enough to trigger a full review, though, it becomes one of the four factors in the balancing test, relevant mainly as a sign of prejudice. *Doggett v. United States*, 505 U.S. 647, 652 (1992).

Both the state and federal supreme courts recognize that “a post-accusation delay approaching one year” is presumptively prejudicial, requiring a court to apply the balancing test. *Urdahl*, 286 Wis. 2d 476, ¶ 11; *Doggett*, 505 U.S. at 652 n.1.

The period under review began with the filing of the criminal complaint and Mr. Coleman’s arrest on June 14, 2019 and ended when the jury trial began on February 7, 2022. *See Borhegyi*, 222 Wis. 2d at 510-511; (1:1; 136). That is nearly three entire years of Mr. Coleman’s life spent living in limbo. While jury trials were obviously delayed by the State of Wisconsin and Dane County during some of this time, Mr. Coleman’s case was pending for about 524 days outside of those Covid delays (though Covid delays will be addressed below in the section concerning reasons for delays). Since Mr. Coleman’s wait far exceeded a year by any measurement, this Court should consider the length of the delay as part of a broader analysis. *Urdahl*, 286 Wis. 2d 476, ¶ 11.

Beyond its threshold function, the length of the delay matters because it is bound up with prejudice: “the presumption that pretrial delay has prejudiced the accused intensifies over time.” *Id.* at 652. Heeding this principle, the Wisconsin Supreme Court has held

that post-accusation delays of 17 months and 18 months are excessive enough to deprive individuals of their constitutional speedy trial right. *See Borhegyi*, 222 Wis. 2d at 514-515; *State v. Hadley*, 66 Wis. 2d 350, 363, 368-369, 225 N.W.2d 461 (1975).

Mr. Coleman's wait of nearly three years or at least 524 non-Covid-delayed days is well above the presumptive one-year standard. This delay was not just presumptively prejudicial—it raises an intensified presumption of prejudice, weighing on the side of a constitutional violation. *Doggett*, 505 U.S. at 652. This factor undoubtedly weighs in favor of a constitutional violation.

## 2. Reasons for the delay

The cause of the delay is intertwined with the length of the delay. During its assessment, the Court should 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, 666-667, 245 N.W.2d 656 (1976). While whether the state is completely responsible for that delay is debatable in light of Covid delays, Mr. Coleman was not responsible for any of the delay.

The nearly-three years of pretrial proceedings can be broken down into three time periods: pre-Covid wait times from June 14, 2019 to March 12, 2020; Covid delays from March 12, 2020 to June 1, 2021; and post-Covid delays from June 1, 2021 to February 7, 2022.

a. Pre-Covid delays

Mr. Coleman was charged on June 14, 2019. (1). The initial appearance took place the same day, and the parties did not stipulate to waiving the time limits for the preliminary hearing. (7).

The preliminary hearing was then set over multiple times. On June 20, 2019, the circuit court set over the preliminary hearing. (133:2). No attorney appeared with Mr. Coleman for this appearance, through no fault of Mr. Coleman. (133). Attorney Gonzalez would be appointed a few days later on June 25, 2019. (9). At a July 2, 2019 hearing, the state requested the preliminary hearing to again be set over due to the unavailability of a witness. (135:2-3). The court granted the request over a defense objection. (14:1; 135:3-4). On July 9, 2019, the preliminary hearing was again rescheduled, finally taking place on July 23, 2019, where the court bound Mr. Coleman over for trial. (19; 134:11). This final delay was caused by court overcrowding. (179:5).

On September 30, 2019, the case was scheduled for a jury trial to begin on January 6, 2020. (30). At a status conference on October 30, 2019, Attorney Gonzalez asked for another status date that would ultimately not impact the trial dates. App. 18. On December 13, 2019, the state requested the trial dates to be set over, which the court granted. (36); App. 18. The jury trial was then rescheduled to begin on April 13, 2020. (38).

From June 14, 2019 to March 12, 2020 was a delay of 273 days. No substantive defense motions were filed, no substitution request was made, and no motions to withdraw as counsel were filed. (9). These delays were attributable to the state, namely the circuit court and the prosecution, and none of the delays can be attributed to Mr. Coleman. *Ziegenhagen*, 73 Wis. 2d at 666-667.

b. Covid delays

From March 12, 2020 to June 1, 2021, criminal jury trials were delayed either by the Wisconsin Supreme Court or circuit court in Dane County. (173:1, 5; 174:3). Jury trials did not resume again in Dane County until June 1, 2021. (176). This delay was for 447 days. During this time, no substantive hearings took place in this case, and the jury trial was not rescheduled after the dates had lapsed.

Mr. Coleman does not concede that this delay of well over 400 days should not be contemplated in determining whether his speedy trial right was violated. In fact, the delay is undoubtedly attributable to the state, as it was the state via state courts and county courts that delayed jury trials indefinitely. During this time period, Mr. Coleman had no way to assert his constitutional rights. While the pandemic was an unprecedented time, Mr. Coleman still retained his constitutional right to a speedy trial.

It is not well-established that Mr. Coleman's constitutional right to a speedy trial could be subverted in such a manner. (*See* 174:3-7; 175:3-5). In

fact, neither the federal or state constitutions contain any exceptions for the guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to a speedy public trial[.]” Wis. Const. Art. I, § 7; *see* U.S. Const. amend. VI. Given these delays were indisputably caused by the state, these 447 days should be weighed in favor of a constitutional violation.

Regardless of whether this Court considers this Covid delay as a factor in determining whether Mr. Coleman’s right to a speedy trial was violated, there are 524 additional days outside of Covid delays that do count in Mr. Coleman’s favor.

c. Post-Covid delays

The third period of time stretched from the date of resumption of jury trials in Dane County, from June 1, 2021, to the date of jury selection on February 7, 2022. (139; 136). Again, Mr. Coleman did not have a single substantive court date between these two dates. While it is clear to expect that a delay in jury trials would result from the suspension of trials that lasted when over a year in Dane County, this is not the fault of Mr. Coleman, as the reason for the delay lies clearly on the state.

In fact, from July 23, 2019 until February 7, 2022, there was only one on the record court appearance for a bail modification where the court found that Mr. Coleman did not need to be on GPS monitoring as he had largely been complying with his

bond terms for an extremely long amount of time. (134; 139:12; 136).

d. Totality of delays

Overall, the reasons for delay in this case lie with the state. While the state did not necessarily act with malice in slowing the case down, it is clear that the delay was the state's doing. Notably, when Mr. Coleman's speedy trial right was mentioned, the state did not place the blame for the delays on Mr. Coleman. Instead, the state responded by stating that defense counsel did not object to the delays. (138:182). Mr. Coleman played no role in these delays. The delays were not Mr. Coleman's problems to solve; they belonged to the state. More broadly, it was not Mr. Coleman's responsibility to bring himself to trial speedily; that responsibility—a responsibility the state failed to meet at the expense of Mr. Coleman's constitutional right to a speedy (and fair) trial—lies with the state. *Borhegyi*, 222 Wis. 2d at 514.

3. Assertion of the right to a speedy trial

No speedy trial demand was filed in Mr. Coleman's case. In fact, the only time that speedy trial rights were brought up during these proceedings was by Attorney Gonzalez in the middle of the trial when the state had already rested its case. (138:157, 169-170). Obviously, waiting until the trial has already begun or is nearly over is untimely.

Still, the failure to assert the right to a speedy trial is not necessarily fatal to the claim. *Barker*, 407 U.S. at 532. This single factor should not foreclose on Mr. Coleman's right to a speedy trial. Additionally, this Court should still examine Mr. Coleman's right as raised below in the section concerning ineffective assistance of counsel.

#### 4. Prejudice to Mr. Coleman

Prejudice is the final factor in the balancing test. The denial of a speedy trial in this case resulted in Mr. Coleman's inability to call Brenda Tompkins, a key defense witness. The denial of his right means the jury was left with an incomplete picture and should weigh heavily in this Court's analysis.

Speedy trials constrain "oppressive pretrial incarceration," the "anxiety and concern" experienced by defendants, and "the possibility that the defense will be impaired" by the passage of time. *See Barker*, 407 U.S. at 532. When a case is delayed as long as Mr. Coleman's case was, those constraints fall away and a certain amount of prejudice is presumed, obviating the need for a "particularized" prejudice showing. *See Hadley*, 66 Wis. 2d at 364; *Doggett*, 505 U.S. at 655.

Of note, pretrial incarceration concerns are lessened here. In total, Mr. Coleman was incarcerated for 80 days prior to his sentencing hearing with the majority of those days being between the end of the jury trial and that sentencing hearing. (122:2). Unlike the statutory right to a speedy trial, there is no

requirement that an individual be in pretrial custody. *See* § 971.10(4). However, there are two ways that Mr. Coleman was prejudiced by the long delay prior to trial.

First, Mr. Coleman had nearly three years' worth of anxiety and concern as he waited for his case to actually go to trial. (166:36). Instead, Mr. Coleman was essentially forced to put his life on hold while awaiting his day in court. Courts have long recognized that a criminal defendant lives "under a cloud of anxiety, suspicion, and often hostility," regardless of whether the individual is in jail. *Barker*, 407 U.S. at 533. The buildup of anxiety and concern in such a scenario is understandable and even expected.

Second, Mr. Coleman suffered prejudice in the long delay prior to trial in a very obvious way. Mr. Coleman's mother Brenda Tompkins passed away in September 2021. (138:253). Her statements were not allowed at trial. (138:176-177). Ms. Tompkins' statements would have undoubtedly helped Mr. Coleman's case in one of two ways: either as a sort of alibi or as a path to refute the charges that made up the state's "repeated" allegations, which subjected Mr. Coleman to a mandatory minimum of 25 years in prison. *See* Wis. Stat. § 939.616(1r).

Regarding an alibi defense, Ms. Tompkins would have stated that, during the timeline of the allegations, she was virtually always present in the one-bedroom apartment where two of the incidents were alleged to have occurred. (138:196-197, 264).

Ms. Tompkins would have testified that there is no way Mr. Coleman could have committed the offense given the layout of the apartment and her presence therein. When told about the allegations, Ms. Tompkins could not believe it and immediately asked where it occurred. (177:3). Ms. Tompkins was in disbelief that some of the events could have taken place in her apartment because she was always present with MAJ and in the same room with her when MAJ was at her apartment. (177:3). Upon further suggestions from law enforcement that “sometimes things happen in a split moment[,]” law enforcement noted that “Brenda advised me she wanted to make clear that she is always there whenever [MAJ] is there and does not believe she would have fallen asleep [if MAJ] was in her care.” (177:3).

Instead of being able to call an actual witness, the defense could only present tangential testimony about Ms. Tompkins being around. (138:196-197, 264). Had the trial not been delayed as long as it was leaving Ms. Tompkins able to testify, it would have cast significant firsthand doubt on the state’s case and the veracity of MAJ’s testimony about where these assaults happened. It would have served not only as a kind of alibi, but as impeachment testimony of MAJ’s description of the events.

Additionally, Ms. Tompkins’ testimony was important because of the charge Mr. Coleman was facing. Under § 948.025(1)(b), the state was required to prove at least three sexual assaults here. *See Wis.*

Stats. §§ 948.025(1)(b), 948.02(1)(am), (b), (c), (d). MAJ's testimony at trial was at least somewhat unclear about how many incidents occurred and where they occurred. (136:222-230). The criminal complaint listed four allegations with two occurring at Ms. Tompkins' apartment and two at MAJ's father's brother's apartment. (1:5). The state was unclear when trying to summarize how many incidents and where they took place, stating that one occurred at each apartment and then vaguely mentioning two other incidents without giving a theory as to where they happened. (138:305-307). In short, Ms. Tompkins' testimony that she was nearly always present at her apartment and had not seen any such incident would have also cast substantial doubt as to the state being able to prove three incidents as necessary under the "repeated" charge of § 948.025(1)(b).

C. The speedy trial balancing test reveals a constitutional violation.

The *Barker* test determining whether Mr. Coleman's right to a speedy trial was violated weighs strongly in Mr. Coleman's favor. The length of the delay, the reason for the delay (whether or not Covid delays are considered, though they should be considered), and the prejudice to Mr. Coleman resulted in the violation of Mr. Coleman's constitutional right. The assertion of the right to a speedy trial is the only balancing factor that this Court could even consider as weighing against a violation. Still, given the balancing test, failure to assert the right is not dispositive. *See Barker*, 407 U.S. at 532.

The post-accusation delay Mr. Coleman endured violated his constitutional right to a speedy trial. Therefore, this Court should reverse the circuit court's denial of Mr. Coleman's postconviction motion, reverse the conviction, and order the charge dismissed. *See Borhegyi*, 222 Wis. 2d at 509-510.

**II. Trial counsel was ineffective for failing to file a motion to dismiss on speedy trial grounds.**

Because Mr. Coleman's constitutional speedy trial right was violated, he is entitled to have this case dismissed with prejudice; that is the sole and mandatory remedy. *See Strunk v. United States*, 412 U.S. 434, 439-440 (1973).

If this court, however, finds that the lack of an assertion of a right to a speedy trial is decisive here, Mr. Coleman asserts that Attorney Gonzalez was ineffective for failing to move for a speedy trial and that this failure prejudiced him.

Attorney Gonzalez never filed a speedy trial demand and never filed a motion to dismiss on speedy trial grounds. Additionally, Attorney Gonzalez made it clear that he had never contemplated or discussed raising a claim regarding the violation of Mr. Coleman's constitutional speedy trial rights. (166:33). Mr. Coleman also stated that he wanted to go to trial as soon as possible and that had Attorney Gonzalez discussed that right with him, Mr. Coleman would have wanted to pursue it. (166:36-37). Therefore, Mr. Coleman's second constitutional right

was deprived here: the right to effective assistance of counsel.

A. Standard of review and applicable legal standards

Criminal defendants are guaranteed the right to effective assistance of counsel under both the United States Constitution and the Wisconsin Constitution. U.S. Const. amend. VI and XIV; Wis. Const. Art. 1, § 7. Wisconsin courts utilize the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether a defendant was denied his constitutional right to effective counsel. *State v. Pitsch*, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). A defendant must show that (1) his attorney performed deficiently and (2) the defendant was prejudiced. *Strickland*, 466 U.S. at 687.

Counsel's performance is deficient when it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-688. Counsel's deficient performance prejudices the defendant when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In this context, "reasonable probability" is not the same as "more likely than not" or preponderance of the evidence; it is a qualitatively lesser standard. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). See *Porter v. McCollum*, 558 U.S. 30, 44 (2009) ("We do not require a defendant to show that counsel's deficient conduct more likely than not altered the outcome of his penalty proceeding, but

rather that he establish “a probability sufficient to undermine confidence in that outcome.” (Citation omitted)).

In reviewing Mr. Coleman’s ineffectiveness claim, this court will uphold the circuit court’s findings of fact absent clear error but will decide de novo whether the facts demonstrate that defense counsel was ineffective. *State v. Dillard*, 2014 WI 123, ¶86, 358 Wis. 2d 543, 859 N.W.2d 44.

#### B. Deficient Performance

Despite Mr. Coleman’s nearly three-year wait for his trial, Attorney Gonzalez made no attempt to assert Mr. Coleman’s right to a speedy trial. Attorney Gonzalez never contemplated or discussed with Mr. Coleman whether to raise a claim regarding the violation of Mr. Coleman’s constitutional speedy trial rights, which Mr. Coleman would have clearly wanted to pursue. (166:33, 36-37). Furthermore, Attorney Gonzalez acknowledged at trial that the long delay in proceeding to trial had prejudiced Mr. Coleman. (138:169-170). Given the exceedingly-long delay before the jury trial, it defies a reasonable strategy that Attorney Gonzalez would not at least question Mr. Coleman about whether a speedy trial demand should be made.

Additionally, Attorney Gonzalez’s first mention of the issue was in the midst of the jury trial when the state had already rested its case. (138:157). Waiting to address the violation of Mr. Coleman’s speedy trial right when it could not have impacted when

Mr. Coleman would proceed to trial negates any possible strategy behind the decision. With no risk to filing a speedy trial demand, especially when it was what his client wanted anyway, Attorney Gonzalez performed deficiently.

C. Prejudice to Mr. Coleman

As noted above, Mr. Coleman was prejudiced by the failure of his attorney to assert his right to a speedy trial. Specifically, because the case lingered for nearly three years, Mr. Coleman was unable to present the jury with exculpatory evidence. Had his trial proceeded even six months earlier, it is likely that Ms. Tompkins—an extremely important alibi witness—could have testified. (138:253). Her statements would have cast doubt upon allegations of incidents that took place within her own apartment. (177:3). Her testimony would have also called into question the state's evidence about all alleged incidents in a “he-said, she-said” case. At the very least, Ms. Tompkins' testimony would have served to rebut the elements of the statute under which Mr. Coleman was charged, which required “repeated” or at least three incidents to be proven. *See* § 948.025(1)(b).

Attorney Gonzalez's failure to assert Mr. Coleman's speedy trial right prejudiced Mr. Coleman given that the remedy for a violation of a constitutional right to a speedy trial is dismissal. If this Court finds that the lack of speedy trial demand is dispositive to the Barker balancing test to determine

whether Mr. Coleman's constitutional right to a speedy trial was violated, this Court should then find that the failure to assert such a demand was the result of ineffective assistance of counsel.

Thus, along with his constitutional right to a speedy trial, Mr. Coleman's constitutional right to effective assistance of counsel was violated. He is entitled to have this case dismissed with prejudice.

## CONCLUSION

Cordero Coleman asks this Court to hold that he was deprived of his constitutional right to a speedy trial. Therefore, this Court should reverse the circuit court's order denying his postconviction motion and remand the case with instructions to vacate his judgment of conviction and dismiss the case with prejudice.

Dated this 11<sup>th</sup> day of March, 2024.

Respectfully submitted,

*Electronically signed by*

*Leo Draws*

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### **CERTIFICATION AS TO FORM/LENGTH**

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5,912 words.

### **CERTIFICATION AS TO APPENDIX**

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

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

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

Dated this 11<sup>th</sup> day of March, 2023.

Signed:

*Electronically signed by*

*Leo Draws*

LEO DRAWS

Assistant State Public Defender