No. 22-6080

ORIGINAL

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF MINNESOTA

JAMES DAVID WREN — PETITIONER

VS.

KEITH ELLISON, ET AL. — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[ ] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

[X] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

ERIC L HENNEN
NOTARY PUBLIC
MINNESOTA
My Commission Expires Jan. 31, 2025

(Signature)

SIGNED / SWORN BEFORE ME ON

THIS 1 DAY OF November 2022.

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SUPREME COURT, U.S.

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, JAMES DAVID WREN, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis,* I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount During the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$	$	$
Self-employment	$ 0	$	$	$
Income from real property (such as rental income)	$ 0	$	$	$
Interest and dividends	$ 0	$	$	$
Gifts	$ 0	$	$	$
Alimony	$ 0	$	$	$
Child Support	$ 0	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$	$
Disability (such as social security, insurance payments)	$ 0	$	$	$
Unemployment payments	$ 0	$	$	$
Public assistance (such as welfare)	$ 0	$	$	$
Other (specify):	$ 0	$	$	$
Total monthly income:	$ 0	$	$	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $ 0

5. Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A		$	$
		$	$
		$	$

6. List the assets, and their values, which you own, or your spouse owns. Do not list clothing and ordinary household furnishings.

□ Home
Value 0

◆ Other real estate
Value 0

□ Motor Vehicle #1
Year, make & model 0
Value

◆ Motor Vehicle #2
Year, make & model 0
Value

□ Other assets
Description N/A
Value

7. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
SW	DAUGHTER	11
JW	SON	12
JW	SON	10

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$ 0	$
Are real estate taxes included? ◆ Yes ☐ No Is property insurance included? ◆ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 0	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other: _____	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: _____	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): _____	$ 0	$
Total monthly expenses:	$ 0	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☒ Yes ☐ No

If yes, how much? $500.00

If yes, state the person's name, address, and telephone number:

ANGELA G. WILLIAMS
4103 COLFAX AVENUE NORTH
MINNEAPOLIS, MN 55412
(612) 403-9031

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I HAVE BEEN INCARCERATED FOR THREE YEARS AND CANNOT RUN MY PROMOTION COMPANY.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 1, 20 22

ERIC L HENNEN
NOTARY PUBLIC
MINNESOTA
My Commission Expires Jan. 31, 2025

(Signature)

No. 22-6080

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES DAVID WREN,

Petitioner,

v.

KEITH ELLISON, et al.,

Respondents.

On Petition for a Writ of Certiorari to the State of Minnesota Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

James David Wren
Pro Se
970 Pickett Street North
Bayport, Minnesota 55003

QUESTION(S) PRESENTED

I. If a jury has been empaneled, and trial has started, is the prosecutor's lack of childcare a good enough reason to violate a citizen engrained constitutional right to enjoy a speedy trial, and the trial Judge to grant a continuance for over 90 days?

II. Is the constitutional right to a speedy trial put on hold during a pandemic?

III. Were the Petitioner denied due process of law in violation of the 14th Amendment, by the circumstances of the conviction were affirmed under criminal statute for violation of which he had not been charged?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Michael O. Freeman, Hennepin County Attorney
Minneapolis, Minnesota
(for Respondents)

RELATED CASES

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Moore v. Arizona,

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STATUTES

MINN. STAT. § 609.06
MINN. STAT. § 611A.04, SUBD. 1(a) (2012)
MINN. STAT. § 611A.045, SUBD. 1(a)
MINN. STAT. § 611A.045, SUBD. 3(a)
MINN. STAT. § 611A.01, SUBD. (b)
M.S.A. § 611A.045

RULES

MINN. R. 2940.2000
MINN. GEN. R. PRAC. 703
MINN. R. CRIM. P. 11.09
MINN. R. CRIM. P. 6.06
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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix _____to the petition and is

[ ] reported at_____;_or,

[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

The opinion of the United States district court appears at Appendix ___to the petition and is
[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

[ ] For cases from **state courts:**
The opinion of the highest state court to review the merits appears at Appendix _____to the petition and is

[ ] reported at_____; or,

[ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

The opinion of the court appears at Appendix ___ to the petition and is

reported; or, [ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date _____ and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on (date) in Application No._____ A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[X] For cases from **state courts:**

The date on which the highest state court decided my case was denied August 9, 2022. A copy of that decision appears at Appendix A – Letter from Mesenbourg & Sarratori Law Offices, P.A., dated August 11, 2022.

[ ] A timely petition for rehearing was thereafter denied on the following date:_____, and a copy of the order denying rehearing appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including (date) on (date) in Application No. A The jurisdiction

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or Naval Forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On October 24, 2019, Petitioner was charged by indictment with First Degree Murder – Premeditated; Second Degree Murder with Intent – Not Premeditated; Attempted Second Degree Murder with Intent – Not Premeditated; and First-Degree Assault – Great Bodily Harm from an incident occurring on June 10, 2019, in Hennepin County. Prior to the indictment, the Petitioner was charged by complaint with the Second-Degree Intentional Murder; Attempted Second Degree Murder with intent; and Felon in Possession of a Firearm.

On October 3, 2019, the Petitioner demanded a speedy trial, however; was not brought to trial until June 15, 2020. The Petitioner was convicted on June 30, 2020 of Second-Degree Murder – Unintentional while committing a felony and first-degree assault – great bodily harm.

The Petitioner's trial counsel brought two Motions to Dismiss the indictment before the trial court for

did not proceed to trial until 256 days after his demand for a speedy trial on October 3, 2019.

On March 16, 2020, the Petitioner was prepared for trial and a Jury was empaneled when the Court, in response to the State's request for a continuance, continued the trial over the objection of the defendant citing child care issue, from Governor Tim Walz, executive order 20-02 ordering the temporary closure of public schools as justification, which was in direct opposition to the U.S. and Minnesota Constitution and the direct order from the Minnesota Supreme Court's Order ADM20-8001 dated and filed March 13, 2020, regarding court procedures during the pandemic.

The first issue of this Petition deals with the trial court's clear violation of the Petitioner's right to a speedy trial. This Petition also addresses three other issues:

- The States inclusion of a Second-Degree Murder – Unintentional while committing a felony. Jury instruction after it had rested and prior to closing arguments, without presenting that charge to a Grand Jury or a Motion to Amend the Indictment; a challenge to the ordered restitution in the matter; and the Petitioner denied the effective assistance of counsel.

REASONS FOR GRANTING THE PETITION

DECISION APPEALED

The Petitioner, James David Wren, requests the Supreme Court Review of the above-entitled decision of the Court of Appeals upon the following grounds:

I. Was Defendant denied his right to a speedy trial hen this matter was continued from March 16, 2020 until June 15, 2020, through no fault of the Defendant? Court of Appeals affirmed. State of Minnesota denied review.

II. Did the trial court error in allowing a jury instruction for second degree murder while committing a felony when that charge is neither on the indictment nor did the state make a motion to amend the indictment? Court of Appeals affirmed. State of Minnesota Supreme Court denied review.

III. Should the restitution award be vacated based upon the district court violating his right to a speedy trial? Court of Appeals affirmed. State of Minnesota Supreme Court denied review.

IV. Was defense counsel ineffective for not calling certain defense witnesses, not objecting to the defendant being referred to as "the shooter," not objecting to Officer Fischer's improper vouching testimony regarding state's witness, Christopher Frovik; and not objecting to a criminal jury

instruction being given for second degree murder - while committing a felony, a charge that was not presented to the grand jury?

Court of Appeals ruled that the appellant was not deprived effective assistance of counsel. State of Minnesota Supreme Court denied review.

Reason why Certiorari by the Supreme Court of the United States review is necessary.

The State of Minnesota in Supreme Court errored when it denied review of this case when the Appellant was asking for clarification from the Minnesota Supreme Court on their order for continuing operations of the courts of the State of Minnesota under a statewide peacetime declaration of emergency filed March 13, 2020, ADM20-8001 signed by the Court Lorie S. Gildea, Chief Justice. The Minnesota Supreme Court granted review or Jackson (State v. Jackson, 968 N.W. 2d 55 (Minn. App. 2021) (Rev. granted) (Jan. 18, 2023)) where there was a delay of only 77 days and the charge was not considered super high priority by the State of Minnesota in Supreme Court. My case was considered high priority, my jury was empaneled on March 13, 2020, and I had a speedy trial demand and did not go to trial until some 256 days from my speedy trial demand and 354 days from my not guilty plea. My trial was on record was stopped

because the prosecution lacked childcare. Not for the fear of transmission of COVID-19 or any health and safety circumstances of any case participant. The trial court judge errored when she did not give me a bench trial. It is clear my engrained constitutional right to enjoy a speedy trial as a citizen was violated. The appeal court errored by using the word impossible when saying it was impossible to move forward with my trial. When the district attorneys for the State, my attorneys, the Judge, the jury, and the appellant were all present in the courthouse and the courthouse was able to house a trial. When trials were still going on in Hennepin County courthouse until March 29, 2020. Because of the issue of COVID-19 vs. the Constitution, this case should be heard.

ARGUMENT

To determine whether a delay constitutes a deprivation of the right to a speedy trial, a court must balance the following four: "(1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his or her right to a speedy trial, and (4) whether the delay prejudiced the defendant." Id. At 109 citing from Barker v. Wingo, 407 U.S. 514, 530-33, 925 Ct. 2182, 2192-93, L. Ed. 2d 101 (1972) and State v. Windell, 258 N.W. 2d 795, 796 (Minn. 1977) which adopted the four-part Barker inquiry for speedy trial demands. None of the factors alone is dispositive; rather, the factors are related and "must be considered together with such other circumstances as may be relevant." State v. Windish, 590 N.W. 2d 311, 315 (Minn. 1999) (Quotation Omitted)

The first part of the Barker analysis is the length of the delay. When the length of the delay is "presumptively prejudicial," it triggers review of the remaining three factors. ID. In Minnesota, a delay of more than 60 days from the date of the speedy trial demand is presumptively prejudicial. Id. At 315-316. State v. Griffin, 760 N.W. 2d 336, 340 (Minn. Ct. App. 2009). Here the length of delay was 256 days, beginning when I asserted my speedy trial demand on October 3, 2019 when I finally got in the courtroom after many off record sessions between the State and my counsel which was undisputed by the trial court and the State to the day trial was commenced on June 15, 2020, 256 days is well beyond the 120 days contemplated by statute,

rule and caselaw, to bring a citizen to trial or release them with non-monetary conditions under Rule 6.01, subd. 1. See Minn. R. Crim. P. 11.09. If the trial would have continued as it began on March 13, 2020, as what was ordered by Justice Gildea on March 13, 2020, this argument would not have been made.

It is clear, and the trial court and the Court of Appeals agreed, that the length of delay weighed in favor of the defendant. The second Barker factor is the reason for the delay. The State and the Court have the burden of ensuring speedy trials for criminal defendants. See Id. at 316; Cham, 680 N. W. 2d at 125. If a defendant's own actions caused the delay, there is no violation of the right to a speedy trial. State v. Jackson, 498 N.W. 2d 10, 16 (Minn. 1993). There may be no violation if the delay is due to good cause, but good cause for delay does not include calendar congestion unless exceptional circumstances exist. McIntosh v. Davis, 441 N.W. 2d 115, 119-120 (Minn. 1989). Here the trial court arguably abused its discretion in determining that the reason for the delay was the fault of me. The trial court analysis was flawed and self-serving. It is clear the Court did not want to release a person accused of premeditated murder even thought I had a valid self-defense claim and was being held in clear violation of my Constitutional Rights. The trial courts statement that the defendant caused most of the delays through March 16, 2020, is false when the speedy trial

date was scheduled on October 3, 2019, when Craig Cascarno was counsel and good cause was found if I got indicted, which I did. The trial court then claims a neutral and valid reason to delay the trial further and violate my constitutional right was presented i.e., the pandemic is troubling considering ruling from the 9th Circuit. Cited from the federal judge in the United States v. Olsen, 21 F. 4th 1036 clearly states, "Given the constitutional importance of a jury trial to our democracy, a court cannot deny an accused his right to a jury trial unless conducting one would be impossible. This is true whether the United States is suffering through a national disaster, a terrorist attack, civil unrest, or the coronavirus pandemic that the country and the world are currently facing. Nowhere in the constitution is there an exception for times of emergency or crisis. There are no ifs or buts about it.

The Court of Appeals position that the second prong of the Baker analysis was neutral is also concerning. When it's up to the government to decide if the defendant goes to trial. The claim that the delay was based upon public safety was not accurate. Check transcript of proceeding dated March 16, 2020, page 19 lines 5 to 16 and you will see, the initial delay that put this case "over the top" was based upon the lack of childcare for the prosecutors. The Court of Appeals also errored when it compared State v. Jackson, 968 N.W. 2d 55, 60 (Minn. App. 2021) (quotation omitted), rev granted (Minn. Jan. 18,

2022) to my case. Jackson is not like my case. I demanded a speedy trial on October 3, 2019. My speedy trial date was March 16, 2020, my jury was empaneled. The Jackson jury was not. I had a first-degree murder charge (high priority), Jackson had a domestic abuse no contact order, medium priorities case by the Minnesota Judicial branch case priorities list. Jackson did not get charged by complaint until March 13, 2020. Jackson invoked his right to a speedy trial at his May 18, 2020, omnibus hearing well after the order by Lorie S. Gildea, Chief Justice, filed March 13, 2020. Jackson was in trial 77 days after his demand. Also, I am not stating that the order from the Chief Justice stopped me from going to trial but is the reason why I should have continued my trial. The reason of a lack of childcare was not a valid reason to delay a murder trial. This is another example of the court interpreting an order to better serve its agenda instead of following the law, not only the constitution, but the orders given to the lower courts by a higher court which a trial Judge is sworn to follow. For the Appellate Court to read the order and affirm is unjust. For the State of Minnesota in Supreme Court to deny review when the order came from their Chief Justice is a blow to the court's democracy. The Appeal Court position that the second prong of Barker analysis weighed against me was not supported by the record of law, this Barker factor too weighs in the appellant's favor.

The third Barker factor is whether the defendant

asserted his right to a speedy trial. State v. Griffin, 760 N.W. 2d 336, 340 (Minn. Ct. App. 2009). It is clear and unrefuted that I asserted that right on October 3, 2019. Even the State's attorney Dominick Matthews in his State memorandum in opposition to Appellate motion to dismiss due to speedy trial violation dated and signed April 15, 2020, said this Barker factor weighs in my favor. Also, I make mention of my speedy trial rights in the transcripts on every court date following the October 3, 2019, demand. For the Appeal court to claim that my assertion was not strong and therefore based upon State v. Jackson, 968 N.W. 2d 55, 60 (Minn. App. 2021), (quotation omitted). Rev. granted (Minn. Jan. 18, 2022), stating "these circumstances weaken the strength of the defendant's demand for a speedy trial in our overall balancing." This is alarming and unsupported by the record. The record clearly supports that I strongly asserted my speedy trial demand on more than one occasion. It was asserted on October 3, 2019. It was asserted again on March 16, 2020, in my objection to the State's request to continue. It was again asserted when my defense counsel filed two motions to dismiss for violations of my speedy trial rights. For the Appeals Court to find that this factor does not even weigh weakly in my favor, as in State v. Boder, (Minn. App. 2022) Unpub, is unjust because I never waived my speedy trial rights 91 days after my demand as stated by the appeals court and is unsupported by the record. The Court of Appeals claim that a trial was not

possible is wrong. United States v. Olsen, 21 F. 4th 1036. Other judges continued trials until March 29, 2020, please check the court calendars. The court errored when saying the word impossible. To rely on Jackson, which was a fundamentally different set of facts, is misplaced. See Jackson. This Barker factor weighs strongly in my favor of finding a speedy trial violation.

The final prong of the Barker test is to determine whether defendant suffered prejudice as a result of the delays. Taylor, 869 N.W. 2d at 20. The Supreme Court has identified three interests that are protected by the right to a speedy trial: (1) preventing oppressive pre-trial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired. See Id. A defendant does not have to affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant's case. See Moore v. Arizona, 414 U.S. 25, 26-27, 94 S. Ct. 188, 38 L. Ed. 2d 183 (1973). The Supreme Court has said that the third factor, impairment of a defendant's defense, is the most serious. See Doggett v. United States, 505 U.S. 647, 655, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (citing Barker, 407 U.S. at 532, 92 S. Ct. 2182). State v. Windish, 590 N.W. 2d 311, 318 (Minn. 1999). A defendant asserting violation of his speedy trial rights does not have to affirmatively prove prejudice; prejudice may be suggested by likely harm to a defendant's case. See Id.

Analyzing these factors, I, the defendant, have borne all three forms of prejudice. First, oppressive pretrial incarceration was clearly present here. I could not get any visits from my family, friends, or even my lawyer, going from having the time of my life to being overcharged and facing the rest of my life for protecting myself, family and friends messed with my liberty. I had to eat cold food three times a day and had only 30 minutes to use the phone or shower every other day. It is clear that my incarceration was oppressive. Second, awaiting trial for first degree premeditated murder is scary. I had to prepare myself mentally for five different trial dates with the many trial dates that were scheduled and then continued. I lost all sources of income, which put a strain on my business and partnership with my business partner. The five different trial dates not only heightened my anxiety and caused me to start medication for anxiety, but it also created anxiety for my family and witnesses. My witnesses were also threatened that if they came to testify on my behalf, something bad would happen to them. Then one of my witnesses got killed when he was in Minnesota only to testify at my trial. All of this would cause anyone anxiety.

The third Barker factor that the appeals court only addressed in its affirming, prejudiced my case. With the COVID-19 restrictions, my defense was hindered with only getting 30 minutes to shower or use the phone every other

day. I could not properly prepare my defense with that short amount of time. I could not call my witnesses or try to at least track them down. I could not call my attorney if I wanted to talk to my mom, kids, or girlfriend. I really had to choose and that was messing with my liberty. My witness, Jeliesa Bellinger, who is named on the defendant's list of potential witnesses dated March 12, 2020, was not able to testify because she was on a preplanned vacation when I was finally to begin trial on June 15, 2020, but was ready to testify on March 17, 2020, and all the other trial dates. Ruby Baker was ready to testify on the March 16, 2020, trial date but could not make it to the June 15, 2020, trial date because she was back on her Army base and could not deploy.

Her testimony alone would have been looked at as an officer and would have supported my self-defense claim. Kyle Culbertson was murdered and was a major witness for me because he was only a few feet away and was going to tell the jury that he heard the would-be armed robbers say, "You know what time it is." Indicating robbery. For the lower courts to appeals court to say he got killed March 22, 2020, and was unable to testify is an assumption. Who's to say that my jury selection would have taken a whole week? It could have taken me three days as we had already discharged eight jurors. What if I was granted the bench trial that I asked for but was denied? In State v. Winbush, 590 N.W. 2d 311, 318-19 (Minn. 1999), the court noted that it is

often difficult to prove impairment of defense and that defendant need only show likely harm to his case. Here I have shown more than likely harm and the prejudice factor, as the others weigh against the State. The loss of witnesses means the loss of evidence. I have shown the unavailability of three major witnesses to support my self-defense claim.

For the appeals court to say that Kyle Culbertson's death occurred before he would have testified and whether his testimony would have helped appellant is at best speculative is concerning and challenges the democracy of the court system. The death or the missing of a witness is obvious. The court is responsible for vindicating a person's right to a speedy trial. See State v. Griffin, 760 N.W. 2d 366 (Minn. Ct. App. 2009) also citing United States v. Hicks, 2022 U.S. Dist. Lexis 70297. Defendant argues he has suffered prejudice because the 147 days of additional imprisonment have forced him to live "under a cloud of anxiety, suspicion, and often hostility and hindered his ability to gather evidence, contact witnesses or otherwise prepare his defense." I even asked the court for a bench trial on record. Please check court transcripts dated March 16, 2020, page 27 lines 3-4 and page 28 lines 5-6. I even asked what day the court would be addressing the issue of a bench trial. The court: we'll talk about all of those things.

The court would not even give me a bench trial. The record is void of the judge even addressing

the bench trial again in over 2000 pages. I mention the bench trial because if the court would not have denied my right to a bench trial and I went to the trial on March 16, 2020, my speedy trial date, my many witnesses including Kyle Culbertson would have been available to testify, and my speedy trial rights would not have been violated.

With all of this, the four Barker factors weight in my favor and it shows a speedy trial violation. The trial court and the court of appeals relying on the COVID-19 pandemic to justify the continuances of the matter, first at the request of the State on March 16, 2020, after a jury was empaneled and sworn, then at least two more times on its own motion, was not legally supported, as in United States v. Olsen, 21.F. 4th 1036. The appeals court by stating that housing a trial was impossible. On March 16, 2020, the trial Judge was available, healthy, and able to proceed, as were both defense's counsel, the defendant, and both State's counsel. The courthouse was still standing and able to house a trial. The jury was empaneled and ready to do their sworn duty. The only articulated reason for the trial not going forward was a childcare concern raised by the State because the schools were closing pursuant to the Governor's executive order. This reason was not sufficient to violate a citizen's constitutional rights and clearly not an exigent circumstance contemplated by the law. Even more concerning is that the court continued to

delay this trial, even allowing it to be subordinate to lesser priority cases on June 1, 2020, only to find out that no cases one out of four scheduled instead of Mr. Wren's went to trial.

There was no justification under the law for the trial court to violate and continue to violate my fundamental right to a speedy trial. There was no executive order from the Minnesota Supreme Court suspending trials on March 13, 2020. Please read the order filed by State of Minnesota Supreme Court dated March 13, 2020, that a Minnesota Judicial Council carefully agreed upon and extended again on March 20, 2020. For the Court of Appeals to affirm, knowing that, and the State of Minnesota Supreme Court to deny review without acknowledging their order is an example of a two-tiered justice system that only exercise the Constitution when it's beneficial and that's not honorable. For these reasons, the Petitioner seeks an order granting review of the decision of the Court of Appeals and the denial of review by the State of Minnesota Supreme Court.

Minn. R. Crim. P. 17.05 provides that the trial court "May permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." As stated in State v. Doeden, 309 Minn. 544, 546, 245 N.W.

2d 233, 234 (1976), "this rule refers to motions to amend indictments or complaints after the commencement of trial." Rule 17.05 comes into play once jeopardy has attached – that is once the jury is sworn.

The principle underlying Rule 17.05 is a concern for prejudicial effect, not procedural regularity. See State v. Caswell, 551 N.W. 2d at 255 "prosecutor cannot sidestep the requirements of Rule 17.05 simply by moving to charge additional violations, rather than by moving to amend the original complaint." Consistent with the rules purpose, we hold that when the record demonstrates that a defendant is confronted with an additional charge after trial has begun, such charge constitutes a constructive amendment of the complaint and must comply with the requirements of Minn. R. Crim. P. 17.05. State v. Guerra, 562 N.W. 2d 10, 13 (Minn. Ct. App. 1997).

In this case, there was no motion made by the State to amend the indictment, which mentions nothing about the Second-Degree Murder while committing a Felony. This charge was not even mentioned in the original complaint prior to the State obtaining the indictment. The only reference to the instruction was on page 1942 of the trial transcript, lines 8-13 wherein the defense references the defendant's notice of "Murder Two, unintentional felony murder instruction" through an email received on the

last day of trial prior to the State's continued cross-examination of Mr. Wren and closing arguments. Murder Two, unintentional felony murder contains different elements and is a completely different charge that what I was indicted for. As for prejudicial, the only murder charge that I was convicted of was the new charge or tab charge that violated my Fifth Amendment rights.

As cited in Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960), after an indictment is returned, its charges may not broaden through amendment except by the Grand Jury indictment against him itself. A defendant's right under the Fifth Amendment, to have a Grand Jury make the charge on its own judgment, is a substantial right cannot be taken away with or without Court amendment of the indictment. Here the District Court did not even amend the charge of my indictment or follow Minn. R. Crim. P. 17.05, which this Court states as being far too serious to be treated as nothing more than a variance and then dismissed as harmless error. In Ex-parte Bain, 121. U.S. 1, the Court held "that after the indictment (****9) was changed it was no longer the indictment of the Grand Jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected (*217) by the Constitutional provision, at the mercy or control of the Court or prosecuting attorney..." 121 U.S. 1, 13. The District Court and the Appeals Court says that it is a lessor

included and must be given citing State v. Dahlin, 695 N.W. 2d 588, 598 (Minn. 2005) (holding that District Court must give a lessor included offense instruction when the lessor offense is included in the charged offense and the evidence provides a rational basis both for acquitting the defendant of offense charged and for convicting the defendant of the lessor included offense).

The Bain case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. See also United States v. Norris, 281 U.S. 619, 622. Cf. Clyatt v. United States, 197 U.S. 207, 219, 220.

This charge is not on record one time, or even in the Register of Actions for Case No. 27-CR-19-13690 so the State has no jurisdiction over me on this charge. The Court attorney even told the jury his own opinion in his closing argument that I got on the stand and admitted to this charge just to get a conviction on an illegal charge. Clearly the State had all the evidence that was given to the jury at trial, June 13, 2019, when the State filed the complaint, and October 24, 2019, when the case was taken to a Grand Jury. Second Degree Unintentional Felony Murder could have been added and the charges that were trumped up, dropped.

The Tab Charge or lessor included charge was

prejudicial and unlawful. I did not have time to prepare for this charge nor was I even offered a plea deal for this charge the Grand Jury never made against me. This was fatal error. The Court pointed out that I did not object to the added charge, but I did. As previously stated, the Court took me off record but under Minn. R. Crim. P. 31.02, the Appeals Court has the discretion to consider a jury instruction not objected to at trial if it's plain error affecting substantial rights.

In light of State v. Griller, 583 N.W. 2d 736, 742 (Minn. 1998) the Courts apply a three-prong test for plain error, requiring that there be (1) error, (2) that it's plain, and (3) that it affects the defendant's substantial rights. Griller, 583 N.W. 2d at 740. To satisfy if "the error was prejudicial and affected the outcome of the case." This is to ensure fairness and the integrity of the judicial proceedings.

Here the Court is relying on the words defined as causing the death of a human being and not the words of and degree of murder. The words premeditated and unintentional are very different and mean the opposite. In one sentence, the State of Minnesota is saying that I premeditated a murder, then in another sentence is saying the murder was unintentional. The facts of the case, the State added second degree murder with intent and second-degree attempted murder as lessor included charges to first degree murder and

first-degree attempted murder, check findings of fact, conclusions of law and order filed in District Court, State of Minnesota dated 2-10-2020. Finding probable cause for first degree murder, on page 30, the Judge said in writing that the State was adding second degree murder with intent and second-degree attempted murder as lessor-included to first murder and first degree attempted murder, so the same Court adding unintentional second degree unintentional felony murder is saying that the State is adding a lessor-included to a charge that the courts have already added as a lessor-included, meaning in context that the court is adding a lessor-included to a lessor-included, and doing so without even following the proper rules of the Court Minn. R. Crim. P. 17.05.

This court did not even have a hearing on the matter, this action clearly violated my Fifth Amendment rights. However, the Constitution does not forbid all amendments of an indictment, but only those "effectively subject a defendant to the risk of conviction for an offense that was not originally charged in the indictment." Here, Rule Minn. R. Crim. P. 17.05 was not even used to amend the indictment. If this court grants a review, restitution would be addressed in the brief. When evaluating an ineffective assistance of counsel claim, we apply the two-prong test articulated in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). State v. Lahue, 585 N.W. 2d 785, 789 (Minn. 1998) (applying the

Strickland test to claim of ineffective assistance of trial counsel); Roby v. State, 547 N.W. 2d 354, 356-57 (Minn. 1996) applying the Strickland test to claims of ineffective assistance of appellate counsel).

The first prong, often referred to as the "performance" prong, requires an appellant to show that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88, 104 S. Ct. 2052. The second prong, often referred to as the "prejudice" prong, requires the appellant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id at 694, 104 S. Ct. 2052 for the claim to succeed, both prongs must be met. Id at 697, 104 S. Ct. 2052. "There is a strong presumption that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" State v. Jones, 392 N.W. 2d 224, 236 (Minn. 1986) (quoting Strickland, 466 U.S. at 694, 104 S. Ct. 2052). Fields v. State, 733 N.W. 2d 465, 468 (Minn. 2007).

Mr. Wren's trial counsel failed to object to the added charge as referenced in the above-stated argument, referring to the second-degree murder, while committing a felony charge that Mr. Wren was ultimately convicted. The record is void of defense counsel objecting to or presenting any argument (1) regarding the

lateness and failure to follow proper procedure to add the charge and instruction, that Mr. Wren would have been exonerated of all charges.

Clearly not presenting a single argument or objection to this gross violation of Mr. Wren's Fifth Amendment rights was not reasonable and prejudiced Mr. Wren. When Mr. Wren did object to the tab charge the court went off record. Please check transcripts when Mr. Wren first found out about the added charge. The appeals courts said in their affirmed opinion, "that the Attorney objections to the lessor included jury instruction would have been pointless" is plain error, if the Petitioner's counsel would have objected to the new jury instruction that added the second degree unintentional murder charge he would have saved the right for the issue to be reviewed by the appeal court and any professional and competent lawyer would have objected to the tab charge just for that reason alone.

Mr. Wren pleaded self-defense and witnesses that he requested, Rashied Howard and Thaddeous Williams was there in the courthouse ready to be called to testify, these are eyewitnesses to the alleged murder, they were attacked and made a statement to his private investigator stating that they were scared of getting robbed and were getting attacked for no reason, and their testimony would have helped me and went right with my

self-defense claim. His reason for not calling them was he did not believe they would help me and therefore he refused to call them to the witness stand. How would more people saying that M.C., S.C., and T.C., were the aggressor's and how scared they were did not help me, their testimony goes directly to my self-defense claim and possible acquittal is plain prejudice and clear ineffective counsel.

During the trial, Mr. Wren's attorney failed to object to improper vouching testimony, given by Officer Molly Fischer about a lay witness in violation of Mr. Wren's due process rights on page 1709 of the transcript, it states as follows:

Q. When you compared the video surveillance to what Mr. Frovik said, did you find it consistent or inconsistent?
A. Found it very consistent (see transcript pg. 1709, 9-11).

The trier of fact is the sole judge of credibility. Mr. Frovik's testimony was not at all consistent with physical evidence and video surveillance, Mr. Frovik testified that Mr. Wren ran up and shot in a crowd that was proven to be false, Mr. Frovik testified that Mr. Wren had the gun in his left hand and extended over his tow truck and shot someone and he fell by his right passenger tire, that was proved to be false. Mr. Frovik testified that Mr. Wren shot another person and that person fell in front of his tow truck that was proven to be false and there are

many more things that he testified to that was proven to be false and these were very important facts that proved Mr. Frovik's testimony was not consistent.

The jury is the only one who should determine what is consistent and what is not. This statement, which was not objected to by Petitioner's counsel, demonstrates ineffective assistance of Counsel. Allowing a police officer to comment on the credibility of a witness or comment about his or her testimony prejudiced Mr. Wren, not objecting to such egregious conduct is unreasonable. During the trial, the defense failed to object and request a mistrial for the State's consistently referring to the defendant as "shooter" and the deceased and injured as victim(s) throughout the trial, which is pejorative and highly prejudicial. Rairdon v. State, 557 N.W. 2d 318, 323 (Minn. 1996) State v. Hall, 764 N.W. 2d 837, 845 (Minn. 2009) during jury selection, the State stated the following:

Now, this kind of goes back to our initial point is you cannot be swayed by sympathy either for the defendant or even the victims in this case. (See transcript pg. 307, 16.18).

Now, you will learn that there are two victims in this case, and that one of them died. (See transcript, pg. 307, 24-25).

There was no objection to those statement or

questions. Mr. Tiemey even called the deceased and his nephew "victims" on page 838, paragraph 1-2. (See transcript, pg. 838, 1-2) and this is supposed to be my lawyer, those are only a few examples. The transcript is full of references to victims which is unconscionable. Mr. Wren is claiming self-defense and saying that he's the victim of an attempted robbery. This takes away the defendant's presumption of innocence and the presumption that he is in fact the victim. Additionally, during opening statement, beginning on page 938 of the transcript, Mr. Larson continuously refers to Mr. Wren as the "shooter." He does it at least eight times during his short opening statement and Mr. Matthews telling the jury in his closing statement that Mr. Wren got on the stand and admitted to the second-degree unintentional murder charge knowing that it is not only prejudicial but takes away Mr. Wrens' presumption of innocence. Again, there was no objection by the defense.

Based on the trial attorney's failure to object to improperly added charge to the indictment which Mr. Wren was convicted; failure to object to the improper vouching testimony; allowing the state to refer to Mr. Wren as the shooter without objection or the injured and deceased as victims; and refusal to call witnesses that were in the courthouse who would have supported Mr. Wren's case. The clear preparation of an incomplete defense and failure's to properly defend Mr. Wren's constitutional rights

throughout a trial amount to ineffective assistance of counsel.

This case presents this court with an opportunity to clarify the Speedy Trial Act and the order from the Supreme Court of Minnesota ADM 20-8001 filed March 16, 2020, dealing with the pandemic and a constitutional right to a speedy trial. Also, the meaning of extraordinary circumstances and if the prosecutors lack of childcare is extraordinary circumstances by this court is a lessor-included violating a strawman constitutional right to not have his or her indictment broadened through amendment except by the grand jury itself. The Sixth Amendment guarantees a defendant in a criminal case the right to assistance of counsel. It is clear my Sixth Amendment was violated by my public defender, but even indigent citizen's deserve effective counsel.

CONCLUSION

For the foregoing reasons, Mr. Wren respectfully requests that the court issue a Writ of Certiorari to review the judgment of the Minnesota Court of Appeals.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES DAVID WREN

Date: 11-1-22

JAMES DAVID WREN #238420
PRO SE ATTORNEY FOR PETITIONER
JAMES DAVID WREN
970 PICKETT ST. NORTH
BAYPORT, MN 55003

ERIC L HENNEN
NOTARY PUBLIC
MINNESOTA
My Commission Expires Jan. 31, 2025

SIGNED / SWORN BEFORE ME ON

THIS 1 DAY OF November 20 22

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

JAMES DAVID WREN,

Petitioner,

v.

KEITH ELLISON, et al.,

Respondents.

PROOF OF SERVICE

I, James D Wren, do swear or declare that on this date, 11-1, 2022 as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN fORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 1, 2022

ERIC L HENNEN
NOTARY PUBLIC
MINNESOTA
My Commission Expires Jan. 31, 2025

SIGNED / SWORN BEFORE ME ON

THIS 1 DAY OF November 2022

(Signature)

ELH

The names and addresses of those served are as follows:

Michael O. Freeman (000031860)
Hennepin County Attorney
Special Litigation Division
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487
(612) 348-5550

Keith M. Ellison (09000890X)
Minnesota State Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101
(651) 297-2040

This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1364, A21-0726

State of Minnesota,
Respondent,

vs.

James David Wren,
Appellant.

Filed May 2, 2022
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-19-13690

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Paul P. Sarratori, Mesenbourg & Sarratori Law Offices, P.A., Coon Rapids, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant argues that his conviction and the district court's post-sentence restitution order must be reversed because his right to a speedy trial was violated by COVID-related delays. He also argues that the district court abused its discretion by instructing the jury

on a lesser-included offense and by ordering restitution and that he received ineffective assistance of counsel. Because appellant's speedy-trial right was not violated by COVID-related delays, we see no abuse of discretion in the jury instruction or the restitution order, and because appellant's counsel did not provide ineffective assistance, we affirm.

FACTS

In June 2019, appellant James Wren was identified by a witness, C.F., as the shooter in an incident in downtown Minneapolis that left one man dead and another man paralyzed. Appellant was charged with second-degree intentional murder, with attempted second-degree intentional murder, and with possession of a firearm by an ineligible person.

In October 2019, appellant demanded a speedy trial. Both his counsel and the prosecutor said that they could not be prepared for trial until January 2020 and that, if appellant were also indicted on first-degree murder charges, they could not be prepared until March 2020. Trial was continued until January 21, 2020. Later in October, appellant was also indicted on charges of first-degree premeditated murder, attempted first-degree premeditated murder, and first-degree assault.

Early in November, appellant's private counsel's motion to withdraw and appellant's motion to discharge his private counsel were both granted, and a public defender (P.D.) was appointed for appellant. The P.D. said he could not be ready for trial by January 21, 2020, and appellant waived his right to a speedy trial until March 16, 2020.

Questionnaires were distributed to potential jurors on March 13, 2020. On that date, the Chief Justice of the Minnesota Supreme Court responded to the emerging COVID-19 pandemic with an order suspending all district court proceedings until March 30, 2020,

except for ongoing jury trials and certain high-priority cases. On March 16, 2020, the state sought a continuance of appellant's trial because of COVID, and a continuance was granted until May 11, 2020.

On March 30, 2020, and again on May 26, 2020, the P.D. moved to dismiss the indictment based on a violation of appellant's right to a speedy trial; both motions were denied. All jury trials were suspended until June 1, 2020, and it was decided that a shorter, simpler case than appellant's should be tried first, as part of a pilot program. Appellant's case went to trial on June 15, 2020.

The jury heard testimony from C.F., a major witness for the prosecution. He testified that, at about two o'clock in the morning on June 10, 2019, while he was at work driving his tow truck in an alley, he had to stop driving because a group of people was walking towards him, arguing and swearing. A man came up on the driver's side of the truck, hit the mirror, and, while standing six or seven inches from C.F.., started shooting. C.F. saw light flashing from the gun; he heard two "tinks" on the hood of his truck that he believed were casings from the gun. C.F. described the shooter as an African-American male, between 6'2" and 6'5" tall, who was wearing a dark shirt and a necklace with a gold charm; his hair was in a bun or braids, and he had a small backpack on his shoulders. C.F. saw a gunshot hit one person, who fell to the ground, and saw another person on the ground, about three or four feet from C.F.'s truck and from the shooter. C.F. looked the shooter directly in the eyes and pointed him out to the police when they arrived. C.F. also said he did not see or hear anyone else firing a gun. Finally, he identified the shooter as appellant, who was present in court.

The state requested a jury instruction on the lesser-included offense of unintentional second-degree felony murder, there was no objection, and the district court added that instruction. The jury found appellant guilty of unintentional second-degree felony murder and first-degree assault. He was sentenced to 189 months in prison for first-degree assault and to a consecutive 180 months in prison for second-degree murder, a total of 369 months in prison, and he was ordered to pay $8,557.65 in restitution.

Appellant challenged the judgment of conviction and the restitution order in separate appeals, which were consolidated. On appeal, he argues that his right to a speedy trial was violated, that the district court abused its discretion in instructing the jury on a lesser-included offense and in ordering restitution, and that he was denied the effective assistance of counsel.

DECISION

1. Right to a Speedy Trial

"Whether a defendant has been denied a speedy trial is a constitutional question subject to de novo review." *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017). But "any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

Barker sets out four factors to be considered in speedy-trial claims: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the prejudice to the defendant. *Barker,* 407 U.S. at 530. Minnesota has adopted these factors, noting that they are to be considered in balancing "the sometimes competing interests between the orderly prosecution of crimes that is fair to both sides and

the prompt resolution of the case by trial." *State v. Mikell*, 960 N.W.2d 230, 245 (Minn. 2021). The *Barker* factors are not exclusive; rather, they are considered "together with such other circumstances as may be relevant" in evaluating an alleged violation of the right to a speedy trial. *Osorio*, 891 N.W.2d at 628. In the final analysis, "whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends on the circumstances." *State v. Jackson*, 968 N.W.2d 55, 60 (Minn. App. 2021), (quotation omitted), *rev. granted* (Minn. Jan. 18, 2022).

The circumstances in *Jackson*, like those in this case, included the COVID pandemic. *Id.* at 58. *Jackson* cited and applied the four *Barker* factors. *Id.* at 60.

A. Length of the Delay

"On demand of any party after the entry of [a not-guilty] plea, the trial must start within 60 days unless the court finds good cause for a later trial date." Minn. R. Crim. P. 11.09(b). Appellant first demanded a speedy trial on October 3, 2019; he waived his speedy-trial right on March 16, 2020, 165 days after his initial speedy-trial demand; and his trial began on June 15, 2020, which was 91 days after the end of the waiver. Therefore, we must address the three remaining *Barker* factors. *See State v. Windish*, 590 N.W.2d 311, 315-16 (Minn. 1999).

B. Reason for the Delay

In *Jackson*, the defendant argued that the state was responsible for the delay because the Chief Justice of the Minnesota Supreme Court had ordered that no trials were to be held until adequate safety precautions were in place. 968 N.W.2d. at 61. This court rejected that argument:

> [T]he circumstances of the pandemic in July 2020 rendered a trial unsafe and did not reflect a deliberate attempt by the state to hamper the defense. [The appellant's] 77-day wait after invoking his speedy-trial demand was unavoidable. Accordingly, we hold that neither [the appellant] nor the state are responsible for the delay in commencing the trial when that delay occurred solely because of public-safety concerns due to the COVID-19 pandemic and when the district court was prohibited from holding a jury trial by order of the Chief Justice.

Id. *Jackson* holds that "[i]n the context of a speedy-trial analysis, neither the state nor the defendant is responsible for the delay in bringing a defendant to trial when that delay is solely due to public-safety concerns related to the COVID-19 pandemic." *Id.* at 58. Accordingly, under *Jackson,* we conclude that neither appellant nor the state was responsible for the 91-day delay from March 16, 2020, to June 15, 2020.

C. Assertion of the Right to a Speedy Trial

Jackson noted that "a defendant's assertion of his speedy trial right is entitled to strong evidentiary weight in determining whether the defendant was deprived of the right, . . . [but] the inquiry is necessarily contextual." *Id.* at 61 (quoting *Mikell*, 960 N.W.2d at 252 (quotation omitted)). In *Jackson,* the state's counsel asked the district court to find good cause to extend the trial date because a trial could not occur without violating the order of the Chief Justice, and the defendant's counsel did not object. *Id.* at 62. The district court responded, "I am going to make a finding that, as [to] the specific articulations by [counsel], they are all true. We couldn't have a trial if we wanted to have a trial today, or [if the defendant] demanded that he have a trial today." *Id.*

This court "[did] not question whether [the *Jackson* defendant's] demand for a speedy trial was serious," but observed that "the context of the demand illustrates that all parties were aware that a safe trial could not occur within the 60-day period because of the pandemic and . . . [t]hese circumstances weaken the strength of [the defendant's] demand for a speedy trial in our overall balancing." *Id.* Analogously, while appellant's demand for a speedy trial was serious, a safe trial in his case was not possible before June 15, 2020. His demand, while serious, was incapable of fulfillment, given the context in which it was made.

D. Prejudice to the Defendant

The prejudice that can result from a violation of a defendant's speedy-trial right may be avoided or minimized by protecting the defendant's interests in (1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired. *Barker*, 407 U.S. at 532. The most serious of these interests is the third. *Id.*

Here, appellant argues that his defense was impaired because K.C., a witness to the shooting, was killed on Sunday, March 22, 2020, and therefore unavailable to testify in support of appellant's self-defense claim. The district court, in denying appellant's motions to dismiss because of a speedy-trial violation, found that, because trial testimony was not due to start until May 23, "K.C. was killed before he would have testified, even if the trial had not been continued." The district court also noted that appellant was "able to use video surveillance footage of the incident or call any of his numerous other friends who were present during the shooting to support his self-defense claim." Appellant's defense

was not impaired by the delay of his trial because K.C.'s death occurred before he would have testified, and whether his testimony would have helped appellant is at best speculative.

The defendant in *Jackson* did not contend that the delay impaired his defense. *Jackson*, 968 N.W.2d at 62. In *Jackson*, the balancing of the four *Barker* factors led this court to conclude that the delay was justified by the pandemic, its length was consistent with and proportionate to that justification, and there was no particular harm to the defendant resulting from the delay: his right to a speedy trial was not violated. The same is true here.

2. Jury Instruction

Near the end of trial, on Saturday, June 27, 2020, counsel for both parties received an email from the district court containing a revised version of the jury instructions and asking them to let the district court know by email if they had any changes or corrections, or if they were "fine with this revised version of the instructions." On Sunday, June 28, 2020, the P.D. sent an email saying, "As for the jury instructions, the defense approves of this final draft"; later, counsel for the state sent an email saying, "The State approves of the current jury instructions. However, the State intends to ask for a lesser-included count of Murder in the Second Degree (Felony/Unintentional) . . . . Therefore we are requesting the jury instructions be added for that offense." The district court replied to these messages that "[t]he murder in the second degree, while committing a felony, instruction was added at the request of the state" and also said, "[t]hese changes will be discussed tomorrow

morning and the instructions will be finalized only after hearing arguments from the parties on any disputes." The next morning, neither side objected to the instructions.[1]

This court reviews a district court's decision to give a requested lesser-included offense instruction for an abuse of discretion. *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005). Where the evidence warrants a requested lesser-included offense instruction, the district court must give it. *Id.*; *see also State v. Dahlin*, 695 N.W.2d 588, 598 (Minn. 2005) (holding that district courts must give a lesser-included-offense instruction when the lesser offense is included in the charged offense and the evidence provides a rational basis both for acquitting the defendant of the offense charged and for convicting the defendant of the lesser-included offense).

Here, based on the evidence, the jury acquitted appellant of the charged offenses, first-degree premeditated murder (defined as "caus[ing] the death of a human being with premeditation and with intent to effect the death of the person or of another" in Minn. Stat. § 609.185(a)(1)(2018)), and second degree murder, with intent but not premeditated, (defined as "caus[ing] the death of a human being with intent to effect the death of that person or another, but without premeditation" in Minn. Stat. § 609.19, subd. 1(1)(2018)). However, the jury convicted appellant of the lesser-included offense, second-degree unintentional murder (defined as "caus[ing] the death of a human being, without intent to

[1] Thus, as appellant acknowledges, the standard of review is arguably de novo. When there is no objection, an appellate court has discretion to consider a claim of error on appeal if the instructions involve either a plain error affecting substantial rights or an error of fundamental law. *State v. Reek*, 942 N.W.2d 148, 158 (Minn. 2020).

effect the death of any person, while committing or attempting to commit a felony offense . . . ." in Minn. Stat. § 609.19, subd. 2(1)(2018)).

Appellant does not mention the term "lesser included offense," but he argues that "[u]nintentional felony murder is a different charge than intentional murder" and "unintentional felony murder contains different elements and is a completely different charge than what [appellant] was indicted." He also argues that it was "clearly plain error" to add a new charge "that is arguably substantially different . . . than what was charged in the original complaint and indictment." But every lesser degree of murder is a lesser included offense under Minn. Stat. § 609.04 (2020), which defines a lesser included offense as a lesser degree of the same crime, or an attempt to commit the crime charged, or an attempt to commit a lesser degree of the same crime, or a crime necessarily proved if the crime charged were to be proved. *See Dahlin,* 695 N.W.2d at 597.

There was no abuse of discretion in the district court's decision to give the instruction on a lesser-included offense that the state requested.

3. Restitution

The district court ordered appellant to pay the mother of the man whose death was caused by the shooting $1,000 and the Crime Victims Reparations Board $7,500 for funeral expenses. The order provided that, during incarceration, appellant was to pay by deduction from his prison wages and inmate account, and, during supervised release, by deduction from his wages; he will have paid the entire amount by the time supervised release ends. Appellant argues that the restitution award should be vacated if his conviction is reversed on speedy-trial grounds and, in the alternative, that the district court "abused its

discretion in finding that [appellant] had the ability to pay restitution [because] he will make $.50 per hour while incarcerated until he is 55 years old." Appellant argues that this court should "remand [the award] back to the trial court to address [appellant's] ability to pay and to outline a payment plan."

A district court in setting restitution "shall consider . . . the income, resources, and obligations of the defendant." Minn. Stat. § 611A.045, subd. 1 (2020). This court reviews a restitution order for an abuse of the district court's "broad discretion." *State v. Wigham*, 967 N.W.2d 657, 662 (Minn. 2021).

Wigham sets out a district court's obligations concerning restitution.

> [W]e hold that a district court fulfills its statutory duty to consider a defendant's income, resources, and obligations in awarding and setting the amount of restitution when it expressly states, either orally or in writing, that it considered the defendant's ability to pay . . . . [T]he record must include sufficient evidence about the defendant's income, resources, and obligations to allow a district court to consider the defendant's ability to pay the amount of restitution ordered.

Id. at 664-65. The district court here complied with these obligations, finding that:

> [Appellant] is currently incarcerated. [He] qualified for the services of the public defender. [Appellant], however, is a relatively young man of 36 years old, and nothing in the record suggests that he would be mentally or physically unable to work, either while in prison or upon release. The Department of Corrections will withhold a portion of prison wages and a portion of money deposited in inmate accounts for restitution. Therefore, [appellant] has an ability to make payments toward the restitution amount while incarcerated. Moreover, [he] is anticipated to be released from prison in 2039, when he will be approximate[ly] 55 years old. He could be employed and will have a sufficient period of time within which to repay restitution while on supervised release (parole). After considering [appellant's] financial situation, including his

> current incarceration, the court concludes that restitution should remain in the total amount of $8,500.
>
> . . . .
>
> Once [appellant] is placed on supervised release, [he] shall work with his supervised release officer to establish a payment schedule. The payment schedule shall ensure that [he] makes regular and substantial payments and remains obligated to pay the entire restitution amount in full by the date that [his] supervised release ends.

Thus, the district court has already done what appellant wants it to do on remand: addressed appellant's ability to pay and outlined a payment plan. We affirm the restitution award.

4. Ineffective Assistance of Counsel

Appellant claims that he received ineffective assistance of counsel during his trial because the P.D. did not call "eyewitnesses to the alleged murder and [appellant] acting in self-defense" and did not object to the jury instruction on second-degree felony murder, to an officer's testimony that he found an eyewitness's testimony consistent with the video surveillance, or to references to appellant as "the shooter" and to the man killed and the man paralyzed by the shooting as "the victims." To prevail on his ineffective-assistance claim, appellant must show both that the P.D.'s "representation fell below an objective standard of reasonableness" and that there is "a reasonable probability that, but for [the P.D.'s] unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). Known as the *Strickland* prongs, these criteria of an ineffective-assistance claim were adopted by Minnesota in *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

A. The P.D.'s Performance

The objective standard of reasonableness is met when an attorney exercises "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Vang*, 847 N.W.2d, 248, 266 Minn. 2014) (citation omitted). There is a strong presumption that an attorney's "performance falls within the wide range of professional assistance." *State v. Miller*, 754 N.W.2d 686, 709 (Minn. 2008). Appellate courts do not generally review an ineffective-assistance claim that is based on trial strategy. *Vang*, 847 N.W.2d at 267. "Which witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of the trial counsel. Such trial tactics should not be reviewed by an appellant court, which, unlike [trial] counsel, has the benefit of hindsight." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Thus, the P.D.'s decision not to call the exculpatory witness or witnesses appellant claims should have been called is not a decision this court reviews in an ineffective-assistance claim. *See id.*; *Andersen v. State*, 830 N.W.2d 1, 13 (Minn. 2013) (declining to review an attorney's decision not to call exculpatory witnesses as an act falling within trial strategy).

An attorney's failure to object to a jury instruction is equally a matter of trial strategy. *State v. Mosley*, 895 N.W.2d 585, 592 (Minn. 2017); *White v. State*, 711 N.W.2d 106, 110 (Minn. 2006) (noting that jury instructions are matters of trial strategy and an attorney's failure to object to a jury instruction is therefore not reviewable). The P.D.'s decision not to object when an officer testified that he found the eyewitness's testimony

consistent with the video surveillance recording, even if it were vouching testimony, is also a matter of trial strategy. *State v. Vick*, 632 N.W.2d 676, 689 (Minn. 2001) (declining to review failure to object to vouching testimony, because not objecting to it was a matter of trial strategy). The P.D.'s decisions not to object when appellant was referred to as "the shooter" and when the man who later died and the man who was paralyzed from the shooting were referred to as "the victims" were also matters of trial strategy. This court does not review such decisions, and the P.D.'s conduct did not fall below an objective standard of reasonableness.

B. Prejudice to appellant[2]

Appellant has the burden of proof as to his prejudice from the P.D.'s representation. *See State v. Cram*, 718 N.W.2d 898, 907 (Minn. 2006) (holding that the defendant has the burden of proof on both prongs of an ineffective-assistance claim). The defendant in an ineffective-assistance claim must show "that but for the errors [of counsel] the result of the proceeding probably would have been different." *Gates*, 398 N.W.2d at 562.

Appellant argues that he "pleaded self-defense[,] and witnesses that he requested of his attorney to be called, eyewitnesses to the alleged murder and [appellant] acting in self-defense, did not testify. . . . [The] attorney did not believe they would help and therefore refused to call them even though they would go directly to [appellant's] possible acquittal." Appellant does not say who these witnesses were or what they would have said to convince

[2]Although we need not consider whether appellant was prejudiced by that conduct, we do so in the interest of completeness. *See Vang*, 874 N.W.2d at 266 (holding that an appellate court "need not analyze both [*Strickland*] prongs if either one is determinative").

the jury that appellant was not the shooter. "In determining whether the defendant [making an ineffective-assistance claim] has made the requisite showing [of prejudice], the court must consider the totality of the evidence before the judge or jury." *Id.* Here, C.F.'s testimony alone provided ample evidence to support the jury's verdict that appellant committed second-degree murder; the witnesses whom appellant wanted to call would not have altered the verdict, and he was not prejudiced by their absence.

Appellant also objects that he was prejudiced because his presumption of innocence was taken away by the references to him as "the shooter." But appellant himself testified that he was the shooter and that he had lied to the police about not being the shooter, which would have done more to reduce the jury's presumption of his innocence than any other person's reference to him as the shooter. The use of the word "victim" to refer to someone who was shot and killed has been held not to be prejudicial. *State v. Hall*, 764 N.W.2d 837, 845 (Minn. 2009). Appellant was not prejudiced either by the P.D.'s failure to object to the use of "shooter" to refer to appellant or by the use of "victims" to refer to those he shot during the trial.

The addition of the jury instruction on the lesser included offense of second-degree murder was mandatory; appellant's attorney's objection to it would have been pointless, because a district court must give a requested lesser-included offense instruction when the evidence warrants it. *Hannon*, 703 N.W.2d at 509. Finally, the officer who testified that she had compared the testimony of C.F., a third-party witness, to the video surveillance of the incident and found that the testimony and the video were consistent was not commenting on the credibility of C.F: she had previously said that the prosecution's "two

big pieces of evidence" were the eyewitness to the crime and the large amount of video surveillance in downtown Minneapolis. She was asked if she found the two pieces of evidence consistent, and said she did; she went on to testify how the videos corroborated what the police had been told by C.F. Moreover, the jurors were repeatedly instructed that they were the sole judges of witnesses' credibility, which would have reduced any possible prejudice from the officer's statements. Appellant was not prejudiced by the P.D.'s failure to object to the officer's testimony. Appellant has not shown either that the P.D.'s representation of him fell below a standard of reasonableness or that he was prejudiced by the P.D.'s representation.

Appellant's right to a speedy trial was not violated; the district court did not abuse its discretion either in instructing the jury on a lesser-included offense or in setting restitution, and appellant was not deprived of the effective assistance of counsel.

Affirmed.

MESENBOURG & SARRATORI LAW OFFICES, P.A.
ATTORNEYS AT LAW

Paul P. Sarratori

J.E. Mesenbourg
Of Counsel

2601 Coon Rapids Boulevard
Coon Rapids, Minnesota 55433
Telephone: 763.754.5555

August 11, 2022

ATTORNEY-CLIENT PRIVILEGE

James David Wren (OID 238420)
Minnesota Correctional Facility - Stillwater
970 Pickett St
Bayport, MN 55003

Re: State v. James David Wren

Dear Mr. Wren:

Enclosed for your review and information please find a copy of the Order from the Supreme Court Petition for Review of Decision of Court of Appeals in your appeal matter. Please let me know if you have any questions.

Sincerely,

Paul P. Sarratori

PPS/dmb
Enclosure

STATE OF MINNESOTA

IN SUPREME COURT

A20-1364
A21-0726

State of Minnesota,

Respondent,

vs.

James David Wren,

Petitioner.

O R D E R

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of James David Wren for further review be, and the same is, denied.

Dated: August 9, 2022

BY THE COURT:

G. Barry Anderson
Associate Justice

STATE OF MINNESOTA

IN SUPREME COURT

James David Wren ,

Petitioner,

PETITIONER FOR REVIEW OF DECISION OF COURT OF APPEALS

vs.

Appellate Court Case No.: A20-1364, A21-0726

State of Minnesota,

Respondent.

Date of Filing of Court of Appeals Decision
May 2, 2022

To: The Supreme Court of the State of Minnesota.

Paul P. Sarratori (#0391714)
Mesenbourg & Sarratori Law Offices, P.A.
2601 Coon Rapids Blvd.
Coon Rapids, MN 55433
(763) 754-5555

Attorneys for Appellant

Michael O. Freeman (000031860)
Hennepin County Attorney
Special Litigation Division
C-2000 Government Center
300 South Sixth Street
Minneapolis, MN 55487
(612) 348-5550

Keith M. Ellison (09000890X)
Minnesota State Attorney General
1800 Bremer Tower,
445 Minnesota Street
St. Paul, MN 55101
(651) 297-2040

Attorneys for Respondent

PARTIES

The parties' and attorneys' names are provided on the cover of this petition.

DECISION APPEALED

The Petitioner James David Wren requests Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

I. **WAS DEFENDANT DENIED HIS RIGHT TO A SPEEDY TRIAL WHEN THIS MATTER WAS CONTINUED FROM MARCH 16, 2020 UNTIL JUNE 15, 2020, THROUGH NO FAULT OF THE DEFENDANT?**

Court of Appeals affirmed the lower court's decision that Appellant's Right to a Speedy Trial was not violated.

II. **DID THE TRIAL COURT ERROR IN ALLOWING A JURY INSTRUCTION FOR SECOND DEGREE MURDER-WHILE COMMITTING A FELONY WHEN THAT CHARGE IS NEITHER ON THE INDICTMENT NOR DID THE STATE MAKE A MOTION TO AMEND THE INDICTMENT?**

Court of Appeals affirmed the lower court decision denying that the lower court abused its discretion in allowing the jury instruction.

III. **SHOULD THE RESTITUTION AWARD BE VACATED BASED UPON THE DISTRICT COURT VIOLATING HIS RIGHT TO A SPEEDY TRIAL?**

Court of Appeals affirmed the restitution award as the challenge to the restitution was based upon the Appellant's position that his Right to a Speedy trial was violated.

IV. **WAS DEFENSE COUNSEL INEFFECTIVE FOR NOT CALLING CERTAIN DEFENSE WITNESSES, NOT OBJECTING TO THE DEFENDANT BEING REFERRED TO AS "THE SHOOTER"; NOT OBJECTING TO OFFICER FISCHER'S IMPROPER VOUCHING TESTIMONY REGARDING STATE'S WITNESS CHRISTOPHER FROVIK; AND NOT OBJECTING TO A CRIMINAL JURY INSTRUCTION BEING GIVEN FOR SECOND DEGREE MURDER, WHILE COMMITTING A FELONY, A CHARGE THAT WAS NOT PRESENTED TO THE GRAND JURY?**

Court of Appeals ruled that the Appellant was not deprived effective assistance of counsel.

REASON WHY SUPREME COURT REVIEW IS NECESSARY

This case should be reviewed by the Minnesota Supreme Court as it deals with numerous issues that clearly show that Appellant's Constitutional Rights were violated, most important being a citizen's right to a speedy trial. A right that Mr. Wren had violated by the trial court when he was charged with First Degree Murder in Hennepin County and was not brought to trial until some 256 days after making his demand. In addition, the trial court defied a direct order from this court in violating Mr. Wren's right to a speedy trial without valid grounds and the court of appeals affirmed.

Although the trial court and court of appeals claimed it was pandemic related, the state's request for a continuance of the trial was not based on a fear of transmittal of COVID-19, but because the prosecution lacked childcare. No matter the recognized reasons, none were valid exceptions to an engrained constitutional right.

Moreover, this court granted review in State v. Jackson, 968 N.W.2d 55 (Minn. App. 2021) where there was a delay of only 77 days and the charge was not considered Super High Priority by this court as was Mr. Wren's matter.

ARGUMENT

To determine whether a delay constitutes a deprivation of the right to a speedy trial, a court must balance the following four factors: "(1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his or her right to a speedy trial, and (4) whether the delay prejudiced the defendant." Id. at 109 (citing test from Barker v. Wingo, 407 U.S. 514, 530–33, 92 S.Ct. 2182, 2192–93, 33 L.Ed.2d 101 (1972) and State v. Widell, 258 N.W.2d 795, 796 (Minn.1977), which adopted the four-part Barker inquiry for speedy-trial demands). None of the factors alone is dispositive; rather, the factors are related and "must be considered together with such other circumstances as may be

relevant." State v. Windish, 590 N.W.2d 311, 315 (Minn.1999) (quotation omitted). State v. Griffin, 760 N.W.2d 336, 339–40 (Minn. Ct. App. 2009).

The first part of the Barker analysis is the length of delay. When the length of the delay is "presumptively prejudicial," it triggers review of the remaining three factors. *Id.* In Minnesota, a delay of more than 60 days from the date of the speedy-trial demand is presumptively prejudicial. Id. at 315–16. State v. Griffin, 760 N.W.2d 336, 340 (Minn. Ct. App. 2009). Here the length of delay was 256 days, beginning when Mr. Wren asserted his speedy trial rights - October 3, 2019, which is undisputed by the trial court and the state to the day trial was commenced, on June 15, 2020. However, 115 of the days can arguably be deducted based upon Mr. Wren's acquiescence to a delay and tolling of his speedy trial time to March 16, 2020, when his new trial counsel was appointed on November 8, 2019, with a hearing held on November 22, 2019, wherein Mr. Wren reluctantly acquiesced to the delay so that his trial counsel could get prepared for a serious felony matter. (See November 22, 2019, hearing Transcript, pg. 3, ¶¶ 3-12). The days remaining is 141, which is well beyond the 120 days contemplated by statute, rule and case law, to bring a citizen to trial or release them with nonmonetary conditions under Rule 6.01, subd. 1. See Minn. R. Crim. P. 11.09. If the trial would have continued on as it began on March 13, 2020, as what was ordered by Justice Gildea, this argument would not have been made.

It is clear, and the trial court and the court of appeals agreed, that the length of delay weighed in favor of the defendant.

The second Barker factor is the reason for the delay. The state and the courts have the burden of ensuring speedy trials for criminal defendants. See Id. at 316; Cham, 680

N.W.2d at 125. If a defendant's own actions caused the delay, there is no violation of the right to a speedy trial. State v. Johnson, 498 N.W.2d 10, 16 (Minn.1993). There may be no violation if the delay is due to good cause, but good cause for delay does not include calendar congestion unless exceptional circumstances exist. McIntosh v. Davis, 441 N.W.2d 115, 119–20 (Minn.1989). State v. Griffin, 760 N.W.2d 336, 340 (Minn. Ct. App. 2009). Here the trial court arguably abused its discretion in determining that the length of delay was the fault of Mr. Wren. The trial courts analysis was flawed and self-serving. It is clear the court did not want to release a person accused of premediated murder even though he had a valid self-defense claim and was being held in violation of his constitutional rights. The trial court's statement that the defendant caused most of the delay through March 16, 2020, where the trial court then claims a neutral and valid reason to delay the trial further and violate Mr. Wren's constitutional rights was present, i.e. the pandemic, is troubling.

The Court of Appeal position that the second prong of the Barker analysis was neutral is also concerning. The claim that the delay was based upon public-safety is not accurate. The initial delay that put this case "over the top" was based upon childcare.

The third Barker factor is whether Mr. Wren asserted his right to a speedy trial. State v. Griffin, 760 N.W.2d 336, 340 (Minn. Ct. App. 2009). It is clear and unrefuted that he asserted that right on October 3, 2019. Even considering the delay from November 22, 2019, until March 16, 2020, so his appointed counsel could be prepared, Mr. Wren still did not go to trial until 141 days after his assertion, which contrary to the trial court's inexplicable findings, was strongly asserted. Mr. Wren makes mention of his speedy trial right numerous times throughout the transcripts in this matter. For the trial court to claim

that his assertion was not strong and therefore based upon State v. Windish, this factor weighs against Mr. Wren, is unsupported by the record. Windish, 590 N.W.2d at 318. And for the court of appeals to claim that a trial was not possible is wrong. In relying on Jackson, which was a fundamentally different set of facts, is misplaced. See Jackson, 968 N.W.2d 55 (Minn. App. 2021).

The final prong of the Barker test is to determine whether Mr. Wren suffered prejudice as a result of the delays. 407 U.S. at 532, 92 S.Ct. 2182. The Supreme Court has identified three interests that are protected by the right to a speedy trial: (1) preventing oppressive pretrial incarceration; (2) minimizing the anxiety and concern of the accused; and (3) preventing the possibility that the defense will be impaired. See Id. A defendant does not have to affirmatively prove prejudice; rather, prejudice may be suggested by likely harm to a defendant's case. See Moore v. Arizona, 414 U.S. 25, 26-27, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973). The Supreme Court has said that the third factor, impairment of a defendant's defense, is the most serious. See Doggett v. United States, 505 U.S. 647, 655, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) (citing Barker, 407 U.S. at 532, 92 S.Ct. 2182). State v. Windish, 590 N.W.2d 311, 318 (Minn. 1999). A defendant asserting violation of his speedy trial rights does not have to affirmatively prove prejudice; prejudice may be suggested by likely harm to a defendant's case. See Id.

Analyzing these factors, they are clearly in favor of the defendant. First, oppressive pre-trial incarceration was clearly present here, based not only upon the year Mr. Wren spent incarcerated awaiting trial, but factor in the pandemic rules which caused major restrictions of movement and communication with family, friends and his counsel from the jail, it is clear that Mr. Wren's incarceration was oppressive. Second, awaiting

trial for first degree premediated murder is scary enough, couple that with delays in his case, attorney's letting him down and witnesses being threatened if they testify, not being able to come because of the uncertainty of when trial will be held and one of his main witnesses being killed when he was up here to testify at the March 16 trial, would cause anyone anxiety and concern. And finally, the third factor, prejudice to Mr. Wren's case was apparent. As mentioned, a main witness to the events that night or early morning, Kyle Culberson, defendant's cousin was murdered in Minneapolis on March 22, 2020.

This factor heavily weighed in Mr. Wren's favor, when looked at through an objective lens.

The trial court and the court of appeals relying on the COVID 19 pandemic to justify the continuances of this matter, first at the request of the state on March 16, 2020 after a jury was empaneled and sworn, then at least two more times on its own motion, was not legally supported.

On March 16, 2020, the trial judge was available, healthy and able to proceed. Both defense counsel, the defendant and state's counsel were healthy and able to proceed. The courthouse was still standing and able to house a trial. The jury was empaneled and ready to proceed. The only articulated reason for the trial not going forward was a childcare concern raised by the state because schools were closing pursuant to the governor's executive order. A reason not sufficient to violate someone's constitutional rights and clearly not an exigent circumstance contemplated by the law.

Even more concerning is that the court continued to delay this trial, even allowing it to be subordinate to lesser priority cases on June 1, 2020, only to find out that no cases or 1 out of 4 scheduled instead of Mr. Wren's, went to trial.

There was no justification under the law for the trial court to violate and continue to violate Mr. Wren's fundamental right to a speedy trial and the court of appeals to affirm.

For these reasons, the petitioner seeks an order granting review of the decision of the Court of Appeals.

Respectfully submitted,

MESENBOURG & SARRATORI LAW OFFICES, P.A.

Dated: June 1, 2022

Paul P. Sarratori (#317974)
Attorneys for Petitioner James Wren
2601 Coon Rapids Boulevard
Coon Rapids, MN 55433
(763) 754-5555