

STATE OF WISCONSIN

CIRCUIT COURT ONEIDA COUNTY BRANCH 2

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 19 CF 180
18 CF 303

BLAKE C. FITZGERALD,

Defendant.

STATUS/PRETRIAL CONFERENCE

HON. Judge Michael H. Bloom,
Circuit Court Judge Presiding

March 25, 2020

Oneida County Courthouse, Wisconsin

APPEARANCES:

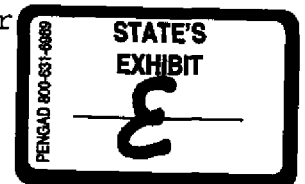
The State of Wisconsin appeared
telephonically by Oneida County Assistant
District Attorney MARY SOWINSKI

The Defendant appeared via
videoconference

Defense counsel, ALBERT MOUSTAKIS,
Attorney at Law, Eagle River, Wisconsin,
and SARA WELCENBACH, Investigator,
appeared telephonically

Stenographically reported and transcribed by:

LYNN M. PENFIELD, RPR, CRR
Oneida County Branch 2 Court Reporter
P.O. Box 400
Rhineland, WI 54501



COPY

1 Oneida County; March 25, 2020; 3:10 p.m.

2 Judge Michael H. Bloom; Branch 2

3 * * *

4 THE COURT: We'll go on the record in
5 18 CF 303, also 19 CF 180, State of Wisconsin versus
6 Blake Fitzgerald. The State appears by Mary Sowinski.
7 The defendant appears personally via teleconference from
8 the Oneida County Jail. His attorney, Al Moustakis,
9 appears via telephone with leave of Court. The
10 investigator engaged by the defendant, Sara Welcenbach,
11 is also appearing via telephone with leave of Court.

12 Pursuant to various orders of the Wisconsin
13 Department of Health Services, the Wisconsin Supreme
14 Court and also Oneida County Circuit Court, in light of
15 the ongoing COVID-19 virus scenario, we are conducting
16 these proceedings remotely consistent with requirements
17 of these orders.

18 We're on the calendar for the Court to make a
19 final ruling on the defendant's motion to amend bond and
20 also to address any other issues that are raised by
21 counsel that can be appropriately addressed today.

22 We are on the calendar for a jury trial in this
23 matter to commence on June 2nd. It had previously been
24 scheduled to begin on March 30th, next week, but as a
25 result of the Wisconsin Supreme Court's order of

1 March 22nd relative to jury trials, we set the matter
2 over until the June date.

3 Is there anything in addition to what's already
4 of record, Mr. Moustakis, that you wish to indicate
5 regarding the motions to modify bond?

6 MR. MOUSTAKIS: There is.

7 THE COURT: Go ahead.

8 MR. MOUSTAKIS: And before I do that, Judge, I
9 also want to -- with the Court's permission, since we
10 had the hearing on Monday, I do want to at least
11 formally object to the Supreme Court's order.

12 Frankly, I'm objecting to the delay of my
13 client's scheduled trial with his speedy trial demand.
14 I want to do that for the record.

15 And I understand that the Court is bound, but I
16 think for purposes of protecting my client's
17 Constitutional rights should this go to a different
18 level at some point, I need to make that objection
19 formally and ask the Court to note it of record.

20 THE COURT: The -- and there's nothing
21 inappropriate about raising the objection, and it is
22 noted of record and will be preserved for purposes of
23 appeal or otherwise in the future.

24 MR. MOUSTAKIS: Okay. And I do have more I'd
25 like to say, Judge, for the record.

1 THE COURT: Go ahead.

2 MR. MOUSTAKIS: The question today is why
3 should the Court release my client pending his trial in
4 light of the fact that he has been charged with bail
5 jumping while on bond -- and I know there are a number
6 of bail jumpings -- and I'm going to give the Court a
7 list of reasons first.

8 I'm also going to talk about a few other
9 things, but first, this is a non-violent case. That's
10 one. Two, there's no violence that's been alleged in
11 this case, and I've already put on the record that the
12 claim that he was in an armed standoff was inaccurate,
13 okay?

14 There's been further things that have happened
15 since this pandemic has occurred. My client's ability
16 to assist in his defense due to the pandemic has been
17 greatly diminished, and I'm going to explain what I mean
18 by that and why I'm saying this, Judge.

19 It's now been exasperated by the jail. They
20 placed him in an area, first off, where other persons
21 that they're bringing in during intake were housed.
22 That's now resulted in his being confined for the next
23 14 days for 23 hours a day. He gets one day out of
24 that -- or one hour out of that 24 hours where he can
25 make contact with anyone outside the jail, including

1 myself, my investigators.

2 So from that perspective I kind of think or
3 looked at it as the jail is now infringing on his right
4 to prepare a defense and actively participate in his
5 defense.

6 Four, as we investigate this going forward,
7 it's my impression that the State has failed to obtain
8 what I consider -- and I don't have it all in front of
9 me -- exculpatory information. I don't know if some of
10 those representatives have done it intentionally or not,
11 but there's things that they should have obtained that
12 they should have certainly known about.

13 I'm extremely concerned about that failure, and
14 while Mr. Fitzgerald is in custody, it's rather
15 difficult for us to not only access that information --
16 and we have been able to access some of it -- but to get
17 ready for trial further.

18 And this is important, I think, from the
19 standpoint of bond. During this entire time
20 Mr. Fitzgerald's been in custody, if he were convicted
21 today, okay, I think there'd be a good argument why
22 little or no further jail time should be imposed. The
23 current incarceration weighs heavily on him, and whether
24 he should just cave in because there's a prospect of
25 being released is something I know that is on his mind.

1 This is a very troubling reality under the
2 circumstances that we have, and now what we have is the
3 Supreme Court of Wisconsin, in my opinion, violating the
4 defendant's federal and state Constitutional rights, the
5 basis of which is found in many ways as -- and I'll
6 note -- and I am discussing the dissent in the opinion,
7 but in many ways there are noted by the Bradley and
8 Daniels' dissent, and I'm going to talk about that, I
9 think, a little more in a few minutes.

10 Mr. Fitzgerald has been in custody since
11 December while -- all the while he spoke of the
12 presumption of innocence for a non-violent offense,
13 where there really has been no evidence of violence to
14 his children or his ex-wife.

15 Mr. Fitzgerald was employed and earning a
16 substantial amount of money prior to his incarceration.
17 All that is now lost, and his children, frankly, are
18 suffering financially as a result.

19 His employer has been contacted by my
20 investigator -- the ex-employer -- and that's one of the
21 reasons I have her on the line, if the Court wants to
22 take some testimony from her relative to her
23 conversation with his prior employer.

24 From the information that I've gathered from
25 her, he's still employable by that company at this time.

1 And I would be remiss if I didn't address the impact of
2 COVID-19 as it should apply as the major factor the
3 Court could consider in its determination on the issue
4 of bond. As we speak, many states are now releasing
5 non-violent offenders that have already been convicted
6 of crimes in an effort to safeguard them and others from
7 COVID-19.

8 I just looked at an article yesterday titled
9 "COVID-19 poses a heightened threat in jails and
10 prisons," a science magazine that's written by Emma Grey
11 Ellis. Under the title it says "An outbreak could
12 seriously harm staff, the incarcerated, and the
13 surrounding community. Releasing inmates could help -
14 if they have somewhere to go."

15 There are, according to -- at least at the time
16 this article was written, there were COVID-19 cases
17 amongst correctional officers in Los Angeles,
18 San Francisco, Leesburg, Georgia and, of all other
19 places, Waupun, Wisconsin, at least according to the
20 article, and I think there were others.

21 Even President Trump has inquired about the
22 possibility of releasing non-violent offenders who are
23 at high risk. The risk is poised to be explosive in the
24 incarcerated populations where social distancing is
25 impossible. Inmates sleep and live in close proximity

1 and, in Mr. Fitzgerald's case, he is not convicted of
2 the crime for which he is charged.

3 The Wisconsin Supreme Court has concluded --
4 has included -- I'm sorry. The Wisconsin Supreme Court
5 has included a provision requiring that all released --
6 have not included a provision requiring the release of
7 all persons who are awaiting trial for non-violent
8 matters or which really do not pose a real threat to the
9 community. They simply didn't do that. What they did
10 instead is they tolled the time for holding trials when
11 there's a speedy trial demand filed, and that's the case
12 that we have here.

13 Currently there are many articles -- and I
14 frankly have to refer to the Internet, because that's
15 where I get a lot of information when I'm at home,
16 regarding these issues.

17 District Attorneys in San Francisco, Boulder,
18 Colorado, have taken steps to release people held
19 pretrial, prison -- called the Prison Policy Initiative.
20 It was updated on March 25th of 2019. The article
21 indicates that jails are amplifiers of infectious
22 diseases such as the COVID-19.

23 According to the article, in Ohio, Cuyahoga
24 County and Hamilton County have begun to issue court
25 orders and conduct special hearings to increase the

1 number of people released from their local jails.

2 The Los Angeles County Sheriff has reduced
3 their jail population by 6 percent in an effort to
4 reduce the risks. Travis County, Texas, more inmates
5 are being released from local jails on personal bond.

6 I'm not going to belabor the point, but the
7 list goes on and on, and I would predict it will grow
8 around the country as the COVID-19 spreads, and it will.

9 The Court should -- and I don't know if maybe
10 the Court has read some of these articles or not, but
11 there are a number of them.

12 And yet another note, and maybe more important,
13 the Wisconsin Supreme Court, in my opinion as I
14 indicated before, has violated both the United States
15 Constitution Sixth Amendment right to a speedy trial and
16 the Wisconsin Constitution, and the defendant's right to
17 a speedy trial in what I consider to be an ex parte
18 manner.

19 Justice Bradley has clearly laid out in her
20 dissent the violations in that regard of the order. The
21 Supreme Court has issued the order without the matter
22 being brought before them by an aggrieved party, either
23 the State or a defendant, and I've been trying to find
24 federal actions similar in nature. I know the Court
25 alluded to one that seemed to be pending. I don't

1 recall if it was having to do with a speedy trial or
2 not, but I could not find it.

3 The research I've been able to find is that
4 what the Supreme Court did and -- well, before I get to
5 that, the Supreme Court issued an order, and I would say
6 that some of the cases that highlight this are *Gideon*
7 *versus Wainwright*, *Betterman versus Montana*, *Barker*
8 *versus Wingo*, and I believe there are others.

9 Recently, March 16th of 2020, there's an ABA
10 Journal article written by Debra Cassens Weiss that
11 recounts the Supreme Court delayed arguments while other
12 courts suspended trials or closed over COVID-19
13 concerns. The article notes what New York courts have
14 done in felony matters where the defendant is in
15 custody. The matters are being conducted remotely by
16 video in jurisdictions where they have the technological
17 capabilities. I'm not sure if we're able to do that or
18 not, but that certainly is what New York appears to be
19 doing.

20 Nowhere did I find in that article or any other
21 information I could find where they were tolling the
22 time of speedy trial demands. The article notes many
23 other jurisdictions' response but, as I indicated, I
24 cannot find anything regarding the speedy trial issue.

25 Defendant's remedy here, according to the order

1 of the Supreme Court, is to request an emergency
2 exception to their order. That, of course, would take
3 time, arguments would have to be made, and all the while
4 Blake, while he is doing this, he is sitting in jail on
5 bond prior to being convicted.

6 If they decide against his request if he were
7 to make one, then there would have to be a federal
8 action which would further delay the matter. The effect
9 is that Mr. Fitzgerald remains in custody in violation
10 of the rights guaranteed to him under the U.S. and state
11 Constitutions. Now, I have to discuss this issue with
12 him, but because of this incarceration issue and the
13 limited time that we have, I have not been able to fully
14 advise him of that right.

15 In Justice Bradley's dissent to the ex parte
16 order of the Supreme Court, she notes that an emergency
17 does not create power. The Constitution was adopted
18 during great emergency.

19 It is the Sixth Amendment to the
20 U.S. Constitution that guaranteed Mr. Fitzgerald's right
21 to a speedy trial. The federal government's
22 Constitution granted power federally and limited the
23 power to the state level. The Supreme Court order
24 clearly attempts to supersede the U.S. Constitution.

25 I do not find any U.S. Supreme Court or other

1 federal case which impinges on the defendant's right to
2 a speedy trial.

3 In Bradley's words, no doctrine involving more
4 pernicious consequences was ever invented by the wit of
5 a man than that any of its provisions can be suspended
6 during any of the great exigencies of government. Such
7 a doctrine leads to anarchy or despotism.

8 The right to a speedy trial is historic in
9 nature. Nothing in the Constitution permits the
10 judiciary to limit the fundamental rights of
11 Mr. Fitzgerald under the Sixth Amendment.

12 As Bradley indicates, the Court order ties the
13 circuit court's hands. I understand that, but it does
14 not preclude the Court from releasing Mr. Fitzgerald
15 under bond or simply reinstating his current cash bond.
16 The Supreme Court order does not prevent that. That,
17 frankly, solves the issue from being raised in the
18 future and even precludes a motion to dismiss, which I
19 think would have to be his next potential motion for
20 holding the trial in an untimely manner.

21 Mr. Fitzgerald still has a sentencing hearing
22 on April 6th in Minnesota and to my knowledge that has
23 not been canceled. It would give the Court further
24 guarantees of Mr. Fitzgerald's compliance with bond,
25 because in that case he is going to be placed on

1 probation for a period of four years.

2 Mr. Fitzgerald, from my perspective of looking
3 at what we have here, has already been punished in a
4 substantial way, and that punishment continues until
5 this trial is concluded. Further, he is not in a
6 place -- he is not placed in a place where -- of
7 jeopardy being -- I'm sorry.

8 Further, he is in a place where there is
9 jeopardy of his being exposed to the virus that prompted
10 the Court -- the Supreme Court to issue its order. As
11 Bradley says, justifying the suspension of the people's
12 Constitutional guaranteed rights based upon a public
13 health emergency nullifies our Constitution.

14 The Wisconsin Supreme Court has done just that
15 by its order. And the more I looked at this issue from
16 Monday until now, Judge, I simply cannot find, even in
17 times of this type of situation that we have where --
18 where the impact of this virus, I don't see why that
19 should supercede a Constitutional right without
20 something coming down from the federal government in
21 that regard, and that hasn't happened to my knowledge.

22 I think Mr. Fitzgerald certainly understands,
23 having been in custody as long as he has, what now it
24 really means to be on bond and how he needs to act while
25 he's out on bond. The Court can make further

1 conditions. He does have an opportunity to be employed
2 at this point with his old employer.

3 And I think that that pretty much sums up the
4 things that I need to say for purposes of argument. I
5 don't know if the Court would like to hear from Sara
6 Welcenbach regarding her conversation with the
7 ex-employer or the information that she obtained from
8 the jail when she was trying to contact my client.

9 THE COURT: I will hear briefly from
10 Ms. Welcenbach, but hold on just a moment, please.

11 All right. Mr. Moustakis, if Ms. Welcenbach
12 has any information to supplement your statements, I'll
13 hear it. I will -- this is a bond hearing; I'm not
14 going to put her under oath. Go ahead.

15 MR. MOUSTAKIS: Mrs. Welcenbach, why don't you
16 describe for the Court your conversation first with the
17 ex-employer of Mr. Fitzgerald.

18 MS. WELCENBACH: I did speak with Steve Little
19 today of the Your Home Improvement Company based in
20 Duluth, Minnesota, and Mr. Little is the previous
21 supervisor for Mr. Fitzgerald. He spoke of him
22 positively and said that they would welcome him back at
23 this time and ensure employment.

24 They are considered an essential business
25 during the Corona-19 situation. Although their numbers

1 are down a little bit, they would be able to offer him
2 some employment.

3 THE COURT: All right. Hold on just a second,
4 please.

5 All right. Ms. Welcenbach, I'm going to have
6 to trouble you to speak a little slower and more clearly
7 so that we can -- so that my court reporter can get down
8 what you're saying.

9 But with that in mind, you can continue.

10 MS. WELCENBACH: Would you like to have me
11 repeat what I just said?

12 THE COURT: If you could, that would be
13 appreciated.

14 MS. WELCENBACH: I did speak with Steve Little.
15 He was Blake Fitzgerald's past supervisor at the
16 business called Your Home Improvement Company, which is
17 located in Duluth, Minnesota.

18 Mr. Little spoke positively about
19 Mr. Fitzgerald and said that they would welcome him back
20 at this time. They are considered an essential business
21 and will continue operations.

22 MR. MOUSTAKIS: And have you had difficulty in
23 having contact with Mr. Fitzgerald in the jail? And, if
24 so, explain to the Court how -- the difficulties that
25 you had and what you've learned from the jail.

1 MS. WELCENBACH: Initially I was able to speak
2 with Mr. Fitzgerald fairly freely. He had kiosk
3 privileges and he was able to call out whenever he
4 wanted to.

5 Unfortunately, he was placed into a lockdown
6 situation which led to a secondary lockdown situation,
7 and he's only allowed phone privileges one hour per day.

8 The jail is overrun right now with duties and
9 they can't assure any specific time that he would have
10 phone privileges. It may be 9:00 p.m. at night when he
11 finally gets his hour out, which has greatly limited my
12 ability to contact some of the people that need to be
13 brought forward as witnesses in his defense.

14 MR. MOUSTAKIS: And there are no further
15 personal visits; is that correct?

16 MS. WELCENBACH: No. We had attempted to visit
17 him in the jail but were denied based on they did not
18 want any type of contamination coming into the jail at
19 all. They have procedures in place for anyone new
20 coming into the jail that they actually have to be
21 quarantined.

22 There's been one time -- I have called the jail
23 and requested that he be allowed to call me. He did not
24 and just happened to call me the next day. I asked him
25 if he had received my message, and he said that no one

1 had ever told him to give me a call.

2 MR. MOUSTAKIS: Okay. That's all I have -- one
3 other thing, Judge, that I failed to mention that is a
4 concern, and that is when we talked about COVID-19 and
5 what is happening in the United States right now, even
6 though the president, local government, state government
7 have asked everybody to stay at home for 14 days, we all
8 know how this virus is spreading, we all know that in 14
9 days, even if everybody was following the requests of
10 our government, that there could be new cases emerging
11 which would cause another 14-day waiting period, and all
12 this time Mr. Fitzgerald is going to be in custody.

13 Come June we may still be in the same boat. I
14 certainly hope not, but I'm concerned that -- that he
15 will further, frankly -- and I look at it to some extent
16 as punishment. I know that the Court doesn't intend
17 that, okay? But all the while being cloaked with the
18 presumption of innocence that he may spend months
19 further in custody before this trial could happen.

20 I have nothing further.

21 THE COURT: Ms. Sowinski, I guess first thing,
22 before you respond otherwise, do you have any direct
23 questions you wish to ask Ms. Welcenbach?

24 MS. SOWINSKI: None at this time, Your Honor,
25 no.

1 THE COURT: All right. You may be heard.

2 MS. SOWINSKI: Thank you. First, Your Honor,
3 two housekeeping matters: The victim, Kylie Snyder, is
4 on the phone with me and so she is participating in this
5 hearing in that way.

6 Secondly, I have made contact with the witness
7 who is a necessary State witness for this trial June 2nd
8 and 3rd, and he is available for that trial.

9 With that, Your Honor, I would like to respond
10 to Mr. Moustakis, some specific comments that he's made.

11 I've spoken twice today with the primary
12 prosecutor in Mr. Fitzgerald's case in Minnesota and
13 there is no April 6th court hearing. The April 6th
14 court hearing was canceled some days ago.

15 When I spoke with her the first time, she
16 didn't know when there would be anything rescheduled.
17 When I spoke with her the second time, she indicated
18 that nothing is being rescheduled until at least
19 April 11th, and so that is how quickly things are
20 happening there.

21 There are two confirmed cases in Clay County,
22 neither of which are associated in any way that I'm
23 aware of with the justice system.

24 Mr. Fitzgerald will not be sentenced
25 accordingly on April 6th and will not be placed on

1 probation at that time as had originally been the
2 thought.

3 Next, Your Honor, relative to Minnesota, there
4 absolutely was -- I don't know what Mr. Fitzgerald is
5 telling Mr. Moustakis and in no way am I suggesting that
6 Mr. Moustakis is not being honest with the Court. I
7 spoke with the prosecutor specifically about whether or
8 not there was a gun involved in the incident for which
9 Mr. Fitzgerald was prosecuted in Minnesota, and there
10 absolutely was. It was located in the garage where the
11 victim said that it would be. It was consistent with
12 the description she gave the police of the gun that was
13 used against her, in threatening her, where
14 Mr. Fitzgerald was threatening her in the domestic
15 situation for which that triggered the standoff.

16 It was, however, a BB gun. Now, I -- I still
17 find that fairly violent and offensive, but I will
18 suggest to the Court that no information that
19 Mr. Fitzgerald provides to the Court, unless confirmed
20 by Mr. Moustakis, is going to be honest in any way,
21 shape, or form. It will always be twisted to support
22 Mr. Fitzgerald's view of reality.

23 Having said that, Your Honor, I think that
24 disposes of the factual issues relative to
25 Mr. Fitzgerald's case, with one issue I'll leave to the

1 end.

2 Specifically as to COVID, I would say that
3 Mr. Fitzgerald is in no greater risk in the jail in
4 Oneida County, where there are absolutely no confirmed
5 cases as of 2:00 o'clock this morning -- excuse me --
6 2:00 o'clock this afternoon, which is just about an hour
7 and a half ago, when the Wisconsin division -- or
8 Department of Health Services' website was updated.
9 There are no Oneida County cases that have been
10 confirmed yet.

11 And I -- my understanding of the procedures at
12 the jail are consistent with Mr. Moustakis'
13 investigator: All -- and this has been happening for
14 some number of weeks now -- all inmates or anyone coming
15 into the jail are being isolated for 14 days, so there
16 is limited opportunity for Mr. Fitzgerald to come into
17 contact with the virus.

18 I would say, Your Honor, as an aside --
19 although Your Honor knows Mr. Fitzgerald well enough at
20 this point that you're probably aware -- Ms. Snyder
21 obviously is making sure that his children are cared for
22 regardless of whether he pays child support, so any
23 argument to the contrary is quite ridiculous and
24 undermines any validity of the rest of his argument, I
25 would suggest.

1 Finally, Your Honor, this whole idea that
2 Mr. Fitzgerald is being punished or is serving less time
3 now than he would be serving if convicted -- excuse
4 me -- more time now than he would be serving if
5 convicted is quite ridiculous.

6 Mr. Fitzgerald picked up numbers of cases in
7 three different states at the same time with three
8 different victims. He is a violent person. The
9 standards for the Court to consider is the public safety
10 not based on the violence of the offense, but the
11 violence of the defendant I would argue under the bail
12 statute and the considerations for what that bail should
13 be.

14 And so I would -- the State would obviously
15 argue -- and I'm sorry if this is repetitive to the
16 Court, because we've made it many times in the past, but
17 Mr. Moustakis obviously has not been privy to those
18 arguments -- Mr. Fitzgerald does not, will not, and has
19 no intention of following any Court order of any court
20 anywhere. He is incapable of doing so. His mindset is
21 one where he will do what he wants to do, when he wants
22 to do it, regardless of Court orders.

23 All of that being considered, Your Honor, I
24 would point out that both the Western and Eastern
25 Districts of Wisconsin's federal court have found in

1 their orders limiting jury trials and other proceedings
2 during the COVID-19 pandemic that any period of delay
3 caused by the virus is excluded from the speedy trial
4 time limits.

5 I think that Mr. Moustakis' reliance on the
6 dissent by Justices Bradley and Kelly relative to the
7 Supreme Court order is misplaced; and the State,
8 Your Honor, would joust point out that I have
9 cooperative witnesses, to my knowledge I have not kept
10 any exculpatory information that is solely in my custody
11 and control from Mr. Moustakis or any previous defense
12 counsel. In fact, there is no exculpatory information
13 that I'm aware of or I would have proceeded very
14 differently on this case to begin with.

15 So having said all that, Your Honor, Your Honor
16 is well aware of the statutory standards that need to be
17 followed. I would ask that there be no modification of
18 bail until the trial on June 2nd and 3rd. Thank you.

19 THE COURT: All right. Just a moment, please.

20 MS. SOWINSKI: Your Honor, I apologize. I
21 missed one point in my list, if I could just make one
22 other point when the Court is prepared.

23 THE COURT: All right. Hold on. Hold on.

24 MS. SOWINSKI: The speedy trial statute --
25 state statute requires consistency with the federal

1 statute that served as the basis for the Eastern and
2 Western district orders in that it does take the public
3 interest into account as well, and I will leave it at
4 that. Thank you.

5 THE COURT: All right. The record should
6 reflect that while the hearing has been going on, I've
7 spoken to Deputy Tate, the court officer today, and
8 requested that she get me some information from the jail
9 administration, and the information she has provided me
10 is consistent with what has been indicated here; that
11 Mr. Fitzgerald needed to be taken to the booking area,
12 which is considered a hot spot of sorts in the jail, and
13 that that resulted in a 14-day period of isolation.

14 According to information provided to
15 Deputy Tate, the window made available to such inmates
16 has been expanded to two hours rather than one hour,
17 although the information I think that is more pertinent
18 to the overall situation is that it's a 14-day period of
19 isolation, not an indefinite or permanent period of
20 isolation.

21 Mr. Moustakis or Ms. Welcenbach, do you
22 understand anything different?

23 MR. MOUSTAKIS: No.

24 THE COURT: All right.

25 MR. MOUSTAKIS: But having said that, Judge,

1 I'm, of course, concerned that that could repeat itself.

2 THE COURT: Well, and I guess here's -- I've
3 got a number of things that have to be touched upon.
4 There is both a statutory and a constitutional right to
5 a speedy trial that's implicated here.

6 And, you know, I've got an analysis that I came
7 into court more or less prepared to make and, in all
8 candor, the one aspect of the situation that exists that
9 potentially impacts how I looked at this issue coming
10 into the hearing is the potential that Mr. Fitzgerald,
11 if not -- or I should say if he remains incarcerated
12 pending trial, if he is unable to effectively
13 communicate -- and I do not begrudge the jail's internal
14 procedures regarding what's necessary to deal with the
15 COVID-19 virus situation at all -- I do have to take
16 into account how those procedures, legitimate though
17 they obviously are, might implicate various aspects of
18 the case, including and in addition to the defendant's
19 right to a speedy trial.

20 And in the event that over a lengthy period of
21 time between now and the date of trial Mr. Fitzgerald
22 were to be held in a manner that only made him available
23 one or two hours a day at various undesignated times,
24 depending on how this works out consistent with what
25 Ms. Welcenbach said, that would have an impact on the

1 scenario with Constitutional implications separate from
2 the issues relative to the defendant's right to a speedy
3 trial.

4 And in terms of his right to a speedy trial,
5 there is both the statutory and a Constitutional right
6 to a speedy trial, as has been acknowledged; and -- and
7 something that I am bound by is the March 22nd order of
8 the Wisconsin Supreme Court. And Mr. Moustakis is
9 correct that that order does not deprive me of the
10 discretion to make rulings relative to the issue of
11 bond. It does make specific findings that the ends of
12 justice served by temporarily suspending jury trials in
13 the courts of this state outweigh the interest of the
14 public and the defendant in a speedy trial under section
15 971.10(3)(a).

16 And so the Supreme Court has, in essence, made
17 findings consistent with suspending that right for the
18 requisite period of time under the Supreme Court's order
19 for purposes of the defendant's statutory right to a
20 speedy trial. And insofar as the gravamen of the
21 defendant's motion relative to bond is the -- you know,
22 the delay that has resulted as a result of the COVID-19
23 situation to his trial for a little over two months,
24 that is relevant to the issue of whether the bond should
25 be modified.

1 I put the reasons on the record previously as
2 to why the bond was set as it is. I'm not going to
3 rehash all those arguments now, but when confronted with
4 a decision whether the circumstances justify modifying
5 the bond, the defendant's statutory right to a speedy
6 trial as a result of the Supreme Court's order does not
7 provide a basis that compels me to modify the bond.

8 Now, relative to the defendant's Constitutional
9 right to a speedy trial, the Court needs to consider a
10 number of different factors, one of which is the length
11 of the delay. And the -- one of the cases that I looked
12 at in regards to the analysis is a Court of Appeals
13 decision from 2000, *State versus Leighton*, which is
14 reported at 237 Wis.2d 709. The Court must make a
15 threshold finding that there was a presumptively
16 prejudicial delay, and the length of the delay as
17 analyzed in that case found that lower courts have
18 generally found post-accusation delay presumptively
19 prejudicial at least as it approaches one year.

20 Now, the date of the initial filing of this
21 complaint was in October of 2018, so we're about 18
22 months out, although the defendant has not been
23 incarcerated over the course of all of that time.

24 As Mr. Moustakis indicated, he was incarcerated
25 in December and the speedy trial demand was made in

1 December of 2019 so the length of the delay is
2 implicated.

3 One of the other factors is whether a demand
4 for a speedy trial was made and that obviously has been
5 made, so that is a factor that plays on the
6 Constitutional analysis, although as we speak today, we
7 are still within the statutory 90-day time limits for
8 holding trial.

9 The Court made findings necessary to adjourn it
10 until next week -- or to schedule it next week, several
11 days past the 90-day time limit that's prescribed by
12 statute. But under all -- under those circumstances,
13 the length of the delay is minimized as a factor because
14 the incarceration of the defendant, which is one of the
15 primary concerns and, in fact, the remedy for speedy
16 trial problems, has not been of a prejudicially lengthy
17 amount of time.

18 Now, the reason for the delay is another
19 factor, and the reason for the delay is this world,
20 national, state, and local health emergency that has
21 provoked both the Wisconsin Supreme Court and both
22 federal district courts in the state of Wisconsin to
23 suspend for a period of time or to toll, if you will,
24 the time frame for honoring speedy trial demands.

25 Now, that does not erase the concerns that have

1 been raised by Mr. Moustakis and that have been pointed
2 out by Justices Bradley and Kelly in the dissent to the
3 Supreme Court's order.

4 However, it is a compelling reason that is not
5 the fault of the government. This was a scenario that
6 arose of itself and has been dealt with by the
7 government, or attempted to be dealt with by the
8 government; and, in all candor, Judge O'Melia, the other
9 judge here in Oneida County, is subject to a quarantine
10 and has been at home, and those of us that have been
11 here at the courthouse -- myself, my staff, and the
12 Clerk of Courts, the District Attorney's Office,
13 et cetera -- have been scrambling to try to deal with
14 the restrictions that have been imposed, including by
15 the State of Wisconsin Department of Health Services, in
16 the so-called Safer-at-Home order which has made it
17 difficult to administer the Court system in a way that
18 complies with these various orders and honors the rights
19 of citizens and litigants.

20 Now, the fourth factor for a Constitutional
21 analysis of a speedy trial is whether the delay results
22 in prejudice to the defendant, and that dovetails with
23 the thing that is potentially of most significance as
24 far as I'm concerned in this situation, and that is if,
25 in fact, the defendant is subject to a legitimate

1 isolation status by the sheriff's department in the jail
2 as a result of the COVID-19 scenario and it is effective
3 isolation of him, not just from other persons present at
4 the jail but also his attorneys, his attorney's
5 investigator, and it implicates his ability to
6 participate in and effectively assist in his own
7 defense.

8 And in the event that Mr. Fitzgerald is
9 isolated for longer than a total period of 14 days -- as
10 of right now we have almost two and a half months
11 between now and trial that's currently set, and in the
12 event that he is not isolated beyond 14 days, I am
13 assuming, based on the record, that he will have the
14 ability to effectively communicate with his attorney and
15 his attorney's investigator and participate in a
16 meaningful, effective way in preparing his own defense.

17 If it comes to pass that for whatever reason he
18 will be subject to a more lengthy delay -- or more
19 lengthy period of isolation is what I mean to say, I
20 believe that it would potentially implicate his ability
21 to meaningfully and effectively participate in preparing
22 his own defense, and under those circumstances I would
23 find the only effective remedy to be to modify the bond
24 and allow him to be released for that purpose.

25 And so for those reasons, I am not granting the

1 defendant's motion to modify bond at this time.

2 And it merits me commenting on the fact that I
3 have said on the record prior to the onset of the
4 various governmental and Wisconsin Supreme Court orders
5 that if we could not conduct the trial in a timely
6 manner, I would need to let Mr. Fitzgerald out. Now, I
7 believe that the onset of the Wisconsin Supreme Court's
8 order, the State Department of Health Services
9 Safer-at-Home restrictions and other intervening events,
10 for the reasons I've alluded to on the record or that
11 I've stated on the record just now, have changed that.

12 But I am more or less in agreement with the
13 assertion made by Mr. Moustakis that if it continues
14 indefinitely or for a lengthier than 14-day period of
15 time to the point where Mr. Fitzgerald is unable to
16 effectively communicate with his attorney or
17 investigator, that would create a situation where I
18 would invite counsel to raise the issue and I would
19 revisit the decision.

20 But I'm finding that if at the conclusion of
21 the 14-day period Mr. Fitzgerald is no longer isolated
22 and freer to communicate with his attorney, and in light
23 of the extraordinary emergency situation that gave rise
24 to the Wisconsin Supreme Court's March 22nd order --
25 specifically In Re the Matter of Jury Trials During the

1 COVID-19 Pandemic, and I'm incorporating that order into
2 the record for purposes of my ruling today -- otherwise,
3 I'm finding that a basis for modifying the bond to my
4 satisfaction has not been presented.

5 I trust, Mr. Moustakis, that you will raise the
6 issue if circumstances require, and it will be addressed
7 in a timely fashion if you do.

8 MR. MOUSTAKIS: Well, I appreciate that, Judge,
9 and I will also discuss with Mr. Fitzgerald his other
10 potential option of petitioning the Supreme Court for an
11 exception.

12 THE COURT: All right. Are there any other
13 issues relative to the case or relative to the trial
14 that are ripe for discussion at this point as far as you
15 are concerned, Ms. Sowinski?

16 MS. SOWINSKI: Yes, Your Honor, just one, and
17 the Court may wish to direct it off the record.

18 Obviously a number of motions will need to be
19 filed in anticipation of trial. I'm thinking that a
20 court date to resolve those motions would make the trial
21 go more smoothly. I'm not sure how Your Honor is
22 setting those under the current special orders.

23 THE COURT: Well, I do not have my calendar
24 with me. A date could be scheduled with my judicial
25 assistant.

1 And just to tip off both parties, the -- both
2 courts in Oneida County are attempting to utilize the
3 Zoom software or website for purposes of having
4 video-remote participation beyond just telephone. And I
5 believe that the District Attorney's Office is
6 attempting to set that up with its attorneys and,
7 Mr. Moustakis, you may avail yourself, if you wish, of
8 that technology.

9 But for the time being, telephone appearances
10 are what is the order of the day.

11 MR. MOUSTAKIS: Understood. I do -- just so
12 the Court knows and so Ms. Sowinski knows, I do
13 anticipate a number of motions.

14 I have ordered a copy of the transcript of the
15 preliminary hearing because I did not have that
16 available to me and all I can see is what was in the
17 court record. I don't know if his prior attorney
18 ordered it or not, but I hope that I will get that
19 quickly.

20 In addition, I do anticipate, as I said, other
21 motions that are not, frankly, trial motions. Those
22 would be in addition to the motions that at this point
23 in our investigation we believe may have to be filed.

24 THE COURT: All right. And either counsel are
25 free to contact my judicial assistant to request a date.

1 She will get the other on the phone and something can be
2 put on the calendar.

3 MR. MOUSTAKIS: Very good. Thank you, Judge.

4 THE COURT: All right. Mr. Fitzgerald, I
5 assume Mr. Moustakis or Ms. Welcenbach will be in touch
6 with you. You can direct questions to them.

7 All right. That's all for today. You may hang
8 up, everyone. Stay safe. We're adjourned.

9 (Proceedings concluded at 4:05 p.m.)

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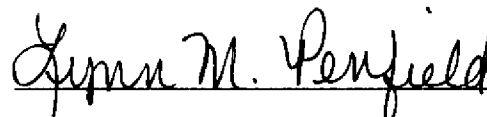
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I, Lynn Penfield, RPR, CRR, Official Court Reporter in and for the State of Wisconsin, do hereby certify:

That I reported stenographically the proceedings held in the above-entitled cause; that my notes were thereafter transcribed with Computer-Aided Transcription; and the foregoing transcript, consisting of pages numbered from 1 to 33, inclusive, is a full, true and correct transcription of my shorthand notes taken during the proceeding had on March 25, 2020.

IN WITNESS WHEREOF, I have hereunto set my hand this 3rd day of April, 2020.



Lynn M. Penfield, RPR, CRR