COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2004AP1555 **Cir. Ct. No. 1998CI5**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

IN RE THE COMMITMENT OF JAMES E. STOKES:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JAMES E. STOKES,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: MARY M. KUHNMUENCH, Judge. *Reversed and cause remanded.*

Before Fine, Curley and Kessler, JJ.

¶1 CURLEY, J. James E. Stokes appeals the commitment order entered against him after he was found to be a sexually violent person. He also

appeals the order denying his postcommitment motion.[1] Stokes contends that: (1) his constitutional right to a speedy trial was violated; (2) there was insufficient evidence to commit him under WIS. STAT. ch. 980 (1997-98)[2]; and (3) he was deprived of his constitutional right to represent himself. In the alternative, Stokes contends that if his arguments are waived due to his trial counsel's failure to file a postcommitment motion, his trial counsel was ineffective for failing to file such a motion. We conclude that Stokes was denied his constitutional right to self-representation because the trial court improperly removed him as his own attorney. Although our conclusion with respect to self-representation obviates the need to address Stokes's other arguments, *see* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to address nondispositive issues), we feel compelled to address Stokes's argument that his right to a speedy trial was violated. We reluctantly conclude that although his right to a speedy trial was not violated, we are very troubled that nearly six years elapsed from the filing of the

[1] During the almost six years that this case languished in the court system, seven different judges were assigned to handle it: The Honorable Diane Sykes presided over the proceedings that took place between the filing of the petition on April 28, 1998, and August 3, 1998. On August 3, 1998, the case was then reassigned to the Honorable Jeffrey A. Wagner, who presided over the proceedings from August 3, 1998, to July 27, 1999. On July 27, 1999, the case was reassigned to the Honorable Elsa C. Lamelas, but four days later, on July 31, 1999, the case was again reassigned to the Honorable Daniel L. Konkol, who presided over the proceedings until July 28, 2000. On July 28, 2000, the case was transferred back to Judge Wagner, who presided over the proceedings until July 27, 2001, when the case was transferred to the Honorable Jacqueline D. Schellinger. Judge Schellinger presided over the proceedings until August 2, 2002, when the case was reassigned to the Honorable John Franke, who presided over the proceedings until August 4, 2003, when the case was transferred to the Honorable Mary H. Kuhnmuench. Judge Kuhnmuench presided over the remaining trial court proceedings, including the trial. Stokes's postcommitment motion was also heard by Judge Kuhnmuench, who, on March 9, 2005, issued a written order denying Stokes's motion.

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. The relevant portions of the 1997-98 version of the Wisconsin Statutes, under which Stokes's petition was filed, have remained unchanged.

petition to the beginning of Stokes's trial. We instruct judges assigned to cases that involve petitions for the commitment of an individual as a sexually violent person to find a way to bring these matters to trial in a more timely fashion. Because Stokes's right to proceed *pro se* was improvidently revoked, we reverse the judgment and remand the matter to the trial court for a new trial.

I. BACKGROUND.

¶2 On March 6, 1985, Stokes was convicted of two counts of second-degree sexual assault and one count of attempted aggravated battery, and imprisoned with an expected release date of May 5, 1998.[3] *See* ***State v. Stokes***, No. L-0656 (Wis. Cir. Ct. Dane County Mar. 8, 1998). On April 28, 1998,[4] the State filed a petition, pursuant to WIS. STAT. ch. 980, to have Stokes committed as a sexually violent person, alleging that Stokes suffered from mental disorders that predisposed him to engage in acts of sexual violence and that it was substantially probable that he would engage in such acts in the future. On April 30, 1998, the trial court found that there was probable cause to detain Stokes. At a scheduling conference on May 6, 1998, a jury trial was scheduled for November 2, 1998, but the trial was postponed numerous times at the request of the State, the defense and the court. On January 3, 2002, almost four years after the petition was filed,

[3] Stokes has a criminal record that includes various sexual offenses with adult women as victims and drug crimes. In 1979, Stokes was charged with raping his ex-wife, and the March 6, 1985, conviction for two counts of second-degree sexual assault, and one count of attempted aggravated battery arose out of Stokes's September 1984 assault of his second estranged wife. While in prison for the 1984 sexual assaults and battery crimes, Stokes participated in pretreatment for a sexual treatment group, but did not complete the pretreatment, and thus also never completed the actual treatment program prior to his expected release date of May 5, 1998.

[4] April 28, 1998, was within ninety days of Stokes's expected release, as required by WIS. STAT. § 980.02(2)(ag) (1997-98) (this statute was later repealed under 2005 Wis. Act 434).

Stokes waived his right to a jury trial.[5] On September 15, 2003, Stokes's trial counsel withdrew due to deteriorated communications between him and Stokes and Stokes was assigned new counsel.

¶3 A bench trial finally began on February 17, 2004, approximately five years and ten months after the petition was filed. Stokes's attorney moved to dismiss the petition, asserting that Stokes's right to a speedy trial had been violated. The trial court denied the motion on grounds that the adjournments were the result of requests by both sides, and were for just cause or strategic reasons.

¶4 Dr. Patricia Coffey, who testified for the State, indicated that she had reviewed Stokes's file, scored Stokes using various diagnostic risk assessment instruments, including the Diagnostic and Statistical Manual of Mental Disorders (DSM), and concluded that he could be diagnosed with "personality disorder, not otherwise specified, with antisocial features" and "paraphilia not otherwise specified," which predispose him to engage in acts of sexual violence. During his counsel's cross-examination of Dr. Coffey, Stokes indicated that he wished to proceed *pro se* because his counsel was not asking Dr. Coffey questions about the DSM. The court granted Stokes's request to represent himself and his former counsel agreed to stay on as standby counsel.

¶5 Stokes cross-examined Dr. Coffey, but asked that she be recalled because he did not have all the notes he needed. The next day the trial continued but was adjourned until March 26, due to Dr. Coffey's unavailability and the

[5] Stokes's waiver of his right to a jury trial on January 3, 2002, was apparently not properly recorded because, at the State's request, on grounds that the record did not properly indicate a waiver, Stokes again indicated that he was waiving his right to a jury trial one year and eight months later on September 15, 2003.

court's crowded docket. On March 26, 2004, the defense called Dr. Diane Lytton, whom Stokes questioned about the reliability of the various instruments used by Dr. Coffey to reach her assessments, including the DSM.

¶6 On April 30, 2004, the trial was to continue, but was adjourned until June 1, 2004, due to the State's failure to produce Stokes. That afternoon Stokes appeared via telephone. The trial court sought to complete the trial telephonically that day, but Stokes refused because he wanted to question Dr. Coffey in person. On June 1, 2004, Stokes finally was able to cross-examine Dr. Coffey. During Stokes's cross-examination, the trial court determined that Stokes could not continue to represent himself, stating that he repeatedly interrupted the court and testified instead of asking questions. The court reinstated Stokes's defense counsel and, after arguments by the State and the defense, found Stokes to be a sexually violent person. That day, six years and one month after the petition was filed, and three and one-half months after the court trial began, the trial court issued an order committing Stokes to institutional care in a secure mental health facility. Stokes was forty-eight years old when the petition was filed and fifty-four years old when the trial was completed. Stokes's counsel did not file a postcommitment motion.

¶7 On June 8, 2004, Stokes filed a *pro se* notice of appeal, but on January 4, 2005, now represented by counsel, filed a motion with this court requesting a remand to the trial court and fifteen days to file a postcommitment motion. This court granted the motion. On January 20, 2005, Stokes filed a timely postcommitment motion to vacate the commitment and dismiss the petition, arguing that: (1) he was deprived of his right to a speedy trial; (2) his trial counsel was ineffective for failing to file postcommitment motions; and (3) the evidence was insufficient to support commitment. On March 9, 2005, the trial court denied

the motion, concluding with respect to Stokes's claim that his right to a speedy trial had been violated that the delay was not unreasonable because Stokes was to blame for most of the delays and that the remainder was neither side's fault and the result of the ordinary demands of the judicial system.

¶8 Stokes filed another motion with this court requesting that this court remand the case to the trial court and grant him fifteen additional days to file another postcommitment motion. This court granted the motion. On July 26, 2005, Stokes filed a supplemental postcommitment motion seeking a new trial, contending that the trial court deprived him of his right to self-representation when it refused to allow him to continue to act as his own attorney, and in the alternative, that his trial counsel was ineffective for failing to raise the issue.

¶9 On October 27, 2005, the trial court issued a written order denying Stokes's motion. The court first stated that "[t]he record reveals that during the course of the respondent's cross-examination of Dr. Patricia Coffey … the respondent was unable to question the witness without testifying himself, without being argumentative, without being extremely repetitive, and without constantly interrupting the court," and that "[t]he record demonstrates that [the court] gave the respondent every opportunity to proceed with cross examination of the doctor within the bounds of appropriate cross-examination procedure." The court explained that Stokes erred in suggesting that once he had been allowed to proceed *pro se* a high standard exists for rescinding his *pro se* status. According to the trial court, it was not prevented from reassessing Stokes's competency to represent himself once the proceedings were in progress, and cited ***Pickens v. State***, 96 Wis. 2d 549, 292 N.W.2d 601 (1980), *overruled on other grounds by* ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), for the proposition that "the court has a continuing duty to evaluate a defendant's ability to represent himself

throughout the proceedings." On this basis the court concluded that it had not erred in revoking Stokes's right to self-representation. This appeal follows.

II. ANALYSIS.

A. Right to Self-Representation

¶10 We begin by addressing Stokes's contention that he was deprived of his right to self-representation.

¶11 Both the United States Constitution and the Wisconsin Constitution guarantee a defendant the right to conduct his own defense. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. When a defendant seeks to proceed *pro se*, the trial court must: (1) conduct a colloquy to insure that the defendant has knowingly, intelligently and voluntarily waived the right to counsel, and (2) determine whether the defendant is competent to proceed *pro se*. ***Klessig***, 211 Wis. 2d at 203.

¶12 Here, Stokes requested permission to proceed *pro se* on February 17, 2004, because he felt his attorney's cross-examination of Dr. Coffey was inadequate. The trial court conducted the requisite colloquy and concluded that Stokes was knowingly, intelligently and voluntarily waiving his right to counsel, and found Stokes competent to proceed *pro se*. It is undisputed that Stokes satisfied both ***Klessig*** requirements. *See* ***id.***, 211 Wis. 2d at 204, 206, 212. The issue, however, is whether the trial court properly revoked Stokes's right to self-representation.

¶13 Both Stokes and the State recognize that the decision whether to revoke a defendant's right to self-representation is discretionary with the trial court. *See* ***Pickens***, 96 Wis. 2d at 569. Stokes maintains, however, that the issue

is one of law in that the underlying question is what legal standard to apply when removing a defendant as his own counsel. Stokes submits that in basing its decision on ***Pickens***,[6] the trial court applied the incorrect legal standard and therefore erroneously held that once a defendant has been found competent to represent himself, the court may simply reevaluate his ability throughout the proceedings. Stokes submits instead that the correct standard for assessing whether a defendant's right to self-representation may be revoked is not ***Pickens***,

[6] In denying Stokes's supplemental postcommitment motion, the trial court relied heavily on ***Pickens v. State***, 96 Wis. 2d 549, 292 N.W.2d 601 (1980), *overruled on other grounds by* ***State v. Klessig***, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), stating that "Pickens specifically acknowledges that the court has a continuing duty to evaluate a defendant's ability to represent himself throughout the proceedings." The trial court then cited to the following paragraphs from ***Pickens***; however, the italicized portions were omitted.

> Moreover, even after the request to proceed *pro se* has been granted and the defendant has begun his defense, the trial court has a continuing responsibility to watch over the defendant and insure that his incompetence is not allowed to substitute for the obligation of the state to prove its case. If, during the course of the trial, it becomes apparent that the defendant is simply incapable, because of an inability to communicate or because of a complete lack of understanding, to present a defense that is at least prima facie valid, the trial court should step in and assign counsel. *But because the defendant is not to be granted a second chance simply because the first is going badly, counsel should be appointed after trial has begun, or a mistrial ordered, only where it appears the defendant should not have been allowed to proceed pro se in the first place.*
>
> We realize, of course, that the determination which the trial court is required to make must necessarily rest to a large extent upon the judgment and experience of the trial judge and his own observation of the defendant. For this reason, the trial court must be given sufficient latitude to exercise its discretion in such a way as to insure that substantial justice will result.

Id., 96 Wis. 2d at 569 (emphasis added). Here, because there is no indication that Stokes "should not have been allowed to proceed pro se in the first place," the above language from ***Pickens*** in fact supports the conclusion that the trial court erred in revoking Stokes's right to self-representation.

but rather, the standard set forth by the United States Supreme Court in ***Faretta v. California***, 422 U.S. 806 (1975).

¶14 In ***Faretta***, the Court recognized the right to self-representation, noting that "[t]o force a lawyer on a defendant can only lead him to believe that the law contrives against him." ***Id.*** at 832-34. Responding to the argument that criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials, the Court noted that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." ***Id.*** at 834 n.46.

¶15 Stokes also cites ***United States v. Brock***, 159 F.3d 1077 (7th Cir. 1998), in which the Seventh Circuit Court of Appeals employed a similar standard. Adopting the reasoning of the Circuit Court of Appeals for the District of Columbia in ***United States v. Dougherty***, 473 F.2d 1113, 1125 (D.C. Cir. 1972), the court held, similar to ***Faretta***, that "when a defendant's obstreperous behavior is so disruptive that the trial cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel." ***Brock***, 159 F.3d at 1079 (citing ***Dougherty***, 473 F.2d at 1125). In ***Brock***, the defendant "expressed his dissatisfaction with the judge's rulings and explanations by refusing to proceed," challenged the court's authority, "refused to answer any questions regarding whether he wished to be represented by counsel," "stormed out of the courtroom," and was repeatedly cited for contempt, but the "[c]ontempt citations had no effect." ***Id.*** at 1080. Applying the above standard to these facts, the court concluded that this behavior showed a lack of cooperation and "made it practically impossible to proceed." ***Id.*** For these reasons, the court concluded that the defendant had forfeited his right to self-representation. ***Id.*** at 1081.

¶16 The State does not dispute that ***Faretta*** and ***Brock*** set forth the proper standard, and thus concedes that the trial court applied the incorrect standard in ruling on Stokes's motion. The State, citing ***State v. Ruszkiewicz***, 2000 WI App 125, 237 Wis. 2d 441, 613 N.W.2d 893, nonetheless urges this court to view the question of self-representation with deference because "the trial judge is in the best position to observe the defendant's conduct and demeanor and to evaluate the defendant's ability to present at least a meaningful defense." ***Id.***, ¶38. The State cites ***Pickens*** for the following proposition:

> We realize, of course, that the determination which the trial court is required to make must necessarily rest to a large extent upon the judgment and experience of the trial judge and his own observation of the defendant. For this reason, the trial court must be given sufficient latitude to exercise its discretion in such a way as to insure that substantial justice will result. On review, therefore, its determination that the defendant is or is not competent to represent himself will be upheld unless totally unsupported by the facts apparent in the record.

Id., 96 Wis. 2d at 569-70. On this basis, the State submits that "repeated failure to follow the rules of procedure and courtroom decorum" is sufficient to justify revocation. Citing ***McKaskle v. Wiggins***, 465 U.S. 168 (1984), the State proffers that "in referring to *Faretta*'s holding, it stated: '[t]he Court held that an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol.'" ***Id.*** at 173.

¶17 We disagree with the State's reliance on ***Pickens*** and ***McKaskle***. The State confuses the standard for competence to proceed *pro se* with the standard for revoking the right to act *pro se* once a defendant has been found competent to do so. ***Pickens***'s emphasis on the trial court's discretion does not address under what conditions the court may revoke a defendant's right to

self-representation; rather, it concerns only the trial court's initial determination to allow a defendant to proceed *pro se* and the standard that an appellate court is to later use to review that determination. Similarly, the language from ***McKaskle*** that a defendant must knowingly and intelligently waive his or her right to counsel, and be able and willing to abide by rules of procedure and courtroom protocol, also misses the point because it, too, addresses the standard for competence to proceed *pro se*, rather than the standard to be used when determining whether to revoke that right. Moreover, contrary to what the State implies, the statement from ***McKaskle*** regarding waiver was not made referring to ***Faretta***'s holding regarding the standard for when to revoke a *pro se* status, but was made in response to ***Faretta***'s discussion about "a criminal defendant who was required to present his defense exclusively through counsel." *See* ***McKaskle***, 465 U.S. at 173. ***Pickens*** and ***McKaskle*** do not, in other words, impact the ***Faretta*** and ***Brock*** standards.

¶18 The question before us is thus whether Stokes was deliberately engaging in "serious and obstructionist misconduct," ***Faretta***, 422 U.S. at 834 n.46, and whether Stokes's behavior was obstreperous and "so disruptive that the trial cannot move forward," ***Brock***, 159 F.3d at 1079-80. Because we have established that the trial court incorrectly applied a lower standard, we must examine whether, despite applying the wrong standard, the trial court's ultimate conclusion to revoke Stokes's right to self-representation was nonetheless correct. *See* ***Bence v. Spinato***, 196 Wis. 2d 398, 417, 538 N.W.2d 614 (Ct. App. 1995) (appellate court may affirm trial court's holding on a theory or reasoning different from that relied upon by the trial court).

¶19 Stokes submits that his behavior was not serious, obstructionist or obstreperous, did not prevent the trial from moving forward, and was neither

abusive nor disrespectful. As to June 1, 2004, the day on which the trial court ultimately revoked his right to proceed *pro se*, he submits that he "never swore, never used abusive language, never refused to proceed, never challenged the Court's underlying authority … never threatened not to continue, never threatened to deliberately disrupt the proceedings, never refused to answer questions, and never refused to cooperate as best he could." Stokes admits that "he exhibited the type of confusion in framing questions common to many laymen," but explains that although he was "somewhat inclined to interrupt," the court "could not and did not point to any specific instance or situation in which the Court or the witness was not ultimately able to make its point." While conceding that he may have been a bit "inartful," he emphasizes that he "managed to proceed as his own counsel appropriately, for three-to-four days of trial," and "did not deliberately or even accidentally engage in serious and obstructionist misconduct."

¶20 The State disagrees. The State claims that there were four instances on the day Stokes first took over as counsel when he interrupted either the court or a witness, that "Stokes persisted in testifying, rather than asking questions," and "engaged in argumentative and repetitive questions on numerous occasions." As to Stokes's cross-examination on June 1, 2004, the State claims that "as his unsuccessful cross-examination proceeded, he became more and more agitated." The State contends that Stokes was "obviously unwilling to accept that either his attorney, Dr. Coffey, or the court, viewed the diagnoses criteria of DSM-IV differently than he did." According to the State, Stokes "repeatedly attempted to argue and badger Dr. Coffey into accepting his view," and became "increasingly agitated" as "the court adhered to its rulings that Stokes had already explored Coffey's view of the DSM-IV criteria which differed from his own." The State further claims that the "record no doubt does not adequately convey the

vehemence, disrespect and disruptive nature of his courtroom demeanor," but "does disclose that he repeatedly interrupted the judge during argument and, on several occasions, openly argued after the court had ruled against him."

¶21 In analyzing Stokes's actions as his own counsel, we first note that it is well–established that although self-representation is "[not] a license not to comply with relevant rules of procedural and substantive law," ***Faretta***, 422 U.S. at 834 n.46, and "neither a trial court nor a reviewing court has a duty to walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law," "some leniency may be allowed," ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). *Pro se* prisoners are also afforded greater leniency than other *pro se* litigants. *See* ***State ex rel. Terry v. Traeger***, 60 Wis. 2d 490, 496, 211 N.W.2d 4 (1973) (sufficiency of *pro se* complaints "filed by unlettered and indigent prisoners" judged by following liberal policy). Indeed, courts are required to liberally construe claims by *pro se* prisoners and "look beyond the legal label affixed by the prisoner to a pleading and treat a matter as if the right procedural tool was used." ***State ex rel. McMillan v. Dickey***, 132 Wis. 2d 266, 279, 392 N.W.2d 453 (Ct. App. 1986); *see* ***bin-Rilla v. Israel***, 113 Wis. 2d 514, 520-21, 335 N.W.2d 384 (1983) (courts are to read *pro se* prisoner pleadings liberally, and to relabel them as necessary to put them in the correct procedural posture). In addition, a defendant is entitled to significant latitude on cross-examination, although the trial court still has a duty to prevent undue prejudice by limiting cross-examination. *See* ***State v. McCall***, 202 Wis. 2d 29, 41, 549 N.W.2d 418 (1996).

¶22 Stokes acted as his own counsel on four days during the trial, February 17, March 26, April 30, and June 1, 2004. The record reveals the following about Stokes's self-representation.

¶23 On February 17, 2004, Stokes, as noted, requested and received permission to proceed *pro se* because he felt his trial counsel's cross-examination of Dr. Coffey was inadequate for not asking questions about the DSM. He proceeded to represent himself immediately, and that afternoon, Stokes cross-examined Dr. Coffey. The record reveals nineteen pages of cross-examination. At the very beginning, Stokes apparently spoke at the same time as the witness and was warned by the court. Stokes then proceeded to ask Dr. Coffey questions about antisocial personality disorder not otherwise specified with antisocial features, one of the diagnoses she had given him.

¶24 At one point the court made a record that Stokes was reading out of the DSM, and, feeling that Stokes was asking the same question more than once, stated: "And you continue to – to sort of question her about that and – and it's turning more into argument now more than anything else. You perceive that language one way, she obviously perceives it another. So let's leave it at that and move on." Stokes responded, "Okay. Let's go to paraphilia," and proceeded to ask Dr. Coffey about paraphilia, the other diagnosis she had given him. He then tried to ask Dr. Coffey about the meaning of the term "residual." The court sustained an objection by the State, and in response to Stokes's attempt to rephrase the question, the court appears to have grown impatient, stating:

> Mr. Stokes, you're – you're asking the question that you don't know the answer to, which is probably a dangerous thing to do. And you're asking a question using a word that you don't know the meaning of, but are asking this witness to define it, and then you reject her definition.

The court then told Stokes that he would not be allowed to move on unless he explained to the court what he thought "residual" meant. The court then asked Dr. Coffey, in response to Stokes's answer, "Would you agree or disagree with his

psychological opinion?" Dr. Coffey explained that she agreed with Stokes, but went on to explain that there was a misunderstanding regarding the DSM. Stokes then continued to cross-examine Dr. Coffey without incident. Later, Stokes objected to the admission of documents on grounds that they did not correctly represent his criminal record, and it was confirmed that the documents in fact contained erroneous information.

¶25 The next day, the prosecutor conducted approximately forty-five pages worth of direct examination of Rebecca Mahin, Stokes's parole agent. During the entire examination, Stokes objected only twice: once to correct Mahin's statement about his criminal record, a correction with which Mahin agreed after checking her notes; and once when asked by the court whether he was objecting to the admission of certain exhibits, to which Stokes indicated that he was objecting based on hearsay. The objection was overruled. The court asked Stokes whether he was planning to call any witnesses, and Stokes responded that he wanted to call Drs. Lytton and Coffey. The court adjourned the trial until March 26, 2004, because the court had another matter scheduled for that afternoon.

¶26 On March 26, 2004, the trial resumed. The court asked Stokes why he wanted to examine Dr. Lytton. Stokes responded that he had been told that she was an expert on the specific tests that had been performed on him in rendering a diagnosis. The court then inquired what questions he was going to ask her about the tests, and Stokes replied that he was "going to ask her about the – the validity that the – the credibility of those tests." The response apparently satisfied the court, who then asked Stokes what he wanted to ask Dr. Coffey that he had been unable to ask Dr. Coffey previously, and Stokes replied, "I didn't have all of my

notes here when I was questioning Doctor Coffey, so I want to go into the – the – her evaluation a little bit more in depth."

¶27 Dr. Lytton then testified via telephone. The record contains twenty-one pages of questioning by Stokes about the various tests. With the exception of a few minor clarifications, Dr. Lytton had no problems understanding Stokes's questions and gave detailed and thorough answers. On one occasion Stokes asked the court whether a certain question would be acceptable prior to asking it. On another occasion, after Stokes made a statement that did not appear to be a question, the court asked Stokes, "are you testifying or are you asking a question?" to which Stokes responded, "I'm asking a question," and proceeded to rephrase the question and Dr. Lytton answered. On a third occasion Stokes was having trouble phrasing a question and stated: "And in the case of a paraphilia NOS, non consent, is there such a thing[] as a consenting rape? Non consent means -- means rape, so -- so --" at which point the court interjected: "Again, don't testify, Mr. Stokes, you have to ask a question. Ask the question." Stokes rephrased the question, Dr. Lytton answered, and Stokes's questioning was completed without further interruptions. During the ten pages of cross-examination by the State, the six pages of questioning by the court and the additional two pages by the State that followed, Stokes raised no objections and did not otherwise interrupt.

¶28 That afternoon, Mahin was called back, and Stokes cross-examined her. Stokes was apparently trying to get on the record that he had successfully completed parole. After twice being warned by the court that he was testifying rather than asking questions, Mahin stated that Stokes was "successfully discharge[d] before he was arrested for his case." A short while later, the court told Stokes that an adjournment had already been discussed: "You should be advised then, Mr. Stokes, that we have tentatively picked April 30th at 1:30."

Stokes, apparently displeased with the more than one-month delay, responded: "April 30th? Your Honor, this is an outrage." The following comments were then made:

> THE COURT: Mr. Stokes, you have to be quiet or I'm going to have my deputies take you back. Please don't interrupt me again.
>
> MR. STOKES: I'm just going to go and you can have them take me back.
>
> THE COURT: Mr. Stokes, you have to be quiet or my deputies are going to take you back without being made – Mr. Stokes, you don't get to choose when you get to come in and when you don't, when you get to talk and not talk. Now stop it. You've been behaved throughout the proceedings, don't start misbehaving now. It would be – it's been to your credit to that you've managed to behave throughout the process, please don't deviate from that.

¶29 On April 30, 2004, despite an order to produce, due to breakdown in communication on the part of the State, Stokes was not produced. Later that afternoon Stokes appeared, via telephone. Stokes, apparently disturbed that he was not produced, stated, when asked by the court to make his appearance for the record, that he refused to conduct a trial over the telephone and wanted to confront his accusers. In response, the court took him off the speakerphone, and told Stokes that he had to wait to speak. The court then told Stokes that he had to make an offer of proof as to why he needed to recall Dr. Coffey because the court, which clearly resisted the idea of calling back Dr. Coffey, stated that it did not believe Stokes had told the truth when he had told the court that it was necessary to call Dr. Coffey back because he did not have his notes. The court then refused to accept Stokes's previous explanation that he did not have his notes, which led Stokes to remind the court that the notes in front of him at the time were those of

his standby counsel, which he had received moments earlier when he took over as counsel, and were not his personal notes.[7]

¶30 The court then asked Stokes again, "[w]hat types of questions did you want to ask Dr. Coffey that you believe you didn't have an opportunity to ask her before." Stokes responded, "Questions to do with – with the – with the diagnosis, Your Honor," to which the court replied that he had already asked her that, leading Stokes to explain that he did not ask her the specific questions that he needed to ask her. The court still vehemently tried to get Stokes to agree to conduct the remainder of the trial telephonically, and asked Stokes if he had the specific questions in front of him. Stokes responded that he did not. The court inquired why he did not, and Stokes stated that he had been told that the purpose of this teleconference was to reschedule the trial. The court responded: "No, I'm not rescheduling the trial. This was the only thing that's left, …" at which point Stokes interjected with, "I'm not going to participate in trying to question – I have a right to confront my accuser." The court again tried to tell Stokes: "[Y]ou had

[7] The transcript provides:

> THE COURT: … I want to have an offer of proof from you, Mr. Stokes, as to why you need to have – what is it that you didn't get to ask Dr. Coffey that you now want to ask her? And I think the only thing you told me last time was that you didn't have any notes in front of you. I don't think that's true, I think you had a variety of materials in front of you, you had a big file, and envelope, and you were even referring to the DSM in your crossing – your cross examination of Dr. Coffey.
>
> DEFENDANT: Your Honor, all of those materials I got there in the court when I – when I took over and with – when the attorney that was acting as my attorney at that time was removed from the case. That's when I got those files. I – how was I going to sit there in the court and go over those files and ask – ask her the questions from his notes?

an opportunity to ask her questions about that last time, and so to accommodate you, even though I don't believe that I had to, I still wanted to go the extra -- " at which point Stokes interrupted the court and reminded the court that last time Dr. Coffey was not present. Stokes then appears to have become frustrated, stating:

> Now you [are] telling me she do[es]n't have to be there and – and I'm not going to have to be there. In other words, you [are] telling me that this court have made up its mind on – on what they want to do, just want to railroad me and – and not allow me to be able to confront my accuser.

Shortly thereafter, Stokes explained to the court that: "Your Honor, and my strategy is to ask her these questions in a way that she would – she would have to lay it out exactly how she came to the conclusion that I suffer from this. And where she found this. What she – who she – how she's making up these diaganos[e]s." The court then once again asked Stokes why he felt it was necessary to call Dr. Coffey.

¶31 The court made a record that Dr. Coffey had not been present during the previous date because the court "had told her and [the court] told [its] clerk that she could respond and be sworn in and questioned to complete her testimony as a convenience to [Dr. Coffey] over the phone." Stokes's response appears frustrated:

> Well that's – see, you talking about a convenience to her and you talked about my – letting my liberty for the rest of my life, Your Honor, and that's just not fair. It's fundamentally not fair that I [have] been denied access and all my due process and my substantial process right been violated for over six years now. And now you gonna tell me that I don't have the right to confront my accuser.

¶32 Stokes then again told the court that he "would prefer to just be able to confront my accuser and ask her those questions," and the court finally stated

that it was "prepared to grant [him] that." The court adjourned the trial until June 1, 2004.

¶33 On June 1, 2004, the trial continued and Stokes was finally able to cross-examine Dr. Coffey. The record contains forty-two pages of cross-examination by Stokes. Stokes began by asking Dr. Coffey about an April 14, 1999 report in which she had written that she was "unable to determine whether the respondent qualifies for a diagnosis of paraphilia not otherwise specified and consent, or two, sexual sadism," and the fact that on January 11, 2000, Dr. Coffey had apparently ruled out sexual sadism in a confidential patient care plan. It appears that Stokes then asked his standby counsel for a copy of the care plan, which was followed by what appears to be an agitated reaction by the court:

> THE COURT: … No, Mr. Stokes, he's not going to do that. You're going to listen till I ask you a question and then you're going to respond directly, because he's not your – your – your water boy.
>
> MR. STOKES: I didn't.
>
> THE COURT: Yes, you did. Go give this to the judge, that's.
>
> MR. STOKES: I asked if he would. I didn't say go give this to the judge.
>
> THE COURT: No, no, no, when I'm talking you don't talk.
>
> MR. STOKES: That isn't what I said.
>
> THE COURT: That's exactly what you said, and he's not going to give this to the court, and if you're not careful I'm going to remove him as your standby counsel, because its more of a distraction than it is anything else. You're not using him properly.

Stokes then tried to explain why he needed the care plan, but the court determined that "that doesn't make any sense," and refused to allow Stokes to offer the care plan as evidence.

¶34 The court then explicitly directed the State to start objecting, stating: "And if the State would like to jump in at any point they should do so. He's representing himself, he's – while he's pro se, the State is still obligated, if there has not been a foundation, if it's not relevant, to make objections accordingly." Stokes responded: "Your Honor, you [are] acting like you [are] prosecuting the case, Your Honor. If you'd give me a chance to explain. I didn't say what you said."

¶35 Stokes then tried to ask Dr. Coffey "[w]hen did you become aware that – my – my – the diagnosis of sexual sadism was ruled out in this particular case?" Dr. Coffey started to answer the question by stating: "Let me explain a little bit about what a rule out…," at which point Stokes interrupted with, "Just answer the question, Doctor. When did you become aware that this – this particular diagnosis was ruled out?" Stokes made four attempts to rephrase the question. The State objected to all of them and all objections were sustained. Stokes then moved on to another question to which the State objected. The court sustained the objection. Stokes tried to rephrase the question, but the court interrupted with the word "sustained," *without* an objection from the State.[8]

[8] The transcript reveals:

BY MR. STOKES:

(continued)

¶36 Stokes moved on and next attempted to ask Dr. Coffey about diagnosing a personality disorder, and as part of his question, read out of the DSM. The court interrupted him, stating: "[W]hat are you reading from?," to which Stokes replied:

> I'm reading from a copy of the old – the old DSM. This is not the revised take, but – but this particular portion of it is identical to the original and I would – I would like to have Doctor Coffey take a look at it, I have it highlighted, take [a] look at it and see if she agree[s] with me that these are the two situations.

The court told Stokes that he could not ask Dr. Coffey whether she agreed with the DSM by reading out of it "because that would be allowing [him] to testify," and then insisted that Stokes explain the relevance of his questions. Stokes replied:

> Because before she testified that there – it was another way that she could diagnose a personality disorder not otherwise specified, and – and here it says that this – this – this is a category provided for two situations. Now,

---

> Q. So, Dr. Coffey, after the – after this date, how much – how much time elapsed after the date of 2000, of January 11th, 2000, where was it passed that you was – before you was contacted by the Milwaukee Public – Milwaukee District Attorney's office to change your diagnosis?
>
> [ASSISTANT DISTRICT ATTORNEY]: Objection. Form.
>
> BY MR. STOKES:
>
> Q. Or do a.
>
> THE COURT: Sustained.
>
> BY MR. STOKES:
>
> Q. How much time had elapsed before you was asked by the DA's office to do an addendum?
>
> THE COURT: Sustained.

> that's why I need the DSM, so that she can show me the situation, that she – she can demonstrate to this court how she come – come to the conclusion that features of a single personality disorder is a disorder itself.

¶37 After a discussion off the record, the court indicated that Stokes's question would not be allowed because: "The question, one, assumes facts not in evidence, two, it has not been properly laid a foundation, and three, is not relevant." Stokes responded, "Your Honor, you're not going to allow her to read the – read the – and see if she agreed with…," at which point the court stated that, in the court's opinion, Stokes had already asked the questions he was trying to ask Dr. Coffey. Stokes tried to explain that his questions were not the same. The court disagreed and told Stokes that his questions were inappropriate for cross-examination and constituted argument. Stokes then tried to rephrase the question, and explained: "I want to know if she – she agrees with the – with the manual that she claims she deduced her diagnosis from."

¶38 After an objection from the State, the court made a record that "the defendant continues to interrupt the court, continues to have outbursts, continues to act in an aggravated fashion at counsel table and continues to disregard the court's earlier ruling," told Stokes that he continued to interpret the DSM a certain way, and to move on because Dr. Coffey was not going to agree with him and sustained the objection.

¶39 Stokes continued to question Dr. Coffey for seven pages with only minor interruptions where he had to clarify one question to Dr. Coffey. At one point, Dr. Coffey stated, as part of her response to a question, "The antisocial personality disorder, the only reason I did not give you that diagnosis was that I did not have juvenile records that establish that prior to the age of 15 you were engaging in conduct related problems." After waiting for Dr. Coffey to finish her

answer, Stokes stated, "No, no, no, no, no. Not only did it not have – did I not have conduct disorder before the age of 15…," at which point the Court interjected stating, "Mr. Stokes – " followed by an objection by the State on grounds that Stokes was testifying. The court told Stokes he could not testify, and Stokes apologized and tried to rephrase the question, after which the following was said:

> Q. What – what – what do you have from – from since I was 15 that – that caused you to say I had a personality disorder not otherwise specified?
>
> A. Well, your criminal record and your life history.
>
> Q. That's not since 15 is it?
>
> A. Yes. 15, 16, 17, 18, into adulthood.
>
> Q. Have – do you have any records where I was in juvenile detention or – or anything like that from age 15?

¶40 Apparently assuming that Stokes had misunderstood Dr. Coffey's answer as implying that she had in fact had his juvenile record from *before* he was fifteen, even though Stokes's questions clearly indicate that he in fact was referring to his record *after* he was fifteen, the court then stated:

> THE COURT: No, I'm going to – you're not listening. You're not listening. The question anticipates and shows that you're not listening. She said the only thing that prevented her is – her testimony was, as this court notes, that prevented her from making a straight out diagnosis of antisocial personality disorder is that she didn't have your juvenile records from prior to age 15, but everything from age 15 going on into your adulthood, including your criminal history and your life experiences, gave her enough to indicate that in her mind you demonstrated antisocial personality features.
>
> MR. STOKES: Your Honor, but –
>
> THE COURT: That's her testimony. You can agree with it or you can disagree with it, but your question shows me that you're not understanding what she's saying or –

> which is really a problem. So I'll have to rethink whether or not I should allow you –
>
> MR. STOKES: She don't understand my question.
>
> THE COURT: And again, the record needs to reflect that the defendant continues to interrupt the court and act in an agitated fashion. The court needs to reconsider whether or not this is going to be a productive hearing, and if it's going to be a productive hearing it means that the defendant needs to be competent to represent himself. I'm beginning, given the nature of the repetitiveness of the questions, the types of questions, the lack of foundation, to think that you're not capable or competent to represent yourself in this matter.
>
> Mr. Stokes I'll give you one or two more cracks at it, but you're going nowhere fast and I'm going to have to reevaluate whether or not I think you should be allowed to represent yourself in this matter.

¶41 Stokes attempted to rephrase the question again referring to the period *since* age fifteen, rather the period *before* he was fifteen:

> Q. Again, Doctor Coffey – it says since – since age 15, 15 years, as indicated by three or more of the following, the failure to conform to societal norms with respect to lawful behavior as indicated by repeatedly failure to conform, by repeatedly performing acts that are grounds for arrest. Now, since age 15 means continual from age 15 until adulthood, you don't wait until a person is 18, and then diagnose him and claim that you reached it from since 15. Since means --

¶42 The court cut Stokes off and said, "Again, again, the defendant is testifying, in his questions. He's stating facts not in evidence as if they are facts, and then asking the witness to comment on it, and that's inappropriate." The Court added: "Her answer stands. She already indicated that since the age of 15 you have demonstrated these behaviors. Whether you understand it or chose to understand it is your business, Mr. Stokes, but you've asked and answered it. We'll move on."

¶43 Stokes moved on and successfully questioned Dr. Coffey for three more pages, but was stopped by the court when, in response to Dr. Coffey's answer, he began to phrase a question with the words, "It's not valid per the – the – the DSM –." The court appeared impatient, stating:

> THE COURT: Again, that's stating facts not in evidence.
>
> MR. STOKES: No, I'm asking her a question.
>
> THE COURT: And testifying.
>
> MR. STOKES: I asked her a question, Your Honor.
>
> THE COURT: No, you didn't. You stated a fact –
>
> MR. STOKES: I said is it valid.
>
> THE COURT: You stated a fact that's not in evidence by testifying and then asked her a question. The question would more properly be whether or not the DSM considers it a valid diagnosis.
>
> BY MR. STOKES:
>
> Q. That was the question, I said is it valid?
>
> A. Yes.
>
> Q. By the –
>
> THE COURT: She just – and I did ask it for you and she just answered yes.
>
> MR. STOKES: That's the same question I asked.
>
> THE COURT: Good. And she answered it and you should be happy. Let's move along.

¶44 Stokes moved on, but two pages later the court again interrupted, telling Stokes that he was testifying when he was asking Dr. Coffey, "So you would say that would have something to do with a human instead of just objects, there are more like objects dealing like…." The court said Stokes was "testifying,

reading from a book and then giving his interpretation of what it is and then asking the witness whether or not she agrees with his interpretation." The court struck the question and told Stokes to rephrase it. The following exchange ensued:

> MR. STOKES: I'm asking does she agree with the interpretation of what the book says.
>
> THE COURT: Rephrase. Asked and answered. Rephrase.
>
> BY MR. STOKES:
>
> Q. So you wouldn't agree that that's – that's more akin to a paraphilia like – like a fetish – or some other diagnosis?
>
> THE COURT: What is the relevance, Mr. Stokes, of reading sections of the DSM that aren't even on point, that have not – that you haven't even been diagnosed with, what is the relevance of you asking or reading sections from the DSM that aren't even on point and asking this witness to testify, tell you whether she agrees with the DSM – wait till I ask the question – whether she agrees with it or not, how is that relevant, sir? And before you ask any additional question of this witness you're going to have to answer that and satisfy me that it has some relevance, because we've been at this an hour and haven't gotten very far.
>
> MR. STOKES: How do you mean, it's not on point? I'm asking about other – other paraphilia not otherwise specified that's listed under 302.9 and I'm trying to show the relevant. And – and the DSM states that it's a residual category.
>
> THE COURT: But if she doesn't diagnose you with those, what is the relevance?
>
> MR. STOKES: She diagnosed me with one that's not even in the book.
>
> THE COURT: You asked her that and she told you that. She answered it and gave you a response.
>
> MR. STOKES: But she diagnosed it under this particular category.
>
> THE COURT: Move along, Mr. Stokes.

> MR. STOKES: It's under this particular category.
>
> THE COURT: Mr. Stokes, no, I'm not going to allow it. Move along.
>
> MR. STOKES: Not allow what?
>
> THE COURT: You can --
>
> MR. STOKES: You acting like – like you're prosecuting this case, or rather than judging it.

¶45 At this point the court reinstated Stokes's trial counsel, stating:

> Mr. Stokes, you've made me be much more involved in the case than I would normally like to be, and that is because you already have – have said that you can handle the case yourself. I'm beginning to believe that you can't handle the case yourself. And I'm going to reinstate[] [Stokes's trial counsel] in just a moment because we need to break this up.

The court then heard another case before recalling Stokes's. As noted, the State and Stokes's defense counsel then presented their arguments and the court found Stokes to be a sexually violent person, committing him to institutional care.

¶46 Based on the foregoing, we are not convinced that Stokes's behavior amounted to "serious or obstructionist misconduct," ***Faretta***, 422 U.S. at 834 n.46, and that Stokes's behavior was obstreperous and "so disruptive that the trial cannot move forward," ***Brock***, 159 F.3d at 1079-80. Stokes's behavior does not even come close to being the type of behavior exhibited by the defendant in ***Brock***.

¶47 Contrary to the trial court's statements, the record does not reflect that the court gave Stokes very much, if any, leniency, which, as a *pro se* prisoner, the court should have given him. *See* ***Terry***, 60 Wis. 2d at 496. Similarly, because most problems and the eventual revocation of Stokes's right to represent

himself occurred during his cross-examination of Dr. Coffey, the court also should have, but does not appear to have, given Stokes much, if any, latitude. *See* ***McCall***, 202 Wis. 2d at 41. The record reveals that the court appears to have been on edge regarding Stokes and seems to have exhibited significant impatience toward Stokes. Indeed, the court in many instances appears to have made it more difficult for Stokes to represent himself. It made numerous demands, including an offer of proof, for further justification for recalling Dr. Coffey, and demanded that he explain the relevance of a number of his questions during cross-examination. The court made condescending remarks regarding Stokes's questions about the term "residual," asking Dr. Coffey about Stokes's "psychological opinion." The trial court even went so far as to encourage the State to raise objections, after which the record contains several pages of questions by Stokes to which the State raised various objections, all to which the court simply responded, "Sustained." On multiple occasions, rather than waiting for a possible objection from the State, the court itself "objected" to Stokes's questions. This behavior by the court evidently prompted Stokes to comment that it appeared as though the court was prosecuting the case rather than judging it, which, as noted, was what led to the court to reinstate Stokes's trial counsel as Stokes's attorney.

¶48 As noted, the State contends that Stokes was agitated, disrespectful, and argued with and badgered Dr. Coffey during the proceedings. While it is hard to discern Stokes's demeanor from the transcripts, we cannot agree.

¶49 The record contains approximately eighty-five pages of questioning by Stokes, and the majority of Stokes's questioning consisted of clear and detailed questions that were answered by the witnesses, which certainly points to the fact that Stokes was able to conduct an acceptable, if not at times, eloquent questioning of the witnesses. For the most part, Stokes appears to have been very well

prepared. Stokes certainly did have to rephrase his questions on a few occasions and did at times appear to be somewhat repetitive in his questioning, but these difficulties certainly do not amount to badgering of any of the witnesses.

¶50 The record does show that Stokes was frustrated with the delays, the court's continued attempts to get him to agree to cross-examine Dr. Coffey telephonically, the court encouraging the State to object, the court misunderstanding his questions, and the court's apparently greater concern about accommodating Dr. Coffey than Stokes's trial. These instances show justified frustration, but not agitation.

¶51 The State's claim that Stokes was disrespectful is also unsupported by the record. He consistently addressed the court as "Your Honor," and on one occasion even asked the court for permission to ask a particular question. He also never swore or used abusive or inappropriate language. Nothing indicates that Stokes's motive was anything other than to represent himself to the best of his ability.

¶52 In fact, nothing about Stokes's behavior points to anything close to that which occurred in ***Brock***. Unlike the defendant in ***Brock***, Stokes never refused to proceed, never challenged the court's authority, never refused to answer questions, never stormed out of the courtroom, and was certainly never cited for contempt. *See* ***id.***, 159 F.3d at 1080. Indeed, in stark contrast to the behavior of the defendant in ***Brock***, here the trial court on one occasion even complimented Stokes.

¶53 In sum, the problems Stokes had—occasionally interrupting, frustration with the proceedings, and some difficulties properly phrasing questions—are not atypical of *pro se* prisoners. *See* ***Terry***, 60 Wis. 2d at 496.

Stokes did not by any means deliberately engage in "serious or obstructionist misconduct," ***Faretta***, 422 U.S. at 834 n.46, and his behavior was not obstreperous and so disruptive that the court could not move on, ***Brock***, 159 F.3d at 1079-80. Stokes attempted to dissect the diagnosis given him by the expert witnesses which ultimately led to his commitment. This was a proper strategy. Thus, his right to self-representation was improperly terminated. Because Stokes's right to act as his own counsel was improperly revoked, we reverse and remand this case to the trial court for a new trial.

B. Right to Speedy Trial

¶54 As a result of our conclusion that Stokes's right to self-representation was violated, and consequent conclusion to grant Stokes a new trial on that basis, we need not address the other arguments raised by Stokes other than his contention that there was insufficient evidence to support his commitment. *See* ***Gross***, 227 Wis. at 300 (unnecessary to address non-dispositive issues). Nonetheless, we exercise our discretion and address Stokes's contention that his right to a speedy trial was violated, to explain that we are troubled by the length of time it took to bring this case to trial and ultimately try it.

¶55 The Sixth Amendment of the United States Constitution and article I, section 7 of the Wisconsin Constitution guarantee defendants the right to a speedy trial.[9] The speedy trial inquiry is triggered by an arrest, an indictment, or other official accusation. ***Doggett v. United States***, 505 U.S. 647, 655 (1992); *see*

[9] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.…" U.S. CONST. amend. VI. "In all criminal prosecutions the accused shall enjoy the right … in prosecutions by indictment, or information, to a speedy public trial." WIS. CONST. art. I, § 7.

State v. Lemay, 155 Wis. 2d 202, 209, 455 N.W.2d 233 (1990) (speedy trial provision applies once a defendant "in some way formally becomes the accused"). Here, Stokes's detention triggered his right to a speedy trial.[10]

¶56 This claim raises a constitutional issue that is reviewed *de novo*. ***State v. Borhegyi***, 222 Wis. 2d 506, 508, 588 N.W.2d 89 (Ct. App. 1998). "In reviewing constitutional questions, the trial court's findings of historical facts are subject to the clearly erroneous standard, but the application of those facts to constitutional standards and principles is determined without deference to the trial court's conclusion." ***Id.*** at 508-09.

¶57 In determining whether a defendant's right to a speedy trial has been violated, we employ the balancing test set forth in ***Barker v. Wingo***, 407 U.S. 514, 530 (1972), and adopted in Wisconsin by ***Day v. State***, 61 Wis. 2d 236, 244, 212 N.W.2d 489 (1973). ***Barker*** directs us to balance the following four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant. ***Id.***, 407 U.S. at 530.

¶58 Under the first factor, the length of the delay, we must determine whether the delay was "presumptively prejudicial." ***Id.*** at 530. If the delay is presumptively prejudicial, we must then address the three remaining factors;

[10] Although the Sixth Amendment applies to only criminal prosecutions, and commitments under WIS. STAT. ch. 980 are civil proceedings, the United States Supreme Court has directed courts to employ the Sixth Amendment speedy trial analysis to civil cases that assert due process violations of the right to be heard at a meaningful time. *See* ***United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency***, 461 U.S. 555, 564-65 (1983). The Wisconsin Supreme Court recently reaffirmed the same principle. *See* ***State v. Beyer***, 2006 WI 2, ¶¶25-26, 287 Wis. 2d 1, 707 N.W.2d 509. We do note, however, that in 2005 Wis. Act 434, § 101, the legislature repealed WIS. STAT. § 980.05(1m) which had extended all rights of criminal defendants to individuals subject to ch. 980 proceedings.

however, if not, the inquiry ends and there is no violation of the right to a speedy trial. ***Id.***; *see* ***Borhegyi***, 222 Wis. 2d at 510 (referring to the first factor as a "triggering mechanism").

¶59 The United States Supreme Court has stated that, "[d]epending on the nature of the charges, the lower courts have generally found post accusation delay 'presumptively prejudicial' at least as it approaches one year." ***Doggett***, 505 U.S. at 652 n.1. Our supreme court came to the same conclusion, holding that an almost twelve-month delay between a preliminary examination and trial was presumptively prejudicial. ***Green v. State***, 75 Wis. 2d 631, 636, 250 N.W.2d 305 (1977). Here, almost six years passed between the date the petition was filed and the date the trial commenced. Clearly, the nearly six-year delay qualifies as presumptively prejudicial.

¶60 We next proceed to the second element, the reason advanced for the delay. Only delays attributable to the State may be considered when deciding whether the defendant has been denied a speedy trial. ***Norwood v. State***, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976).

¶61 The total time from the filing of the petition on April 28, 1998, to the start of trial on February 17, 2004, was 2,121 days. The State suggests that the delay should be assessed from the forty-fifth day after the filing of the petition, apparently asserting that the time that elapsed before that date should not be considered because WIS. STAT. § 980.05(1) required that a trial be held within forty-five days,[11] and because it is a normal delay resulting from setting the

[11] In 2005, via 2005 Wis. Act 434, § 100, the time within which a trial must be held was extended to ninety days. This legislative change does not, however, affect our analysis, as Stokes's trial of course took place before the change.

calendar.[12] We disagree. Stokes's speedy trial right attached on the date the "first official accusation on the underlying charges occurred," here, the day the petition was filed, April 28, 1998. *See* ***Borhegyi***, 222 Wis. 2d at 511. Accordingly, we assess the delay from that date and the relevant dates are thus April 28, 1998, through February 17, 2004, or 2,121 days.

¶62 The parties disagree on the length of the delay attributable to Stokes, the State, and the court respectively. The record reveals that the total delay attributable to Stokes is 853 days, including 119 days due to the unavailability of the defense's expert witness, 112 days due to a change in defense strategy as a result of newly discovered information and witnesses, 239 days due to Stokes's petition for interlocutory appeal, 107 days due to briefing of defense's motion to dismiss, and 133 days due to defense counsel's withdrawal.[13]

[12] Stokes does not argue that the delays violated his rights under WIS. STAT. § 980.05(1), which requires a trial within forty-five days of the finding of probable cause under WIS. STAT. § 980.04(2). A violation of the constitutional right to due process (speedy trial) is not contingent upon the existence of a statutory time limit and the parties agree that the proper inquiry is the balancing test under ***Barker v. Wingo***, 407 U.S. 514 (1972).

[13] The delays that can arguably be attributed to Stokes are: (1) August 2, 1999, to November 29, 1999, due to the unavailability of the defense's expert witness (119 days); (2) November 29, 1999, to March 20, 2000, due to a change in defense strategy as a result of newly discovered information and discovery of witnesses (112 days); (3) March 20, 2000, to November 15, 2000, due to Stokes's petition for interlocutory appeal (239 days); (4) January 3, 2001, to April 15, 2001, due to briefing of defense's motion to dismiss (107 days); (5) May 1, 2001, to May 4, 2001, due to unavailability of Stokes's defense attorney who was scheduled to give a lecture for Law Day (3 days); (6) May 4, 2001, to May 30, 2001, due to additional briefing of defense's motion to dismiss (26 days); (7) May 30, 2001, to June 13, 2001, due to defense attorney's other trial (14 days); (8) July 19, 2001, to August 31, 2001, due to unavailability of the defense's expert (43 days); (9) January 22, 2002, to March 20, 2002, due to Stokes's *pro se* motions (57 days); and (10) September 15, 2003, to January 26, 2004, due to defense counsel's withdrawal (133 days).

¶63 While we have charged Stokes with being responsible for 853 days of delay, we note that between the filing of the petition and the start of trial there were forty-one in-court hearings or other proceedings at which Stokes's attorney appeared on Stokes's behalf, but Stokes was produced for only eight proceedings: April 30, 1998; February 11, 1999; November 29, 1999; March 9, 2000; May 4, 2001; January 3, 2002; September 15, 2003; and September 24, 2003. Consequently, some of the adjournments charged to Stokes occurred when Stokes was not present.

¶64 The total delay attributable to the State is 891 days, including 298 days related to the State's failure to complete a psychological evaluation of Stokes, 294 days due to State's request to stay proceedings pending the resolution of ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, and 250 days due to the unavailability of the State's witness.[14] The total delay attributable to the court is 555 days, including 154 days due to scheduling, 27 due to the court requesting copies of documents, 6 days due to the court misplacing its notes, 92 days due to the likelihood that the trial would last more than two days, conflicting

[14] The following delays can be attributed to the State: (1) October 6, 1998, to March 1, 1999, because the State failed to complete a psychological evaluation of Stokes (145 days); (2) March 1, 1999, to May 3, 1999, because evaluation of Stokes was still not complete (63 days); (3) May 3, 1999, to August 2, 1999, because evaluation of Stokes had just been completed (90 days); (4) November 15, 2000, to January 3, 2001, due to the unavailability of State's expert (49 days); (5) March 20, 2002, to January 8, 2003, due to State's request to stay proceedings pending the resolution of ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784 (294 days); (6) January 8, 2003, to September 15, 2003, due to the unavailability of State's witness (250 days).

with the court's attendance at a judicial conference, and 22 days due to the court's decision to hear a homicide trial rather than Stokes's case.[15]

¶65 Out of the delays not attributable to Stokes, Stokes acquiesced to some of the delays, which to some degree mitigates the State's failure to bring him to trial, *see* ***Barker***, 407 U.S. at 529; however, as noted, he was not present during many of the proceedings and it was his attorney who acquiesced to the adjournments. The total delay to which Stokes acquiesced is 222 days.[16] While mitigated by Stokes's acquiescence, these delays are nonetheless charged to the State because it is ultimately the State's obligation to bring a case to trial. *See* ***id.***

¶66 There was also a delay of three days between July 16, 2001, and July 19, 2001, the reason for which is unclear from the record. The total delay attributable to the State, that is, delays attributable to the court and the prosecution,

[15] The following delays can be attributed to the court: (1) April 28, 1998, to May 5, 1998, due to scheduling (9 days); (2) May 5, 1998, to October 6, 1998, due to scheduling (154 days); (3) August 2, 1999, to November 29, 1999, due to the court's recusal and assignment of new judge (119 days) (also attributable to Stokes for unavailability of defense witness); (4) April 15, 2001, to May 1, 2001, due to the court's calendaring of motion decision (17 days); (5) June 13, 2001, to July 10, 2001, due to the court requesting copies of the State's documents (27 days); (6) July 10, 2001, to July 16, 2001, due to the court misplacing its notes (6 days); (7) August 31, 2001, to October 22, 2001, due to court's unavailability of earlier dates (52 days); (8) October 22, 2001, to January 22, 2002, due to likelihood that trial would last more than two days and the court was attending a judicial conference the rest of the week (92 days); (9) January 22, 2002, to March 20, 2002, due to necessity to reset trial as bench trial and hear motions (57 days) (also attributable to Stokes for *pro se* motions); (10) January 26, 2004, to February 17, 2004, due to court's decision to hear a homicide trial rather than Stokes's case (22 days).

[16] The delays to which Stokes acquiesced were: (1) March 1, 1999, to May 3, 1999 (Stokes stipulated to the State's request for a continuance because evaluation of Stokes was not complete) (63 days); (2) May 3, 1999, to August 2, 1999, because evaluation of Stokes had just been completed and the defense had not yet deposed the State's expert (90 days); (3) April 15, 2001, to May 1, 2001, due to the court's calendaring of motion decision—Stokes had a role in setting the date (17 days); (4) August 31, 2001, to October 22, 2001, due to the court not having an earlier date available—Stokes had a role in setting the date (52 days).

see ***Hadley v. State***, 66 Wis. 2d 350, 362-63, 225 N.W.2d 461 (1975) (court congestion charged to the state), are thus 891 (State) + 555 (court) = 1,446 days. Subtracting the delays that can also be attributed to Stokes, the remaining delay is 1,446 – 119 – 57 = 1,270, a period of over three and one-half years. Thus 1,270 days out of the 2,121 day delay cannot be attributed to Stokes.

¶67 Having established the delay attributable to the State, we must examine the reason provided by the State for the delays. ***Barker*** instructs us to assign differing weights to the reasons that the State may give for the delay:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.

Id., 407 U.S. at 531 (footnote omitted). However, a valid reason "should serve to justify appropriate delay." ***Id.*** Our supreme court has held that:

> The elements of delay that are to be weighed most heavily against the state are (1) intentional delay designed to disadvantage the defendant's defense, (2) a cavalier disregard of the defendant's right, (3) missing or forgetful witnesses, and (4) prolonged pretrial incarceration.

Green, 75 Wis. 2d at 638 (footnote omitted). In ***Green***, the court concluded that none of the four factors existed which contributed to the court ultimately declining to find a violation of Green's right to a speedy trial. *See* ***id.*** In ***Borhegyi***, by contrast, this court found a "cavalier disregard of a defendant's right" as a result of the State's inability to explain a four-month delay, ultimately concluding that Borhegyi's right to a speedy trial had been violated. *See* ***id.***, 222 Wis. 2d at 513-14, 520.

¶68 Here, the State insists that a number of its delays have valid reasons that justify them. The 298-day delay, which was caused by the lack of a psychological evaluation, the State explains as resulting from the death of one of the evaluators, causing additional work for the evaluation staff. The State acknowledges that 250 days were due to the unavailability of the State's expert and a State witness, but the State does not otherwise explain the delays. The State also notes that "[a] delay of over nine months was because the trial court stayed the proceedings pending the supreme court's decision in *State v. Laxton*, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784." However, this request came from the State. In making its request, we must assume the State was aware of the length of time it would take before the opinion would be released by the court. The State candidly admits, however, that some of these delays "appear[] to be beyond 'appropriate,'" explaining:

> For instance, witness unavailability in excess of eight months, while based on an appropriate reason, seems excessive. Likewise, the six months [sic], twenty-six day delay in the initial evaluation would seem a bit lengthy even in view of the death of a staff psychologist. But while the record is silent, an unknown amount of the time can no doubt be attributed to crowded dockets in Milwaukee County.

¶69 Some of the explanations the State provides appear understandable. For instance, the death of a psychologist set to conduct an evaluation might in itself be a perfectly reasonable delay; however, the length of the delay in this instance was nearly ten months (including three months due to the defense not being able to depose the expert sooner). Under the circumstances, this appears to be an unreasonably long period of time. Likewise, unavailability of a witness can certainly be a valid reason for delay, but for the witness to be unavailable for more than eight months seems unreasonable. With respect to the over nine-month delay

that resulted from the trial court staying the proceedings pending the decision in ***Laxton***, as noted, the court stayed the proceedings at the State's request, and this long delay must therefore be charged against the State. The State insisted at the time that the court should wait for the supreme court's decision on grounds that it might affect the outcome of this case; however, as Stokes notes, this argument is significantly weakened by the fact that the State did not consistently seek an adjournment of all of its petitions for sexually violent person commitments pending in Milwaukee County.

¶70 Moreover, the State's vague reference to "crowded dockets in Milwaukee County" as an explanation for delays when "the record is silent," is unclear. In fact, the record sets forth a number of the delays attributable to the court's docket—which the State correctly acknowledges are charged to the State, albeit weighed less heavily. For instance, the court's docket was responsible for the ninety-two-day delay, due to the court's refusal to begin a bench trial in this case, because it would take more than two days "and thus conflict with" the trial court's attendance at a judicial conference, and twenty-two days due to the trial court's decision to try a homicide case rather than this case. In light of these entries we cannot presume, as does the State, that "crowded dockets" must have caused other delays when no reason for the adjournment is given. As evidenced by the trial court's subsequent denial of Stokes's postcommitment motion, the trial court was, as noted, unconvinced that the abnormally long time it took to bring Stokes to trial was unreasonable. *See* ***Barker***, 407 U.S. at 529-31.

¶71 Although there is no indication that the State intentionally put Stokes's defense at a disadvantage or had a witness who was forgetful or failed to appear, *see* ***Green***, 75 Wis. 2d at 635, the State detained Stokes for almost six years before trial. Even though some of the State's explanations for the delays are

reasonable, the aggregate result satisfies one of the factors our supreme court has listed as weighing most heavily against the State, "prolonged pretrial incarceration," and comes close to being a "cavalier disregard of the defendant's right." ***Id.*** Consequently, because many of the reasons for the delays are legitimate and understandable, Stokes was still detained during the entire almost six-year period he spent awaiting trial, more than half of which was due to actions by the State, this factor is neutral.

¶72 We thus move to the third consideration: whether Stokes asserted his right to a speedy trial. ***Barker***, 407 U.S. at 531.

> Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.

Id. at 531-32. A defendant does not waive the right to a speedy trial by failing to assert it, but failure to assert it "will make it difficult for a defendant to prove that he was denied a speedy trial." ***Id.*** at 528-29, 532.

¶73 The parties disagree about when Stokes actually asserted his right to a speedy trial. The State maintains that "the first indication in the record that Stokes was concerned about his trial proceeding promptly is the hearing on July 30, 2003," when his attorney indicated that Stokes was very angry that the trial date had been postponed at the May 7, 2003 hearing. As support, the State cites the following statement by Stokes from January 3, 2002: "I'm not trying to overthrow the court's schedule or anything, you can always reset the trial date. I

been [sic] sitting for 4 years now. So another 30 days or 60 days won't make a difference."

¶74 Stokes disagrees and submits that he "raised his concerns about delays before April 22, 1999," and points to remarks his counsel made on April 22, 1999, in opposition to the State's request for an adjournment, referencing Stokes's feelings about the previous adjournment on February 11, 1999: "Let me indicate Stokes' position, which is one of really being upset. I talked to him Sunday – or Saturday about the trial and the last time this was scheduled was told in essence by everyone that we would be able to go on this date." Stokes also cites to portions of the record from March 26, 2002, and July 30, 2003 (dates when Stokes was not produced), at which time his attorney relayed to the court Stokes's frustration with the delays and desire for a swift resolution.

¶75 Thus, the record clearly indicates that Stokes asserted his right to a speedy trial as early as April 1999. In 2003, as the State acknowledges, Stokes was extremely upset about the delays, and the record in fact shows that his eventual request that his attorney withdraw from the case and that he be assigned a new attorney was in part due to his dissatisfaction with the delays. On September 15, 2003, Stokes told the court:

> I've realized that the probable cause hearing then already found … that it was probable -- that I should, you know, be locked up until -- until my trial date. They keep riding that horse down the road. I told my attorney numerous times that I didn't want all these delays, I wanted to get this, it's been five and a half years, I've sitting up there waiting to come to trial.
>
> ….
>
> I asked him to make motions two -- three years ago, four years ago, to -- to get this trial -- to get this trial over with. And is there any motions up there where he's asked to -- to have me have a speedy trial or get this done? You don't

> just lock a person up for five and a half years, and -- even on a homicide case, and -- and -- and won't bring 'em to trial for five and a half years, Your Honor.

¶76 Despite Stokes's subsequent frustration with the delay and strong assertion of his right, he did make a statement in 2002 indicating indifference toward further delay. However, the statement quoted by the State was made on the date Stokes waived his right to a jury trial, which in and of itself appears to have been done in an effort to speed up the proceedings.

¶77 Still, for most of the proceedings, Stokes was not produced, and hence, relied on his attorney to express his desire for a speedy resolution. As noted, there were a total of forty-one in-court proceedings that Stokes's counsel attended and Stokes was produced for only eight: April 30, 1998; February 11, 1999; November 29, 1999; March 9, 2000; May 4, 2001; January 3, 2002; September 15, 2003; and September 24, 2003. Granted, some hearings were less significant and may not have required Stokes's participation, but it is nevertheless clear that during the entire six years Stokes spent incarcerated awaiting trial, he was given only eight opportunities to personally assert his interest in a speedy resolution—seven when disregarding the April 30, 1998 probable cause hearing that took place two days after the filing of the petition. As is evident from the dates on which Stokes did appear in court, during 2000, 2001, and 2002, he appeared in court only once, and during 1999 and 2003 he appeared twice. On September 15, 2003, when asked by the court why he waited until that date, a scheduled trial date, to ask for a new attorney, Stokes responded that it was because he was almost never produced and was unaware of his attorney agreeing to adjournments and he could not understand why his attorney was not making certain motions on his behalf. Against this backdrop, Stokes's assertion of his

right through his attorney appears sufficient. Because Stokes did also express indifference, this factor seems to weigh slightly in favor of a violation.

¶78 Finally, the last factor is whether the delay resulted in prejudice to Stokes. This factor is assessed in "light of the interests of defendants which the speedy trial right was designed to protect." ***Barker***, 407 U.S. at 532. ***Barker*** identified three such interests: (1) "to prevent oppressive pretrial incarceration"; (2) "to minimize the anxiety and concern of the accused"; and (3) "to limit the possibility that the defense will be impaired." ***Id.***; *see* ***Hatcher v. State***, 83 Wis. 2d 559, 569, 266 N.W.2d 320 (1978). The Court explained that "the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." ***Barker***, 407 U.S. at 532. With respect to pretrial incarceration and anxiety and concern of the accused, the Court commented:

> [There are] societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs. The time spent in jail is simply dead time. Moreover, if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense. Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility.

Id. (footnotes omitted).

¶79 The State asserts that "Stokes suffered no prejudice in his ability to try this case." In so arguing, the State appears to focus exclusively on Stokes's ability to adequately prepare his case for trial, and while the State correctly notes that the ***Barker*** Court considered this factor to be the most serious, the State's argument ignores the other two factors.

¶80 We agree with the State that it does not appear as if Stokes's defense was impaired by the delay, but it does appear as if the other two interests that the speedy trial right was designed to protect—prevention of oppressive pretrial incarceration and minimization of anxiety and concern—were not protected. *See* ***id.***, 407 U.S. at 532. The State filed the petition for Stokes's commitment a few days before he was set to be released. Unlike ***Green***, where the defendant was not prejudiced because he was already incarcerated for other reasons while awaiting trial, ***id.***, 75 Wis. 2d at 637-38, here, but for the State's petition, Stokes would have been released. As Stokes points out, the long delay put him in an untenable position with regard to sexual offender treatment programs because enrollment in such programs while awaiting trial would have made it practically impossible for him to maintain his defense that he was not a sexually violent person, and because participation in treatment requires him to give up his right to remain silent since the State has been known to use treatment records, including any incriminating statements, at trials. Stokes's detention thus seems to constitute "oppressive pretrial incarceration." *See* ***Barker***, 407 U.S. at 532.

¶81 With regard to anxiety and concern, obviously Stokes's life was disrupted upon learning that, after serving a thirteen-year sentence, he would not be released when expected, ultimately resulting in almost six additional years of idleness and "dead time." *See* ***id.*** As evidenced by Stokes's at times angry reactions to the delays, detaining him for such an exorbitant amount of time

without a resolution did the opposite of "minimiz[ing the] anxiety and concern" he faced. *See* ***id.*** Accordingly, the prejudice factor weighs in favor of a violation.

¶82 Finally, the State also appeals to Stokes's history and insists that in balancing the four factors, the delay in this case does not justify the extreme remedy of dismissal because Stokes was eventually adjudicated to be sexually violent and his release without any commitment places the community at risk. The State cites ***State ex rel. Marberry v. Macht***, 2003 WI 79, ¶¶29-30, 262 Wis. 2d 720, 665 N.W.2d 155; ***State v. Schulpius***, 2006 WI 1, ¶¶39-40, 287 Wis. 2d 44, 707 N.W.2d 495; and ***State v. Beyer***, 2006 WI 2, 287 Wis. 2d 1, 707 N.W.2d 509, as support for the proposition that the supreme court has been reluctant to order release as a remedy for delay for sexually violent persons. We first note that ***Marberry***, ***Schulpius*** and ***Beyer*** are in some ways unlike this case because none of them involved a violation of the defendant's right to a speedy trial; rather, they involved due process violations *after* the accused had already been adjudicated a sexually violent person. Nonetheless, we agree that their basic message resonates here as well, and thus, we agree with the State's concern that because Stokes was ultimately found to be a sexually violent person, dismissal of the petition and releasing Stokes into the community would place the public at risk.

¶83 Having determined that the delay in this case was presumptively prejudicial, balancing the remaining three factors of the ***Barker*** test—reason for the State's delay, Stokes's assertion of his right, and prejudice to Stokes—we conclude that while the facts before us come very close to violating Stokes's constitutional right to a speedy trial because of Stokes's status as a sexually violent person, we decline to conclude that a violation occurred. While we decline to hold that the facts of this case in fact amount to violation, we emphasize that

this decision ought not to be read as a validation of the delay and that this case is not to be viewed as effectively eviscerating the right to a speedy trial, guaranteed by both the United States and Wisconsin Constitutions. Rather, we wish to highlight that the facts before us came extremely close to satisfying the stringent criteria for a violation of the right to a speedy trial. The record in this case suggests that the court system, the State, and even Stokes's own attorney had little interest in giving Stokes a timely trial. Never was an adjournment denied, and adjournments were often granted for the most whimsical of reasons. Even after Stokes waived his right to a jury trial, he waited two years for his trial to be completed.[17] Although not a constitutional violation, we find this very troubling.

[17] We take judicial notice of the fact that Milwaukee County has a specific judge who is assigned to handle petitions for the commitment of sexually violent persons and that this assignment has a term length of only one year. As a result, and as discussed in footnote one, during the six years that Stokes's case was pending before the Milwaukee County Circuit Court, seven different judges were assigned to it. In light of the term being only one year, we recognize that a significant part of the problem appears to be a systemic one. Each judge who received the case naturally viewed it as new to them. While the record includes references by the various judges to whom this case was assigned acknowledging that the case had been pending for a very long time, it appears that the judges failed to grasp the cumulative effect of the delays to Stokes, and accordingly, did not exhibit affirmative attempts to achieve a speedy resolution.

Further, we also take judicial notice of the record and appellate briefs filed in ***State v. Tillman***, 2006AP0366-CR (2006). In this case, the defendant was represented by the same public defender who represented Stokes during the majority of Stokes's case before he withdrew from Stokes's case on September 15, 2003. Although ***Tillman*** was filed after the public defender in question withdrew from Stokes's case, we note that in November 2004 the attorney also sought to withdraw from Tillman's case, stating as reasons that he had not been paying adequate attention to Tillman's case due to his heavy caseload at the public defender's office, specifically admitting that "I have probably been ineffective and compromised Mr. Tillman's case." We see these events in ***Tillman*** as a further indication of a systemic problem where the public defender's office is overburdened and where an experienced attorney becomes apparently incapable of handling the heavy caseload. It is a well-known fact that the resources in the public defender's office are stretched; however, we cannot accept disregard for defendants' rights as a consequence of lack of funding.

C. Sufficiency of Evidence

¶84 Finally, Stokes also submits that the evidence was insufficient to commit him under WIS. STAT. ch. 980.[18] Although we conclude that Stokes's right to self-representation was violated, ***State v. Ivy***, 119 Wis. 2d 591, 609-10, 350 N.W.2d 622 (1984), dictates that we must nevertheless address the sufficiency of evidence issue ("[W]here a defendant claims on appeal from a conviction that the evidence is insufficient to sustain the conviction, the appellate court is required to decide the sufficiency issue even though there may be other grounds for reversing the conviction that would not preclude retrial.").

¶85 We review the sufficiency of evidence issue employing the same standard as in criminal cases. *See* ***State v. Curiel***, 227 Wis. 2d 389, 417-19, 597 N.W.2d 697 (1999). The standard for reviewing the sufficiency of evidence in criminal cases is well-settled:

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

[18] In the alternative, Stokes also contends that if this court considers the argument waived due to the trial court's failure to file a postcommitment motion, then his trial counsel was ineffective for failing to challenge the issue in a postcommitment motion. Because we address the merits of Stokes's main argument we need not address his alternative argument.

¶86 To prove that Stokes is a sexually violent person, as relevant here, the State must establish that Stokes "has a mental disorder" and "is dangerous to others because the person's mental disorder creates a substantial probability that he or she will engage in acts of sexual violence." WIS. STAT. § 980.02(2) (2001-02).[19]

¶87 Stokes contends that the evidence presented was insufficient to support a finding that he was a sexually violent person under WIS. STAT. § 980.02(2) (2001-02) because the evidence presented established neither that he suffered from a mental disorder nor that it was substantially probable that he would engage in acts of sexual violence.

¶88 With respect to evidence showing that he suffered from a mental disorder, Stokes concedes that Dr. Coffey diagnosed him with both "personality disorder, not otherwise specified, with antisocial features" and with "paraphilia, not otherwise specified, non-consent." He submits, however, that because paraphilia not otherwise specified, non-consent is not in the DSM, it "is not scientifically accepted as a diagnosis," and therefore it cannot form the basis for his commitment. He insists that Dr. Coffey even admitted that the authors of the DSM considered but rejected that diagnosis from inclusion in the DSM. He also asserts that, although personality disorder, not otherwise specified, with antisocial features is in the DSM, it is an insufficient diagnosis because it is "too imprecise." We are not convinced.

[19] Subsequent amendments to the statutory language introduced by 2003 Wis. Act 187 do not effect our analysis because they came into effect after the commencement of Stokes's trial.

¶89 As to Stokes's claim that paraphilia, not otherwise specified, non-consent is not a valid diagnosis, contrary to what Stokes argues, the record does not reflect that Dr. Coffey admitted that the authors of the DSM considered but rejected this particular paraphilia diagnosis. During Stokes's cross-examination of Dr. Coffey, Stokes asked Dr. Coffey whether there are diagnostic criteria for paraphilia, not otherwise specified, non-consent, and Dr. Coffey responded: "[t]here's diagnostic criteria for paraphilia not otherwise specified in the DSM, and I added the non consent as a descriptor." Immediately thereafter, Stokes asked Dr. Coffey whether rape has diagnostic criteria in the DSM. Dr. Coffey responded that such criteria were considered, but due to concerns from the Women's Movement, "that someone could be diagnosed with a paraphilia for rape, that that would somehow be used as not guilty by reason of insanity or mitigating kind of factor in defense," diagnostic criteria for rape were left out. She then added, however, that "there's clear research that people demonstrate deviant arousal patterns to rape, as well as we have behavioral evidence that it does exist and does cause problems and impairments, and that's why I put it in that not otherwise specified category." We are satisfied that the paraphilia with which Dr. Coffey diagnosed Stokes is a valid diagnosis and sufficient to constitute a "mental disorder."

¶90 However, even if Dr. Coffey's paraphilia diagnosis could not be said to have been explicitly mentioned in the DSM, we are unconvinced that this fact would make the diagnosis insufficient to constitute a "mental disorder" within the meaning of WIS. STAT. § 980.02(2) (2001-02). ***Kansas v. Hendricks***, 521 U.S. 346 (1997), makes this evident. Stokes references ***Hendricks*** but does not mention the discussion pertaining to the terminology referring to mental health issues as used in the medical and legal fields. ***Hendricks*** specifically addressed

the argument that a "mental abnormality" is not the same as "mental illness" because "mental abnormality" is a term invented by the legislature, not the psychiatric community. ***Id.*** at 359. The Court reasoned as follows:

> Not only do "psychiatrists disagree widely and frequently on what constitutes mental illness," but the Court itself has used a variety of expressions to describe the mental condition of those properly subject to civil confinement.
>
> Indeed, we have never required state legislatures to adopt any particular nomenclature in drafting civil commitment statutes. Rather, we have traditionally left to legislators the task of defining terms of a medical nature that have legal significance. As a consequence, the States have, over the years, developed numerous specialized terms to define mental health concepts. Often, those definitions do not fit precisely with the definitions employed by the medical community.

Id. (citations omitted).

¶91 The leeway expressed in ***Hendricks*** and Dr. Coffey's explanation for why she diagnosed Stokes with paraphilia, not otherwise specified, non-consent are clearly sufficient to establish that Stokes has a mental disorder within the meaning of WIS. STAT. § 980.02(2) (2001-02).

¶92 We are also not convinced by Stokes's claim that personality disorder, not otherwise specified, with antisocial features, is too imprecise a diagnosis. In ***State v. Adams***, 223 Wis. 2d 60, 588 N.W.2d 336 (Ct. App. 1998), *rev. denied*, 225 Wis. 2d 488, 594 N.W.2d 382 (1999), the defendant presented an argument with respect to antisocial personality disorder that was practically identical to the one Stokes is making with respect to personality disorder, not otherwise specified, with antisocial features. The court rejected the arguments, stating "under ch. 980, a person who has the mental disorder of 'antisocial personality disorder,' uncoupled with any other mental disorder, may be found to

be a 'sexually violent person,'" and committed under WIS. STAT. ch. 980. 223 Wis. 2d at 68-69. In arguing that the diagnosis is too general, Stokes concedes that in ***Adams*** this court held that a diagnosis of only "antisocial personality disorder" was not too imprecise, but he claims nonetheless that it should be, and that personality disorder, not otherwise specified, is even more imprecise than antisocial personality disorder. We disagree. ***Adams*** controls. Dr. Coffey's diagnosis of personality disorder, not otherwise specified, with antisocial features, was clearly sufficient to constitute a mental disorder for purposes of WIS. STAT. § 980.02(2) (2001-02).

¶93 Finally, with regard to the requirement that there be a substantial probability that Stokes will engage in acts of sexual violence, Stokes contends that the evidence was insufficient to satisfy this requirement because "no expert ever made a prediction specific to [him]." He submits that none of Dr. Coffey's risk assessments predicted the risk of him actually reoffending, and asserts that Dr. Coffey "was very clear that she was not making a 'prediction statement' which could never be tested in terms of accuracy," and "[i]nstead she was 'categorizing' the probability of reoffense." He acknowledges that Dr. Coffey opined that Stokes had a substantial probability of reoffense, but asserts that this was merely due to her belief that "the instruments she used underestimated the risk of reoffense because not all reoffenders were caught." We again disagree.

¶94 By arguing that Dr. Coffey never predicted that he would reoffend, Stokes appears to be splitting hairs to reach a conclusion that is not supported by the record. Evidently because Dr. Coffey appears to have preferred not to use the word "predict," Stokes seizes on the word "predict" to argue that no one actually predicted that he would reoffend and that therefore the evidence was insufficient. This emphasis by Stokes on one word is not on point. The relevant standard,

however, is not whether a prediction was made; rather, it is whether there was a substantial probability that Stokes would reoffend. Dr. Coffey may have shied away from using the word "prediction," but she unequivocally testified in multiple instances that, in her opinion, there was a substantial probability that Stokes would reoffend. She also stated that Stokes's scores on the various risk assessment tests were "consistent with an individual whose level of risk is above the much more likely than not level of risk required for Chapter 980 commitment." There was certainly enough evidence to establish a substantial probability that Stokes would engage in acts of sexual violence under WIS. STAT. § 980.02(2) (2001-02). We are thus satisfied that the trial court had sufficient evidence to conclude that Stokes was a sexually violent person under § 980.02(2) (2001-02).

¶95 Based upon the foregoing reasons, we therefore reverse and remand for a new trial.

By the Court.—Orders reversed and cause remanded.

Recommended for publication in the official reports.

¶96 FINE, J. (*concurring*). I fully join in the Majority opinion, but write separately to amplify on the Majority opinion's footnote seventeen.

¶97 At its core, the power of the purse is vested in the legislature. WIS. CONST. art. VIII, § 2 ("No money shall be paid out of the treasury except in pursuance of an appropriation by law."), subject to judicial override when the legislature's exercise of that power "unreasonably curtail[s] the [judiciary's] powers or materially impair[s] the efficacy of the courts," ***Flynn v. Department of Admin.***, 216 Wis. 2d 521, 550, 576 N.W.2d 245, 257 (1998), because the judiciary has the "inherent powers … to preserve its constitutional duty to oversee the administration of justice," ***id.***, 216 Wis. 2d at 551, 576 N.W.2d at 257.

¶98 The Majority opinion eloquently recognizes that what happened in this case is not acceptable. The Dissent, too, recognizes the right to the speedy resolution of disputes where the result may place significant restrictions on a person's life—either through the criminal process as such or *via* WIS. STAT. ch. 980. No person against whom criminal-law-type sanctions may be applied should have to wait for the judicial resolution of his or her claims as long as James E. Stokes has waited. ***Jarndyce and Jarndyce*** delays are intolerable.

¶99 The Wisconsin Supreme Court has the ultimate responsibility for lawyers practicing in this state:

> We must reiterate, the primary duty of the courts as the judicial branch of our government is the proper and efficient administration of justice. Members of the legal profession by their admission to the Bar become an important part of that process and this relationship is

> characterized by the statement that members of the Bar are officers of the court. An independent, active and intelligent Bar is necessary to the efficient administration of justice by the courts. The labor of the courts is lightened, the competency of their personnel and the scholarship of their decisions are increased by the ability and the learning of the Bar. The practice of the law in the broad sense, both in and out of the courts, is such a necessary part of and is so inexorably connected with the exercise of the judicial power that this court should continue to exercise its supervisory control of the practice of the law.

In re Integration of Bar, 5 Wis. 2d 618, 622, 93 N.W.2d 601, 603 (1958). Thus, among other things, the Wisconsin Supreme Court has promulgated Rules of Professional Conduct, which govern the practice of law. SCR ch. 20. The Rules' preamble declares the lawyer's responsibility to his or her clients and to the judiciary: "In all professional functions a lawyer should be competent, prompt and diligent." This hortatory command has been reified by two main ethical rules: SCR 20:1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.") and SCR 20:1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."). Supreme Court Rule 20:8.4 tells us it is "professional misconduct for a lawyer to: **(a)** violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Lawyers must also ensure that lawyers under their direct supervision do not violate the Rules. SCR 20:5.1(b) ("A lawyer having direct supervisory authority over

another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.").[1]

¶100 The American Bar Association has recognized in a formal ethics opinion the tension between a lawyer's caseload and the lawyer's ethical responsibility to fully represent his or her client:

> All lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation. If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide competent and diligent representation. If the court denies the lawyer's motion to withdraw, and any available means of appealing such ruling is unsuccessful, the lawyer must continue with the representation while taking whatever steps are feasible to ensure that she will be able to competently and diligently represent the defendant.
>
> Lawyer supervisors, including heads of public defenders' offices and those within such offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the other lawyers in the office conform to the Rules of Professional Conduct. To that end, lawyer supervisors must, working closely with the lawyers they supervise, monitor the workload of the supervised lawyers to ensure that the workloads do not exceed a level that may be competently handled by the individual lawyers.

ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (May 13, 2006) (italics omitted), *available at* http://www.abanet.org/cpr/06_441.pdf; *see*

[1] The Rules of Professional Conduct were amended, effective July 1, 2007, by Supreme Court Order 04-07, 2007 WI 4. Neither the Preamble excerpt nor the Rules quoted in the body of this concurrence are changed by the new rules.

also Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, THE CHAMPION (Dec. 2006), *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads /ABA_ethicsp10-22.pdf.

¶101 As judges, we know that the delays visible in this case often fly beneath the radar, as "cases" are "disposed of" by various expediencies, generally focusing on plea bargaining, which, as I explained at length some twenty years ago, not only permits many persons guilty of horrific crimes to escape their just punishment, but also ensnares innocent persons in the system's maw because the lawyers, either prosecution or defense, cannot fulfill their ethical duty to fully represent their clients. RALPH ADAM FINE, ESCAPE OF THE GUILTY 16–111 (1986).

¶102 In my view, the Wisconsin Supreme Court should: (1) determine whether the caseload burdens on prosecutors and defense lawyers prevent or interfere with the lawyers' ability to fully represent their clients; and, if so, (2) determine whether the caseload burdens stem from the legislature's refusal to adequately fund Wisconsin's public-defender and prosecutorial services; and, if so, (3) devise a solution within its powers as the head of the judicial branch of government to mandate expenditures necessary to ensure that justice is done in *every* case.

¶103 The ability of lawyers to fully represent their clients, whether those clients are defendants in criminal cases, respondents in WIS. STAT. ch. 980 proceedings, or the State of Wisconsin, is *at least* as critical to the functioning to our system of justice as is the availability of air conditioning. *See* ***Barland v. Eau Claire County***, 216 Wis. 2d 560, 583, 575 N.W.2d 691, 700 (1998) (A "court's

need to function efficiently included the inherent power to order installation of an air conditioner.”). We must not tolerate a bleak house of Justice where lawyers cannot comply fully with the Rules of Professional Responsibility to give to *each* client the high quality of representation mandated by those Rules.

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¶104 KESSLER, J. (*concurring/dissenting*). I join in Part A of the Majority analysis and conclusions that Stokes was improperly deprived of his right to proceed *pro se* and is therefore entitled to a new trial.

¶105 However, I cannot join the Majority's extremely reluctant conclusion that Stokes has not been deprived of his constitutional right to a speedy trial. Majority, ¶83. Stokes was subjected to a delay of nearly six years (2121 days) from the time the petition was filed until the trial began. Majority, ¶61. Even though some delays in which he acquiesced (222 days) can fairly be attributed to Stokes, Majority, ¶65, a three year, 175 day (1270 days) delay is fairly attributable only to the State, including the trial court. Majority, ¶66. During the trial, additional adjournments and delays from February 17, 2004 through June 1, 2004, further deprived Stokes of his right to a speedy trial. Majority, ¶¶3-6. Under the totality of the circumstances, because Stokes was incarcerated from April 28, 1998 through June 1, 2004, without any determination that the State had a statutory right to continue to incarcerate him, in my judgment, following the analysis required by ***Barker v. Wingo***, 407 U.S. 514 (1972), ***Norwood v. State***, 74 Wis. 2d 343, 246 N.W.2d 801 (1976) and ***Day v. State***, 61 Wis. 2d 236, 212 N.W.2d 489 (1973), Stokes has been deprived unconstitutionally of his right to a speedy trial.