STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2023AP002414 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CORDERO D. COLEMAN,

Defendant-Appellant.

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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REPLY BRIEF OF DEFENDANT-APPELLANT

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

A. Introduction.

Mr. Coleman's constitutional right to a speedy trial was violated when he awaited trial from the charging date on June 14, 2019 until the beginning of his eventual jury trial on February 7, 2022. (1:1; 136). This delay totaled 969 days. Furthermore, Mr. Coleman was prejudiced by these substantial delays given the death of a defense witness about five months before the trial. (138:253).

As the final appellate brief before the Court in this matter, it is clear that the parties agree on the standards of review (*de novo*) and the applicable balancing test for a constitutional speedy trial claim under *State v. Urdahl*, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324, and *Barker v. Wingo,* 407 U.S. 514, 533 (1972). (Def. Brief 18-19, 32; St. Brief 20-21). That test as to whether a particular delay infringes on the right to a speedy trial 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. *Urdahl*, Wis. 2d 476, ¶11.

Additionally, the parties agree that the first factor in the *Barker* test—that the length of the delay is presumptively prejudicial—is in Mr. Coleman's favor. (Def. Brief 19-21; St. Brief 21-22). The parties also agree that the above charging and jury trial dates are the relevant timeline, though there are some

disputes about which dates fall into pandemic and post-pandemic delays. (Def. Brief 12-16; St. Brief 8).

Therefore, the big question on appeal is whether this delay of 969 days between charge and trial, spanning pre-pandemic, pandemic, and post-pandemic times, violated Mr. Coleman's right to a speedy trial. To that end, Mr. Coleman argues that the suspension of jury trials in Dane County from March 12, 2020 until June 1, 2021 (or 466 days) is attributable to the state as it was the state and county courts that rendered trials impossible. Even outside of those delays, there were 523 days in between charge and trial, very few of which are attributable to Mr. Coleman and well past the range of presumptive prejudice.

B. Reasons for the delay.

There is no dispute that Mr. Coleman awaited 969 days between charge and trial. (1:1; 136). Of these 969 days, the state takes responsibility for a grand total of 11 days. (St. Brief 8, 23, 25). These 11 days are the period of time between July 11, 2019 and July 23, 2019 and are accountable to the state because an overcrowded court was the cause of the delay. (179:5; St. Brief 25); *see Urdahl*, 286 Wis. 2d 476, ¶26 (delays caused by overcrowded courts are counted against the state).

The state refutes the position that the pandemic delays consist of the time between March 12, 2020 until June 1, 2021, during which jury trials were shut down. (St. Brief 8, 23). Instead, the state takes a longer view: that the pandemic delayed Mr. Coleman's trial from March 12, 2020 until his trial began on February 7, 2022, for a total of 697 days. (St. Brief 23).

It is, therefore, the state's position that the pandemic delay spans those first 446 days when a jury trial was literally impossible as they were prevented by court order and the 251 days as well from the court's reopening to, apparently, the minute Mr. Coleman's trial began. The state's position here is that the delays after the courts reopened were due to "the court system [ ] laboring under the significant backlog of cases caused by the pandemic." (St. Brief 23).

In other words, the state accepts that the 11 days between July 11, 2019 and July 23, 2019 are attributable to it because the delay was caused by an overcrowded court calendar. (St. Brief 8, 23, 25); *see Urdahl*, 286 Wis. 2d 476, ¶26. In an apparent contradiction, the state denies responsibility for any other delay, including the 251 days when courts were too overcrowded to have a jury trial between June 1, 2021 and February 7, 2022. (St. Brief 34-35). Instead of referring to overcrowded courts as the reason for the delay, the state references the "backlog" of cases in an attempt to avoid this discrepancy. (St. Brief 34-35). Under *Urdahl*, these 251 days should be attributed to the state. *Urdahl*, 286 Wis. 2d 476, ¶26.

As the state notes, there is no published Wisconsin case law on whether the state is responsible for pandemic delays. (St. Brief 31). The state cites several cases outside our jurisdiction for the proposition that these delays do not count against the state. (St. Brief 32-33). Still, other courts have held differently.

The Montana Supreme Court has stated it "agree[d] with [the defendant] that the outbreak of the COVID-19 pandemic and this Court's precautionary

directives did not confer a free pass to the government to ignore speedy trial protections." *State v. Hesse*, 2022 MT 212, ¶13, 410 Mont. 373, 519 P.3d 462.[1] The Vermont Supreme Court echoed that pandemic delays are attributable to the state because the responsibility for addressing the logistical problems rested with the government. *State v. Labrecque*, 2023 VT 36, ¶¶25-28, 307 A.3d 878.[2] And while not a criminal matter, the United States Supreme Court has held that "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 20, 141 S. Ct. 63 (2020).

As to whether the pandemic delays during which jury trials were shut down from March 12, 2020 until June 1, 2021 (446 days), Mr. Coleman still contends that these should be held against the state. After all, this shut down was ordered by the courts of this state. (173:1, 5; 174:3; 176). While this is not the fault of the "prosecution" here, it is still the fault of the state and should be held against the state:

> "[T]he government as an institution is charged with the duty of assuring a defendant a speedy trial. It is irrelevant whether the delay occurred in the clerk's office, the prosecutor's office, or *the judiciary*. The delay in the circumstances of this

[1] The court found on other grounds that the defendant's right to speedy trial was not denied, but he also did not demonstrate any specific prejudice to his case because of the delays. *Id.*, ¶24. Here, Mr. Coleman does show specified prejudice.

[2] Similar to the Montana Supreme Court's decision, this court found the defendant had still not shown actual prejudice and instead relied on the presumptive prejudice inherent to the delay. *Id.*, ¶¶40-42.

> case is to be charged against the State of Wisconsin."

State v. Ziegenhagen, 73 Wis. 2d 656, 666-667, 245 N.W.2d 656 (1976) (emphasis added).

The state says that 11 days of delay are attributable to it because they were caused by an overcrowded court. (St. Brief 8, 23, 25). The state then says that the 251 days following the reopening of courts are not attributable to it, even though they were also caused by an overcrowded court. (St. Brief 34-35). Mr. Coleman still firmly argues that these delays, combined with delays caused by the state, via courts, in shutting down jury trials (for 446 days), are attributable to the state. At minimum, this is a delay of 708 days that should be held against the state. It was the state's job to ensure that Mr. Coleman was brought to trial in a speedy fashion, and the state, whether it was the prosecution or judiciary, failed to do so. *See State v. Borhegyi*, 222 Wis. 2d 506, 514, 588 N.W.2d 89 (1998). Thus, this Court should find that the second factor in the *Barker* test is in Mr. Coleman's favor.

C. Mr. Coleman was prejudiced by this substantial delay.

Prejudice is the fourth and final factor in the *Barker* balancing test. The delay prejudiced Mr. Coleman in two main ways. 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). Second, Brenda Tompkins, Mr. Coleman's mother, passed away in September 2021, and Mr. Coleman was prejudiced by her inability to testify because of the delays. (138:253).

Regarding the first area of prejudice, the state seems to argue that Mr. Coleman's anxiety and concern about his pending criminal case was normal "in virtually every criminal case[.]" (St. Brief 38). This overlooks the fact that Mr. Coleman faced this matter for 969 days before trial—something that is not necessarily present in virtually every criminal case. Additionally, the state contends that Mr. Coleman was not forced to put his life on hold during the pending allegation because he was employed during that period of time. (St. Brief 37-38, citing 139:4-5). It is not clear why Mr. Coleman maintaining employment in order to afford the necessities to continue living would mean that his life was not on hold during the pendency of this case.

More importantly, Mr. Coleman was prejudiced by the death of his mother, who would have been a witness, about five months prior to trial. As a short initial matter, the state incorrectly says that Ms. Tompkins passed away in September 2020, when she actually passed away in September 2021. (138:253; St. Brief 44). While this is likely a typo as the state lists the date correctly in other places in its brief, it is notable that Ms. Tompkins would have been available to testify had the trial been delayed only about five months fewer. (St. Brief 16, 38, 40).

Had Ms. Tompkins' testified, she would have been akin to an alibi witness or at the very least refuted some of 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. (177:3). 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). Despite prodding from law enforcement, the officer 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).

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 sort of alibi, but as impeachment testimony of MAJ's description of the events. This is important because MAJ's testimony about how many incidents occurred or where they occurred was messy. (136:222-230). In closing, the state was similarly unclear on this. (138:305-307). This would have made Ms. Tompkins' testimony all the more important.

As set forth in the defense brief, this testimony was also important because of the nature of the "repeated" charge Mr. Coleman was facing. (Def. Brief 28-29).

The state argues that Mr. Coleman never specifies "exactly" what Ms. Tompkins would have testified to. (St. Brief 38). The state also argues that a claim that Ms. Tompkins would have provided an alibi defense is too speculative. (St. Brief 38-39).

As stated above, Ms. Tompkins would have testified before the jury in line with her statements to law enforcement—that "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). Such testimony was so important for the jury to hear in a case with no physical evidence.

The state argues against Ms. Tompkins as an alibi witness by providing "possible" occasions that she would not have been present during the timeline of the allegations. (St. Brief 39-40; 177:3). Of note, the timeline of the allegations totaled six months. (1:1). That neither Mr. Coleman during trial or Ms. Tompkins in her conversation with law enforcement did not give a detailed account of each second of these six months does not render the potential testimony useless. If anything, Mr. Coleman and Ms. Tompkins not being able to account for each moment during the six-month timeline is expected and would have come across honestly.

Given that the delay prejudiced Mr. Coleman by the substantial pre-trial wait and resulted in the death of a key defense witness, this Court should find that the fourth factor of the *Barker* test weighs in Mr. Coleman's favor.

D. Conclusion.

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, and the prejudice to Mr. Coleman resulted in the violation of Mr. Coleman's constitutional right. 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.

Just as the parties are in agreement that the first factor in the *Barker* test is in Mr. Coleman's favor, there is also no dispute that Mr. Coleman did not assert his right to a speedy trial. (Def. Brief 25-26; St. Brief 36-37). However, the failure to assert the right to a speedy trial is not necessarily fatal to the claim as this is a balancing test. *Barker*, 407 U.S. at 532.

If this Court does find that the lack of such an assertion of a right to speedy trial is the deciding factor in the *Barker* test, Mr. Coleman argues that the failure to raise such an assertion was due to ineffective assistance of counsel. (Def. Brief 30-32).

Trial counsel's performance was deficient were he never filed a speedy trial demand or motion to dismiss the case on speedy trial grounds. Additionally, trial counsel clearly never contemplated or discussed raising a claim regarding the violation of Mr. Coleman's speedy trial rights with Mr. Coleman—

a right Mr. Coleman would have wanted to raise had he been informed of it. (166:12, 33, 36-37). The prejudice, as outlined above, that Mr. Coleman suffered was the case pending for so long such that a key defense witness died five months before trial.

The state argues that trial counsel's performance was not deficient because had trial counsel filed a constitutional speedy trial demand, the trial court would have denied it anyway. (St. Brief 42, citing 179:14-15).

It is correct that the trial court later stated that it would have denied any demand for a speedy trial should it have been made in a timely fashion. (179:14-15). Likewise, it is undisputed that trial counsel never advised Mr. Coleman of the right or even contemplated filing such a demand. (166:33). Mr. Coleman contends that it is this error by counsel that resulted in deficient performance and that this is the reason that the third factor in the *Barker* test—the demand for a speedy trial—was not met. (Def. Brief 32-33). This is the sole reason for which Mr. Coleman raises such an ineffective assistance of counsel claim.

Based upon these facts, there is no situation in which this Court should find that Mr. Coleman's constitutional right for a speedy trial would have been violated had he filed a demand for a speedy trial but then find trial counsel was not ineffective for failing to do so (or even confer with Mr. Coleman about the possibility of such a demand). It is logically inconsistent to find both that Mr. Coleman's claim fails for want of a speedy trial demand and then find that trial counsel was effective where he did not demand a speedy trial.

In conclusion, trial counsel'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 12th day of July, 2024.

Respectfully submitted,

Electronically signed by
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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 2,882 words.

Dated this 12th day of July, 2024.

Signed:
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