STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2015AP001292-CR &
2015AP001293-CR

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD J. ZIMBAL,

Defendant-Appellant-Petitioner.

---

On Review of a Decision of the Court of Appeals, District III,
Affirming a Judgment of Conviction Entered in
the Brown County Circuit Court, the
Honorable William M. Atkinson, Presiding.

---

# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

---

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

TRISTAN S. BREEDLOVE
Assistant State Public Defender
State Bar No. 1081378

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorneys for Defendant-Appellant-Petitioner

## TABLE OF CONTENTS

## CASES CITED

## WISCONSIN STATUTES CITED



## OTHER AUTHORITIES

## ISSUE PRESENTED

> Is a substitution request timely when: (1) a defendant, before having an attorney appointed, requests substitution in the circuit court orally and in the court of appeals in writing, within the deadline to do so, (2) is told by the circuit court that action on substitution will be deferred until after an attorney is appointed, and (3) counsel formalizes the substitution request 17 days after being appointed?

Both the circuit court and the court of appeals held that Mr. Zimbal's request was untimely.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Given the court's grant of review, oral argument and publication are warranted.

## STATEMENT OF THE CASE AND FACTS

The criminal charges in these cases were originally filed in 2010 and 2011. In Case No. 10-CF-706, the amended information charged Mr. Zimbal with three counts: stalking, disorderly conduct, and sending an obscene computer message. (21).[1]

In Case No. 11-CF-231, the information charged Mr. Zimbal with another three counts: stalking and two counts of felony bail jumping. (11-CF-231:7).

---

[1] Record citations throughout this brief are to the record in Case No. 10-CF-706 unless otherwise noted.

In June 2011, Mr. Zimbal entered no contest pleas to one count of stalking in Case No. 10-CF-706 and one count of bail jumping in Case No. 11-CF-231, in the Brown County Circuit Court, the Honorable William M. Atkinson, presiding. (169:5-6). The remaining counts in each case were either dismissed outright or dismissed and read-in at sentencing. Judge Atkinson sentenced Mr. Zimbal to consecutive, maximum sentences, totaling nine years, six months in prison. (58, 11-CF-231:23).

Mr. Zimbal filed a ***Bangert***[2] motion to withdraw his pleas and vacate his convictions. Judge Atkinson denied the motion. (74, 77).

The court of appeals summarily reversed Mr. Zimbal's convictions and the denial of the postconviction motion. The case was remanded to the circuit court on October 8, 2013. (*See* 2012AP2234, 2012AP2235).

**Substitution Request**

On October 4, 2013, four days before remittitur, the court held a status hearing at which Mr. Zimbal appeared by telephone from a state prison. (173:2; App. 113). Attorney Jeffrey Cano, who is the Regional Attorney Manager for the State Public Defender in Green Bay, appeared in the courtroom in his administrative capacity, not as an appointed attorney. (173:2-5; App. 113-116). At one point during this hearing Mr. Zimbal asked the court: "Can I talk to Attorney Cano?" (173:3; App. 114). The court responded: "You're on the speaker system right now." (173:3; App. 114). Mr. Zimbal replied: "Oh, that's not going to work." (173:3; App. 114). At the conclusion of the hearing, the court set the hearing over for October 7, 2013. (173:4-5; App. 115-116).

[2] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

On Monday, October 7, 2013, the day before remittitur, Judge Atkinson continued the status hearing from the previous Friday. (174:1-2; App. 118-119). Again, Mr. Zimbal appeared by telephone from prison and Attorney Cano appeared in the courtroom. The state informed the court that the Attorney General's office would not petition for review. The court then said it would allow Mr. Zimbal to withdraw his pleas, as mandated by the court of appeals. The court also reinstated cash bail and said it would have Mr. Zimbal transported back to the county jail for trial. (174:2; App. 119).

The court then asked: "Do you want to pick a trial date, Mr. Cano, or do you believe some other attorney will be actually handling the trial?" (174:2; App. 119). Attorney Cano indicated another attorney was going to be appointed and Mr. Zimbal should be transported to the county jail so that they could "discuss with him the appointment of attorney." (174:2; App. 119). The court then scheduled a status hearing for October 15, 2013, to allow time for the appointment of an attorney. (174:2-3; App. 119-120).

After the court scheduled the status hearing, Mr. Zimbal made motions on his own for a signature bond and for Judge Atkinson to "recuse" himself. (174:4-5; App. 121-122). Attorney Cano said nothing on Mr. Zimbal's behalf, reflecting the fact that Mr. Zimbal was representing himself on both motions. (174:4-5; App. 121-122). Mr. Zimbal explained to the court that his appellate attorney told him he had a right to request a different judge. (174:5; App. 122).

The court denied Mr. Zimbal's bond modification motion, but indicated he could renew the motion after an attorney was appointed, stating: "Your attorney can renew the motion of yours, if you wish, at the status conference…" (174:4; App. 121).

The following exchange then took place between Mr. Zimbal and Judge Atkinson regarding Mr. Zimbal's request for a different judge:

> Mr. ZIMBAL: I'm also asking that you recuse yourself because there is no way you can be impartial and/or bias (sic).
>
> THE COURT: Since you probably haven't done any research, I'll let your attorney do research on that issue and you can address that at the status conference. I'll deny your request at this time.
>
> MR. ZIMBAL: I spoke to Attorney Hirsch this morning, and she said absolutely you can't do that. The Judge must recuse himself.
>
> THE COURT: All right. He can provide his authority for that at the status conference, and he can send it by letter beforehand, by the way, if you want it addressed beforehand.

(174:5; App. 122).

After the hearing, Mr. Zimbal wrote a letter to the court of appeals expressing his frustration over the court's denial of his request and again made clear he wanted Judge Atkinson taken off his case. (190; App. 123-126). In his letter, Mr. Zimbal wrote that he believed it was critical to have Judge Atkinson off his case. (190:4; App. 126).

Remittitur was filed by the court of appeals on October 8, 2013. (96).

Mr. Zimbal was not produced from prison for the status hearing scheduled for October 15, 2013, and no attorney appeared on his behalf. The hearing was rescheduled for October 29, 2013. (175; App. 127-128).

On October 17, 2014, court of appeals Clerk Diane M. Fremgen replied to Mr. Zimbal's letter, with a copy to Judge Atkinson. Ms. Fremgen described Mr. Zimbal's letter as "regarding substitution or recusal of Judge Atkinson." It noted that the court of appeals no longer had jurisdiction over the matter and suggested that Mr. Zimbal consult with his trial counsel. That letter was filed in the circuit court on October 22, 2013. (100; App. 129).

On October 29, 2013, Mr. Zimbal appeared for another status hearing without counsel and again, no attorney appeared on his behalf. (176:1-2; App. 130-131). The court stated that it had called the public defender's office and "I think we've been able to determine there is no one appointed for you at this time." (176:2; App. 131). The court advised Mr. Zimbal: "[Y]ou should have an attorney appointed for you. So, they haven't appointed one yet. So I presume you are requesting an appointment by the public defender?" (176:2; App. 131). Mr. Zimbal answered affirmatively.

Later in the hearing, the court said: "[T]he public defender's office is requesting a week [adjournment] because they apparently have not been able to find an attorney to take your case yet." (176:3; App. 132). The court then rescheduled the hearing for three days later, on November 1, 2013. (176:3; App. 132).

On November 1, 2013, Mr. Zimbal appeared in court with appointed trial counsel. (11-CF-231:84). Counsel pointed out that he had "just recently been appointed" and that he had "just briefly spoken to Mr. Zimbal." (11-CF-231: 84:2).

On November 18, 2013, counsel for Mr. Zimbal filed a request for substitution of judge. (105; App. 136). The request pointed out that substitution is authorized pursuant to Wis. Stat. § 971.20(7) within 20 days of the filing of remittitur. It requested that the substitution request be deemed timely for two reasons:

> First, Mr. Zimbal had made a *pro se* written request for substitution within the statutory deadline, although it was directed to the wrong court.
>
> Second, Mr. Zimbal was not represented by counsel until after the statutory deadline had elapsed.

(105; App. 136).

Judge Atkinson denied the request for substitution on November 22, 2013, because the "[d]efendant did not comply with Wis. Stats. § 971.20(7)." (106; App. 138).

After a jury trial on the original charges, Mr. Zimbal was found guilty of three counts in Case No. 10-CF-706 and three counts in Case No. 11-CF-231. (11-CF-231: 86:52-53).

Judge Atkinson again sentenced Mr. Zimbal to consecutive, maximum sentences; this time totaling nineteen years, six months in prison. (11-CF-231: 88:33-34).

After timely filing a notice of intent to pursue postconviction relief, Mr. Zimbal filed a postconviction motion requesting a new trial in the interest of justice, or

alternatively, a new trial because of ineffective assistance of counsel. (142). Mr. Zimbal's motion preserved, but did not raise, the court's denial of his substitution request. (142). Judge Atkinson denied the postconviction motion. (154).

On appeal, Mr. Zimbal argued that his oral and written substitution requests were timely because they were made within 20 days of remittitur or alternatively his substitution request should be considered timely based on a reasonable, rather than strict, application of Wis. Stat. § 971.20(7) or based on application of the equitable tolling rule. The state argued that Mr. Zimbal's oral request was for recusal rather than substitution and was insufficient because it was not in writing or filed in the circuit court within 20 days of remittitur. It also argued Mr. Zimbal was represented by either Attorney Cano or Attorney Hirsch at the time and that a reasonable construction of Wis. Stat. § 971.20(7) and equitable tolling should not apply because nothing stopped Mr. Zimbal from filing a timely written request for substitution on his own.

In its July 6, 2016, unpublished opinion, the Court of Appeals, District III, affirmed Mr. Zimbal's judgment of conviction. (Slip. Op. ¶8; App. 101-105). The court did not adopt the state's argument that Mr. Zimbal was in fact represented by counsel prior to November 1, 2013. (Slip. Op. ¶¶1-4, n.1; App. 102-103). Rather, the court held that Mr. Zimbal did not properly invoke Wis. Stat. § 971.20(7) because his original request for substitution was made orally and his written request for substitution was sent to the wrong court. (Slip Op. ¶¶5-6; App. 103). The court found the formalized substitution request filed by Mr. Zimbal's attorney was untimely because it was not filed within 20 days of remittitur. (Slip op. ¶6; App. 103). The court rejected Mr. Zimbal's arguments that a reasonable, not strict,

construction of Wis. Stat. § 971.20(7) and equitable tolling should apply, concluding that there was nothing preventing Mr. Zimbal from filing a timely *pro se* written request for substitution and compliance with the statute was not impossible. (Slip op. ¶¶7-8; App. 104).

## ARGUMENT

### Where Mr. Zimbal Timely Filed *Pro Se* Oral and Written Requests for Substitution, and the Court Told Mr. Zimbal It Would Defer Action Until Counsel Was Consulted, and Then Counsel Formalized the Substitution Request 17 Days After Appointment, Mr. Zimbal's Request for Substitution Was Timely.

A. The standard of review and introduction.

The application of Wis. Stat. § 971.20 presents a question of law this court decides independently of the circuit court and the court of appeals but benefiting from their analyses. ***State v. Harrison,*** 2015 WI 5, ¶37, 360 Wis. 2d 246, 858 N.W. 2d 372. Wisconsin Stat. § 971.20 has been referred to as the "criminal peremptory substitution statute, the peremptory right to substitution, or the peremptory right to substitution statute." ***Id***., ¶2.

Wisconsin Stat. § 971.20(7) provides that when an appellate court orders a new trial or sentencing, the defendant has the right to substitution of judge. The request must be filed "within 20 days after the filing of the remittitur by the appellate court." Wisconsin Stat. § 971.20 is an expression of legislative intent that a person's right to a fair trial should be observed. ***Baldwin v. State***, 62 Wis. 2d 521, 532, 215 N.W. 2d 541 (1974). For that reason, Wisconsin

courts have rejected application of Wis. Stat. § 971.20 deadlines in a way that violates the intention of the legislature or is unjust.

Here, there are three alternative legal analyses that lead to the same result: the circuit court erred when it denied Mr. Zimbal's request for substitution of judge. First, Mr. Zimbal, prior to the appointment of trial counsel, made *pro se* oral and written substitution requests at his earliest opportunity and ahead of the 20-day post-remittitur deadline provided in Wis. Stat. § 971.20(7). Those requests were timely filed and made clear Mr. Zimbal's intent to assert his right to substitute Judge Atkinson from his case.

Second, alternatively, the court should apply longstanding precedent and reasonably construe Wis. Stat. § 971.20 to give effect to the predominant intention of the legislature to ensure the constitutional requirement of a fair trial. *See* ***Baldwin v. State****,* 62 Wis. 2d at 529-30.

Third, alternatively, the court should apply the equitable "tolling rule" to the facts of this case because circumstances beyond Mr. Zimbal's control – the delay in appointment of counsel by the state public defender – resulted in the belated filing of a formal substitution request. *See* ***State ex rel. Nichols v. Litscher***, 2001 WI 119, 247 Wis. 2d 1013, 635 N.W. 2d 292.

For the court's convenience, a chart of the relevant dates, as described in the statement of facts is provided below:

| | |
|---|---|
| October 7, 2013 | Status hearing: pleas withdrawn; bail set; *pro se* oral substitution request made and denied "at this time;" counsel not yet appointed; court adjourns hearing "so we can get the attorney lined up" |
| October 7, 2013 | Mr. Zimbal's "substitution or recusal" letter sent to the court of appeals |
| October 8, 2013 | Remittitur filed |
| October 15, 2013 | Status hearing: Mr. Zimbal not produced; counsel not yet appointed; no defense counsel present; hearing rescheduled |
| October 22, 2013 | Court of appeals letter, dated October 17, 2013, "regarding substitution or recusal of Judge Atkinson" filed in circuit court |
| October 28, 2013 | 20th day after remittitur |
| October 29, 2013 | Status hearing: Mr. Zimbal produced; counsel not yet appointed; no defense counsel present |
| November 1, 2013 | Status hearing: Mr. Zimbal appears in court with appointed counsel; order appointing counsel filed |
| November 18, 2013 | Mr. Zimbal files renewed formal substitution request through appointed counsel |
| November 22, 2013 | Substitution request denied as untimely |

B. Mr. Zimbal's request for substitution was timely filed.

Mr. Zimbal did as much to substitute a judge as can reasonably be expected of a *pro se*[3] defendant under these circumstances. First, Mr. Zimbal requested the substitution of Judge Atkinson at his earliest possible opportunity – during a status hearing before remittitur and immediately after the circuit court allowed him to withdraw his pleas and set bail

[3]Mr. Zimbal was not represented by counsel when he made oral and written requests for Judge Atkinson to recuse himself. First, Mr. Zimbal was not represented by his former appellate attorney Eileen Hirsch. Attorney Hirsch's appellate appointment and representation was separate and distinct from Mr. Zimbal's trial representation. *See* Wis. Admin. Code PD § 2.11(1) ("Appellate representation shall be considered a separate case and reassigned under s. 2.03.") Second, Mr. Zimbal was not represented by Attorney Jeffrey Cano. Attorney Cano is the Regional Attorney Manager for the state public defender in Green Bay and appeared at Mr. Zimbal's October 4 and October 7, 2013, status hearings in his administrative capacity under Wis. Stat. § 977.08 to arrange for appointment of counsel under Wis. Admin. Code PD § 2.03. (*See* Reply br. at 2, n.2). Third, the record is clear that Judge Atkinson considered Mr. Zimbal to be unrepresented and awaiting the appointment of counsel at the time Mr. Zimbal made his oral and written requests for substitution. (174:2-5, 175:2, 176:2-3, 6, 11-CF-231:84; App. 119-122, 128, 131-132, 135).

While the order appointing counsel for Mr. Zimbal was signed on October 29, 2013 (103), Mr. Zimbal did not appear in court with appointed trial counsel until the November 1, 2013, status hearing. Whether counsel was appointed on October 29, when the order appointing counsel was signed, or on November 1, when the order was filed in the circuit court and counsel first appeared in court on behalf of Mr. Zimbal for a status hearing is a distinction without a difference. Both dates fall outside the 20-day statutory deadline provided in Wis. Stat. § 971.20(7). Further, counsel for Mr. Zimbal filed a written substitution request within 20 days of both dates.

pending trial. (174:2-5; App. 118-122). Second, concerned about the circuit court's denial of his oral motion, Mr. Zimbal, from prison, submitted a written request to substitute Judge Atkinson to the court of appeals. (190; App. 123-126).

Mr. Zimbal's goal was clear: he did not want Judge Atkinson to preside over his case. Although Mr. Zimbal used the word "recusal" instead of "substitution," a *pro se* litigant's pleadings must be construed liberally. ***State ex rel. L'Minggio v. Gamble***, 2003 WI 82, ¶16, 263 Wis. 2d 55, 667 N.W.2d 1. In ***State v. Harrison***, 360 Wis. 2d 246, ¶26, this court accepted *pro se* substitution requests similar to Mr. Zimbal's, saying: "Although the defendant used phrases like 'change of judge' and 'recusal' in some of his filings . . . the defendant's goal was clear: He did not want Judge Counsell on the instant case. . . ." Mr. Zimbal's goal was equally clear. (*See* Slip Op. ¶1, n.1).

Moreover, Mr. Zimbal's statement that he had been given legal advice that "absolutely" the judge "must recuse himself" was sufficient to alert the court that his request for recusal was intended to be a request for substitution. (174:5; App. 122). Similar statements made in Mr. Zimbal's letter to the court of appeals alerted that court of Mr. Zimbal's request for "substitution or recusal of Judge Atkinson." (100; App. 129).

The court did not decide Mr. Zimbal's substitution request at the October 7, 2013, status hearing. Rather, it denied the request "at this time" to allow Mr. Zimbal to consult with his yet-to-be-appointed trial attorney. (174:5; App. 122).

The court of appeals responded to Mr. Zimbal's letter and referred to Mr. Zimbal's request as "regarding substitution or recusal of Judge Atkinson." The court of appeals' letter also encouraged Mr. Zimbal to "consult with your trial counsel about how to proceed." (100; App. 129).

By the time Ms. Fremgen's letter was filed in the circuit court on October 22, 2013, Mr. Zimbal had proactively, diligently, and repeatedly asserted his right to substitution. He had also been told by the circuit court and the court of appeals that he should consult with appointed trial counsel about how to proceed. Mr. Zimbal did just that. He awaited the appointment of counsel and through counsel, filed another, more formal request for substitution. (105; App. 136-137).

Considering these circumstances, what more could reasonably be expected of Mr. Zimbal? Should he have ignored instructions from the circuit court and the court of appeals to wait to file his motion until an attorney was appointed? Would circuit court judges rather *pro se* defendants file pre-trial motions without the assistance of trial counsel? Would trial attorneys prefer their soon-to-be-clients raise technical and procedural issues prior to their appointment? Would prosecutors prefer to be peppered with *pro se* filings before the defendant is represented by trial counsel? Mr. Zimbal thinks not.

Not only did Mr. Zimbal do everything in his power to substitute Judge Atkinson, the circuit court was aware of Mr. Zimbal's requests. At the October 7, 2013, status hearing Mr. Zimbal made his goal clear to Judge Atkinson. (174:5; App. 122). The court of appeals' letter, filed in the circuit court six days before the Wis. Stat. § 971.20(7) deadline of October 28, 2013, alerted the circuit court to

Mr. Zimbal's written request for substitution. (190; App. 123-126). Given these facts, Mr. Zimbal timely requested substitution of Judge Atkinson.

Alternatively, as argued below, Mr. Zimbal's November 18, 2013, request for substitution should be considered timely because it was not a new request but rather a more formal renewal of his pending *pro se* requests, which the court denied "at this time" (174:5; App. 122), and held in abeyance while Mr. Zimbal was awaiting the appointment of counsel.

### C. Wisconsin Stat. § 971.20(7) must be applied reasonably, not strictly, to effectuate the predominant intention of the legislature.

The State of Wisconsin recognizes that "every accused is entitled to a fair trial" by an impartial judge "without any showing of any prejudice in fact." ***Baldwin v. State***, 62 Wis. 2d at 530. For more than four decades, Wis. Stat. § 971.20 has consistently and repeatedly been construed reasonably, rather than strictly, to give "effect to the predominant intention of the legislature expressed in the section to afford a substitution of a new judge assigned to the trial of that case." ***Baldwin v. State***, 62 Wis. 2d at 530. (Internal quotations omitted). Wisconsin appellate courts have recognized the fundamental unfairness of applying § 971.20 deadlines strictly when "a strict construction makes it impossible to obtain the objective of this section and would frustrate the objective of the statute." ***Id***.

In ***Baldwin***, the court addressed Milwaukee County's calendaring system in which the trial judge was not assigned until after arraignment, making it impossible for a defendant to file a timely and intelligent substitution request pursuant to Wis. Stat. § 971.20(4). ***Id***. at 530-31. The state argued that

§ 971.20 precludes a defendant, no matter how extenuating the circumstances, from asserting the right to substitute a judge if the request for such substitution is not timely under the statute. ***Id***. at 529. The court rejected the state's strict and unreasonable construction of the statute. ***Id***. at 529-32.

Rather, the court held that "arraignment," for the purposes of Wis. Stat. § 971.20, would not be completed until the trial judge confirmed the plea and set a trial date. ***Id***. at 530. "This interpretation witnesses and gives effect to the predominant intention of the legislature expressed in the section to 'afford a substitution of a new judge assigned to the trial of that case.'" ***Id***.

In ***Clark v. State***, 92 Wis. 2d 617, 627, 286 N.W. 2d 344 (1979), the court acknowledged the "vagaries of practice and procedure" that necessitate the reasonable application of Wis. Stat. § 971.20 to ensure a person's right to a fair trial is preserved. The case involved a defendant's substitution request that was filed *after* he filed a motion to quash the indictment but before his arraignment. ***Id***. at 622-23. The court interpreted the statutory language to unquestionably require a substitution request be filed before the filing of a motion or the arraignment, whichever event occurs first. ***Id***. at 626. Under that plain, if strict, reading of the statute, the defendant's request was technically untimely. ***Id***.

Nevertheless, the court immediately turned to whether the defendant's request for substitution should actually be considered "untimely." ***Id***. at 628. In doing so, the court noted that it views the defendant's ability to exercise his right of substitution *intelligently* as the key to the statutory right, which preserves the right to a fair trial. ***Id***. at 627-28. The court explained that its prior cases have attempted to apply § 971.20 in a way that will "inhibit a defendant's use of the

request to disrupt orderly calendaring or to delay the scheduled trial" and "at the same time, in a way that will give a defendant a reasonable period of time to request substitution…" ***Id***.

While the court ultimately concluded that Clark withdrew his request for substitution by inaction, ***id***. at 629-30, the court reasoned that:

> Recognizing the substitution request as timely under these facts, would give effect to the legislative intent expressed in sec. 971.20 and would not enable a defendant to use the request as a technique to disrupt scheduled calendaring or delay the scheduled trial.

***Id***. at 628.

The mandate that Wis. Stat. § 971.20 must be applied reasonably was followed again in ***State ex rel Tessmer v. Circuit Court Branch III***, 123 Wis. 2d 439, 443-44, 367 N.W.2d 235 (Ct. App. 1985), in which the court addressed a defendant's substitution request, which would have been untimely under a strict application of the statute. The ***Tessmer*** court highlighted the importance of a defendant's right to "intelligently exercise the right of substitution" and the lack of any evidence that the proceedings were disrupted or delayed by the defendant. ***Tessmer***, 123 Wis. 2d at 443-44.

In ***State ex rel. Tinti v. Circuit Court for Waukesha County, Branch 2***, 159 Wis. 2d 783, 788, 464 N.W. 2d 853 (Ct. App. 1990), the court addressed a different county's intake system that, if Wis. Stat. § 971.20's applicable deadlines were strictly construed, would interfere with the defendant's right to intelligently exercise the right of substitution. There, even though the defendant was represented by a veteran local attorney who failed to comply

with the statutory deadline, the court held that the applicable "filing deadline of the statute must be relaxed to allow for an intelligent opportunity to exercise the right of substitution." ***Tinti***, 159 Wis. 2d at 790.

In Mr. Zimbal's case, a reasonable application of Wis. Stat. § 971.20(7) yields a conclusion that he timely asserted his right to substitution.

First, Mr. Zimbal's diligent, if imperfect, *pro se* substitution requests were clear expressions of his statutory right to substitute Judge Atkinson. At his earliest opportunity to do so, Mr. Zimbal made it clear orally and in writing that he did not want Judge Atkinson to preside over his trial. *See* ***Harrison***, 360 Wis. 2d 246, ¶26. (174:5, 190; App. 122-126).

Second, Mr. Zimbal acted reasonably after he was told by Judge Atkinson that his request was "denied at this time" (174:5: App. 122) and when the court of appeals suggested, in response to Mr. Zimbal's "letter regarding substitution or recusal of Judge Atkinson" that he "consult with your trial counsel about how to proceed." (100; App. 129). As a *pro se* defendant waiting on the state public defender to appoint new trial counsel, Mr. Zimbal (1) made his objective clear to Judge Atkinson, (2) expressed concern over Judge Atkinson's decision to the court of appeals, and (3) thereafter abided by Judge Atkinson's and the court of appeals' instructions to raise the issue through counsel. With appointed counsel, Mr. Zimbal then filed a formal request for substitution of Judge Atkinson within 20 days of counsel's appointment. The alternative would have been for Mr. Zimbal to ignore the instructions of the circuit court and the court of appeals to consult with trial counsel and to file another *pro se* motion without consulting with his trial attorney.

Third, Mr. Zimbal's substitution request did not disrupt orderly calendaring or delay his trial. Mr. Zimbal requested substitution at his earliest possible opportunity. (174:5; App. 122).

Further, Mr. Zimbal consistently expressed his interest in moving his case along as expeditiously as possible. He expressed dissatisfaction with the state's last minute decision not to seek review of the court of appeals decision summarily reversing his original convictions. (173:2-4; App. 113-115). On December 2, 2013, fourteen days after Mr. Zimbal's counsel filed the substitution request, counsel requested an adjournment of the trial date, explaining "this is a substantial file," and "I only received documents from prior counsel a matter of days ago." (11-CF-231: 84:2). Given the length and complexity of the record, it was inconceivable that Mr. Zimbal's appointed counsel could have been prepared for a trial in early December 2013. Nevertheless, Mr. Zimbal demanded a speedy trial on January 1, 2014, and went to trial in March 2014. (109, 180). These facts demonstrate that Mr. Zimbal's substitution requests were not intended to and did not delay his trial.

Fourth, circumstances outside of Mr. Zimbal's control restricted his ability to intelligently exercise his right to substitution within the statutory deadline. As an indigent defendant, who had been instructed to consult with trial counsel, Mr. Zimbal was stuck in a "Catch-22" situation. To abide by the circuit court's and the court of appeals' instructions and to intelligently exercise his right to substitution, he needed to consult with trial counsel, but that appointment had to be made by the state public defender. Mr. Zimbal was not responsible for the delayed appointment of counsel. As in ***Baldwin***, ***Tinti***, and ***Tessmer***, the peremptory substitution statute must be applied reasonably to

prevent circumstances outside of a defendant's control from interfering or preventing a defendant from intelligently exercising his right to substitution.

Strictly construing Wis. Stat. § 971.20(7)'s 20-day deadline in this case is contrary to long-standing case law and would frustrate the predominant intention of the legislature to fulfill the constitutional requirement of a fair trial. Indeed, strict construction leads to the unjust result of Mr. Zimbal being deprived of his right to substitution through no fault of his own and due solely to the time it took the state public defender to appoint trial counsel. This unjust result undermines public confidence in a fair judicial system, which is a main goal of the peremptory substitution statute. *See* ***State v. Holmes***, 106 Wis. 2d 31, 46-47, 315 N.W.2d 703 (1982).

D. The equitable tolling rule should be applied to Mr. Zimbal's request for substitution because forces beyond his control precluded a counsel-filed substitution request within 20 days of remittitur.

As argued above, the circuit court's refusal to consider a request for substitution until Mr. Zimbal was represented by counsel placed him in a "Catch 22" situation. He could not file an acceptable request for substitution until he had counsel, but he could not get counsel until one was assigned by the state public defender.

In situations like this, Wisconsin appellate courts have recognized the fundamental unfairness of enforcing filing deadlines when a *pro se* defendant or prisoner is dependent on a third party to finalize the filing. When circumstances beyond the control of a litigant result in belated filing of court documents, the courts have applied an equitable "tolling

rule." In ***State ex rel. Walker v. McCaughtry***, 2001 WI App 110, ¶18, 244 Wis. 2d 177, 629 N.W. 2d 17, the court held that a statutory deadline must be tolled when circumstances beyond the *pro se* prisoner's control prevented him from meeting the statutory deadline. Specifically, the court tolled the deadline while the inmate awaited a Wisconsin Department of Justice certification. ***Id***.

The tolling rule was adopted by the Wisconsin Supreme Court in ***State ex rel. Nichols v. Litscher***, 247 Wis. 2d 1013. In that case, this court held that its 30-day deadline for receipt of a petition for review "is tolled on the date that a pro se prisoner delivers a correctly addressed petition to the proper prison authorities for mailing." ***Id***., ¶32. Again, the court tolled the statutory deadline while the *pro se* prisoner waited on the action of others over which the prisoner had no control.

Application of the equitable tolling rule in this case would toll the § 971.20(7) deadline from October 7, 2013, the date on which Mr. Zimbal's substitution request was deferred by the court, until he was appointed counsel on November 1, 2013. Not only was the appointment of counsel out of Mr. Zimbal's control, but the circuit court responded to his *pro se* oral request for substitution by denying his motion "at this time." (174:5; App. 122). The court went on to tell Mr. Zimbal that his attorney could raise the issue again at a status conference. (174:5; App. 122). Mr. Zimbal's first appearance with appointed counsel was on November 1, 2013. (11-CF-231:84). Mr. Zimbal's attorney then filed a renewed substitution request 17 days later. (105; App. 136-137).

Application of the equitable tolling rule is appropriate in this case and would result in Mr. Zimbal's substitution request being deemed timely filed on November 18, 2013.

## CONCLUSION

Under each applicable legal theory, Mr. Zimbal timely requested substitution of Judge Atkinson. The court erred first by failing to acknowledge and deem timely Mr. Zimbal's oral and written *pro se* requests that made his purpose clear: he did not want Judge Atkinson to preside over his new trial and he intended to exercise his right to substitution. Next, the court erred by failing to reasonably apply Wis. Stat. § 971.20(7) to the circumstances of Mr. Zimbal's case and by not tolling the statutory deadline when Mr. Zimbal found himself in a "Catch 22" situation in which he was instructed to consult trial counsel but no attorney was appointed before the statutory deadline.

For these reasons, Mr. Zimbal respectfully requests that the court vacate the judgments of conviction entered in these cases, and remand the cases to the circuit court for a new trial.

Dated this 13th day of October, 2016.

Respectfully submitted,

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

TRISTAN S. BREEDLOVE
Assistant State Public Defender
State Bar No. 1081378

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorneys for Defendant-Appellant

## CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,427 words.

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of October, 2016.

Signed:

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Defendant-Appellant

# A P P E N D I X

# I N D E X
# T O
# A P P E N D I X

Page

# CERTIFICATION AS TO APPENDIX

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

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

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

Dated this 13th day of October, 2016.

Signed:

JEREMY A. NEWMAN
Assistant State Public Defender
State Bar No. 1084404

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 264-8566
newmanj@opd.wi.gov

Attorney for Defendant-Appellant