STATE OF WISCONSIN

WISCONSIN SUPREME COURT

Case No. 2018AP2142

In re the commitment of Tavodess Matthews:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

TAVODESS MATTHEWS,

Respondent-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District I, Affirming a Nonfinal Order Denying Judicial Substitution, Entered in the Milwaukee County Circuit Court, the Honorable Michelle A. Havas and Maxine A. White, Presiding.

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT-PETITIONER

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ISSUE PRESENTED

1. Is the adjournment of a probable cause hearing a "preliminary contested matter" that terminates litigants' opportunity to request judicial substitution?

The circuit court and court of appeals found that Tavodess Matthews' request for substitution was untimely because the adjournment of the probable cause hearing was a "preliminary contested matter."

This Court should reverse and affirm its many prior decisions requiring the court to reach the substantive issues in the case before a litigant's right to substitution is terminated. "Preliminary contested matters" encompass only *substantive* decisions that "could have implicated the merits of the case." *State ex rel. Sielen v. Cir. Ct. for Milwaukee Cnty.*, 176 Wis. 2d 101, 114, 499 N.W.2d 657 (1993) ("the dispositive question is whether the hearing concerned a substantive issue which went to the merits of the case."); *State ex rel. Serocki v. Cir. Ct. for Clark Cnty.*, 163 Wis. 2d 152, 156, 471 N.W.2d 49 (1991) ("[t]he legislative intent is that substitution be requested before the circuit court reaches a substantive issue."); *State ex rel. Tarney v. McCormack*, 99 Wis. 2d 220, 234, 298 N.W.2d 552 (1980) (the legislative intent is that substitution be requested "before the court reaches the substantive issues.").

POSITION ON ORAL ARGUMENT AND PUBLICATION

This case presents issues of statewide concern, meriting both oral argument and publication.

STATEMENT OF FACTS

On July 27, 2018, the State filed a petition to commit Tavodess Matthews under ch. 980. (1.) Before Mr. Matthews was served with the petition, the circuit court made a statutorily-required *ex parte* finding of probable cause. Wis. Stat. § 980.04(1). (2; 3.) As a result of that finding, Mr. Matthews was temporarily detained until a contested probable cause hearing could be held under Wis. Stat. § 980.04(2). (2.)

When the petition was filed, Mr. Matthews was still serving a sentence at Green Bay Correctional Institution. (*See* 3.)[1] That meant the court had to hold a probable cause hearing within 10 days of his scheduled release. Wis. Stat. § 980.04(2)(b)2. Mr. Matthews was released on August 7, 2018, and a hearing was scheduled for August 15, 2018. *Id.*; (13:3; App. 116).

At the beginning of the probable cause hearing, Mr. Matthews' counsels requested an adjournment, explaining that they had first met with Mr. Matthews earlier that day because they had been

[1] Offender Locator, https://appsdoc.wi.gov/lop/detail.do (search for Tavodess Matthews; then follow "Movement" hyperlink).

unable to meet with him earlier. (13:2-3.; App. 115-16.) The State objected "for the record," but conceded its only witness was not present. (13:3-4; App. 116-17.) The prosecutor told the witness not to come after Mr. Matthews' counsels notified her that they would be seeking an adjournment. (13:3-4. App. 116-17.)

The statute requiring a probable cause hearing within 10 days of discharge also permitted the trial court to extend that deadline "for good cause shown upon its own motion, the motion of any party, or the stipulation of the parties." Wis. Stat. § 980.04(2)(b)2.[2] The court found good cause, confirmed that Mr. Matthews consented to the extension, and adjourned the hearing. (13:4-6; App. 117-19.)

Although the court granted the adjournment, it was openly disappointed with the last-second request. The court indicated it was "disappoint[ed]" the hearing could not proceed because it cleared significant time on its calendar, and had refused requests from other judges to help with their schedules. (13:4-6; App. 117, 119.) The court went on:

[2] The full statute reads: "If the person named in the petition is in custody under a sentence, dispositional order, or commitment and the probable cause hearing will be held after the date on which the person is scheduled to be released or discharged from the sentence, dispositional order, or commitment, the probable cause hearing under par. (a) shall be held no later than 10 days after the person's scheduled release or discharge date, excluding Saturdays, Sundays, and legal holidays, unless that time is extended by the court for good cause shown upon its own motion, the motion of any party, or the stipulation of the parties." Wis. Stat. § 980.04(2)(b)2.

"It's a waste of the [c]ourt's time. It's a waste of the parties' time. It's a waste of the family members' time. Mr. Matthews has been brought all the way down here for this hearing, and we're not able to do it." (13:5-6; App. 118-19.)

Before the next hearing, Mr. Matthews filed a request for substitution pursuant to Wis. Stat. § 801.58(1). (4; App. 132.) The substitution statute permits a party to request substitution so long as the request is made (1) within 60 days of service on the party of the initiating documents, and (2) before "the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1).

At the hearing, the State objected to substitution, but stated no grounds for its objection. (14:2; App. 124.)

The circuit court denied the request for substitution as untimely, concluding that it had already resolved a "preliminary contested matter" when it extended the deadline to hold the probable cause hearing:

> I do believe Mr. Matthews has this [substitution] right; however, because we had a hearing scheduled for August 15, 2018, at which time the State was ready to proceed—I believe they had—they had their witness here or told their witness they didn't need to appear based on the representations made by counsel late that morning, I believe, that the State objected to the adjournment request at that time.

> I took from Mr. Matthews a waiver of time limits. That is a substantive decision that I made; therefore, I don't believe that this is timely filed.

(14:3; App. 125.) Mr. Matthews' counsels stated they would seek review of the court's decision by the chief judge pursuant to Wis. Stat. § 801.58(2). (14:4-5; App. 126-27.) The court then supplemented its ruling, explaining that its *ex parte* order was also a preliminary contested matter:

> If we could just supplement the record here, in my analysis, I spoke of the time limits as it related to the—as the contested substantive issue. I have additionally done an *Arends* review when the petition was originally filed and signed findings and orders—or findings and order that relate to this matter, so I believe that is also a substantive issue that has been raised.

(14:7; App. 129.)

Mr. Matthews filed a petition with the chief judge, arguing his substitution request was timely, and that adjourning the probable cause hearing was not a preliminary contested matter within the meaning of Wis. Stat. § 801.58(1). (6.) He pointed out that reviewing courts required a decision to relate to the substantive issues in the case before it could be deemed a preliminary contested matter. (6:4); (citing *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship*, 2003 WI App 190, ¶¶ 37-38, 267 Wis. 2d 233, 670 N.W.2d 74, aff'd in part, rev'd in part, 2004 WI 92, 273 Wis. 2d 577, 682 N.W.2d 839)).

The chief judge affirmed the denial of substitution. The court agreed that a "preliminary contested matter" must relate to the substantive issues in the case. (7:2; App. 112.) However, the court found that extending the deadline to hold the probable cause hearing was a substantive issue in the case:

> The court granted Mr. Matthews' request and adjourned the matter. In doing so, the court addressed and decided the substantive issue of whether Mr. Matthews could waive his statutory right to a timely hearing, and the outcome of the court's decision directly affected the presentation of Mr. Matthews' case within the meaning of Wis. Stat. § 801.58(1).

(7:2; App. 112.)

Matthews petitioned the court of appeals for leave to appeal the nonfinal order on substitution. The court granted the petition, but affirmed the circuit court's decision. *State v. Matthews*, No. 2018AP2142, unpublished (WI App May 12, 2020) (App. 101). The court of appeals held that it was enough that the case "was *set* for a contested probable cause hearing," even though the parties never addressed probable cause at the hearing. *Id.*, ¶19 (emphasis added). While, the court held that "[t]he trial court's decisions [on the adjournment request] had implications for further proceedings on the merits of the State's petition to commit Matthews as a sexually violent person" i*d.*, ¶22, it did not articulate how the adjournment could implicate the merits of the case.

ARGUMENT

I. The circuit court was required to grant substitution because Mr. Matthews' substitution request was made before the court reached any substantive issues in the case.

Mr. Matthews requested substitution before the circuit court heard or decided any substantive issues in the case, so his request was timely. This case turns on whether the circuit court decided a "preliminary contested matter" under Wis. Stat. § 801.58(1) when it granted Mr. Matthews' request to adjourn the probable cause hearing.

This Court has repeatedly held that "preliminary contested matters" encompass only *substantive* decisions that "could have implicated the merits of the case." *State ex rel. Sielen v. Cir. Ct. for Milwaukee Cnty.*, 176 Wis. 2d 101, 114, 499 N.W.2d 657 (1993); *State ex rel. Serocki v. Cir. Ct. for Clark Cnty.*, 163 Wis. 2d 152, 156, 471 N.W.2d 49 (1991) ("The legislative intent is that substitution be requested before the circuit court reaches a substantive issue."); *State ex rel. Tarney v. McCormack*, 99 Wis. 2d 220, 234, 298 N.W.2d 552 (1980).

In this case, the circuit court extended the deadline for holding a probable cause hearing. This determination had no effect on the substantive issues in the case. The court could either grant the procedural request for an adjournment, or deny it; neither outcome affected the merits of the case

against Mr. Matthews. The court's determination was solely a procedural matter. Therefore, it was not a "preliminary contested matter" within the meaning of Wis. Stat. § 801.58(1), so Mr. Matthews' substitution request was timely.

A. Mr. Matthews's request for substitution was timely if it preceded the court hearing a "preliminary contested matter."

"[A]ny party" may file a written request for substitution "not later than 60 days after service of the summons and complaint," and before "the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1). The full text of the statute reads:

> Any party to a civil action or proceeding may file a written request, signed personally or by his or her attorney, with the clerk of courts for a substitution of a new judge for the judge assigned to the case. The written request shall be filed preceding the hearing of any preliminary contested matters and, if by the plaintiff, not later than 60 days after the summons and complaint are filed or, if by any other party, not later than 60 days after service of a summons and complaint upon that party. If a new judge is assigned to the trial of a case, a request for substitution must be made within 10 days of receipt of notice of assignment, provided that if the notice of assignment is received less than 10 days prior to trial, the request for substitution must be made within 24 hours of receipt of the notice and provided that if notification is received less than 24 hours prior to trial, the action shall proceed to trial only upon stipulation of the parties that the assigned judge may

> preside at the trial of the action. Upon filing the written request, the filing party shall forthwith mail a copy thereof to all parties to the action and to the named judge.

Wis. Stat. § 801.58(1). If a substitution request is timely filed, substitution must be granted, and the judge loses competency to proceed further. *City of La Crosse v. Jiracek Co., Inc.*, 108 Wis. 2d 684, 697, 324 N.W.2d 440 (Ct. App. 1982).

The right to substitution under section 801.58 applies in ch. 980 commitment proceedings. *State v. Brown*, 215 Wis. 2d 716, 719, 724, 573 N.W.2d 884 (Ct. App. 1997).

This means that Mr. Matthews only needed to file his substitution request (1) within 60 days of being served with the ch. 980 petition, and (2) before "the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1).

The first of these criteria was indisputably satisfied. Mr. Matthews filed the request 28 days after he was served with the ch. 980 petition. (3; 4; App. 122.) Thus, the only issue on appeal is whether the adjournment was a "preliminary contested matter" within the meaning of Wis. Stat. § 801.58(1).

This is a question of statutory interpretation. Statutory interpretation is a question of law that this court reviews de novo. *Westmas v. Creekside Tree Service, Inc.*, 2018 WI 12, ¶ 17, 379 Wis. 2d 471, 907 N.W.2d 68. "The cardinal rule in all statutory interpretation, as this court has often said, is to

discern the intent of the legislature." *Scott v. First State Ins. Co.*, 155 Wis.2d 608, 612, 456 N.W.2d 152 (1990).

B. The adjournment was not a preliminary contested matter because it was not a substantive issue implicating the merits of the case.

1. The statute is intended to permit substitution before the court reaches the substantive issues in the case.

This Court has already articulated the legislative intent behind this provision of the substitution statute. "The legislative intent is that substitution be requested before the circuit court reaches a substantive issue."[3] *Serocki*, 163 Wis. 2d 152, 156-57. "The reason for the statutory requirement is that a litigant who does not like the way a judge is handling a matter should not be able to substitute a second judge simply because the litigant believes things are going badly before the first judge and hopes to obtain a more favorable

[3] As discussed below, this Court was in a particularly good position to identify the legislative intent because the statute merely codified this Court's preexisting rule. *Pure Milk Products Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974); *State ex rel. Carkel v. Cir. Ct. For Lincoln Cty.*, 141 Wis. 2d 257, 265, 414 N.W.2d 640 (1987) (recognizing that Wis. Stat. § 801.58(1) is a codification of this Court's decision in *Pure Milk*).

tribunal." *Tarney*, 99 Wis. 2d 220, 234 (internal quotations omitted).

This plain statement of the statutory intent demonstrates that Mr. Matthews' substitution request was timely. "[T]he dispositive question is whether the hearing concerned a substantive issue which went to the merits of the case." *Sielen*, 176 Wis. 2d at 113. Mr. Matthews requested substitution before the court considered any substantive issues in the case. The court had only ruled on his procedural request to adjourn the probable cause hearing. Extending this statutory deadline had no effect on whether Mr. Matthews should be committed under ch. 980. This Court does not need to look any further than the previously-identified statutory intent to resolve this case.

2. This Court's cases reaffirm that substitution is barred only after the court reaches a substantive issue.

Case law further supports Mr. Matthews. The statute barring substitution after the court has ruled on "preliminary contested matters" has its roots in *Pure Milk Products Coop. v. Nat'l Farmers Org.*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974). There, the circuit court entered an *ex parte* temporary restraining order against the defendant at the same time the complaint was filed. *Id.* at 244. Later, the court held a contested hearing to decide whether to keep the restraining order in place until it could hold a hearing on the plaintiff's request for an injunction.

Id. at 244-45. After that hearing, the defendant requested substitution. *Id.* at 245.

At the time, the substitution statute did not include language barring substitution after the court ruled on "preliminary contested matters," and more broadly permitted substitution anytime within 10 days after the case was noticed for trial. Wis. Stat. § 261.08(1) (1973-74). Nevertheless, this Court interpreted the statute to include this limitation. The Court held that a litigant could not seek substitution after the court had weighed in on the substantive issues in the case:

> The right to a substitution of a judge . . . can also be waived by participation in preliminary motions in which the judge is allowed to receive evidence which of necessity is used and weighed in deciding ultimate issues as determined by the Arizona court in *Marsin v. Udall*.

Id. at 250. The court adopted the rule from *Marsin* as its own and quoted that case further:

> Evidence of collateral matters not bearing on the final decision cannot constitute a waiver of the right to challenge the fairness of a judge, but this court is committed to the rule that if a judge is allowed to receive evidence which of necessity is to be used and weighed in deciding the ultimate issues, it is too late to disqualify him on the ground of bias and prejudice.

Id. (quoting *Marsin v. Udall*, 279 P.2d 721, 725 (Ariz. 1955)).

This last quote makes plain that Mr. Matthews' request was timely. He requested substitution before the court received any "evidence which of necessity is to be used and weighed in deciding the ultimate issues." The court had not received any evidence at all; the court had merely ruled on a procedural motion to adjourn the probable cause hearing. This was a "collateral matter[] not bearing on the final decision," so it did not result in a waiver of his right to substitution.

After *Pure Milk*, the statute was amended to codify the rule it announced, and the "preliminary contested matters" language was added.[4]

Importantly, *Pure Milk* limited this rule to *substantive* issues that could have some bearing on the trial. The defendant in *Pure Milk* was not entitled to substitution because it made its request *after* the court heard a contested hearing on a temporary restraining order. *Id.* at 245. By that point, the court had already taken evidence, and resolved issues that could bear on the plaintiff's request for a permanent injunction.

In contrast, here the court had not resolved any substantive contested matters in Mr. Matthews' case before he sought substitution. Instead, the court made *ex parte* findings, and Mr. Matthews appeared

[4] "The requirement in section 801.58(1) that a party may not request substitution after it has presented its views in a preliminary contested matter is a codification of our decision in *Pure Milk Products Co-op. v. NFO*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974)." *Carkel*, 141 Wis. 2d at 265.

at the scheduled probable cause hearing, but neither of these steps change the fact that the only contested matter the court resolved was whether to extend the statutory deadline for holding a probable cause hearing. That decision had no effect on either party's case in the ch. 980 trial.

The cases following *Pure Milk* have reaffirmed that it only bars substitution after the court decides a *substantive* issue in the case:

- A party is entitled to substitution if requested "before the court reaches the substantive issues." *See Tarney*, 99 Wis. 2d at 234.
- "The legislative intent is that substitution be requested before the circuit court reaches a substantive issue." *Serocki*, 163 Wis. 2d at 156.
- "[A] party may waive the right to substitution by participating in preliminary matters where evidence is received which goes to the merits of the case. *Carkel*, 141 Wis. 2d at 265.
- "Rather, the dispositive question is whether the hearing concerned a substantive issue which went to the merits of the case." *Sielen*, 176 Wis. 2d at 113.

No Wisconsin court has held that a ruling on a motion to adjourn—or any other procedural issue—is

a preliminary contested matter. Purely procedural matters do not implicate the concerns at the heart of the substitution statute. In *Sielen*, this Court held that a hearing on a motion to compel discovery was a preliminary contested matter because the hearing could have resolved matters that would have affected the presentation of the case at trial. 176 Wis. 2d 101, 114. In that case, the Sielens contested the reasonableness of an estate attorney's fees in a probate case. *Id.* at 104-05. The Sielens filed a motion to compel discovery. *Id.* at 105. After a hearing on that motion, and after the court ruled on the motion, the Sielens sought substitution. *Id.*

This Court held that the request was untimely because the motion to compel discovery implicated the substantive issues in the case. *Id.* at 114. The Court pointed out that when deciding a motion to compel discovery, the circuit court could "hold certain facts established" or "preclude the introduction of certain evidence," two outcomes that could have dramatically "implicated the merits of the case." *Id.* "In fact, in a motion to compel discovery, the judge could impose a sanction that precludes a party from submitting any evidence, a sanction which obviously implicates the merits of the case in that it likely disposes of the case." *Id.*

In contrast, the merits of the case were not implicated here, where the court was simply asked to decide whether there was cause to extend the deadline for a probable cause hearing. There was no possibility that the merits of the case would come into play. Although the hearing was *scheduled* to address

probable cause, that issue was never actually considered. The only matter the court resolved was whether cause existed to delay the probable cause hearing. No consequence affecting the merits of the ch. 980 petition flowed from this proceeding.

3. An adjournment is procedural, not substantive.

The circuit court interpreted the phrase "preliminary contested matter" inconsistently with this Court's precedent. In a strictly literal sense, the parties had "contested" whether to adjourn the probable cause hearing because the State objected "for the record" (notably, however, the State did not have its witness present, so it conceded it would have been unable to proceed with the hearing had the court denied the requested adjournment (13:3-4; App. 116-17.)) But ruling on the request for an adjournment had nothing to do with the substantive issues in the case (i.e. whether Mr. Matthews was a sexually violent person); it was strictly a procedural matter related to rescheduling a court date. The court did not take evidence, rule on the admissibility of evidence, hear argument on any substantive issues, or take any action that would bear on the substance or the merits of the ch. 980 trial.

The chief judge found the court "decided the substantive issue of whether Mr. Matthews could waive his statutory right to a timely hearing, and the outcome of the court's decision directly affected the presentation of Mr. Matthews' case within the meaning of Wis. Stat. § 801.58(1)." But this ruling is

based on an inaccurate definition of a "substantive" issue. Extending the deadline for a probable cause hearing has nothing to do with the substance of the ch. 980 petition. Rather, this was solely a question of procedure.

"Substantive law" is "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of parties." Black's Law Dictionary (11th ed. 2019); *City of Madison v. Town of Madison*, 127 Wis. 2d 96, 102, 377 N.W.2d 221 (Ct. App. 1985). The substantive issue in this case was whether Mr. Matthews was a sexually violent person. The adjournment in this case—even if perfunctorily contested—had no bearing on the substantive issues. The decision did not affect the admissibility of evidence, the waiver of arguments, or any issue related to the State's commitment petition.

Instead, the issue was purely procedural—a question about moving a hearing on the court's calendar. The decision related to "the method—the legal machinery" for reaching the underlying substantive issues, meaning it was procedural. *Id.*

4. The substitution statute must be interpreted reasonably, to permit substitution after the parties learn of the assigned judge.

The fact that the deadline to hold the probable cause hearing could be extended on the State's motion, or on the court's own motion confirms that deciding to adjourn a hearing cannot be a preliminary contested matter. Wis. Stat.

§ 980.04(2)(b)2. It would completely defeat the purpose of the substitution statute if the State or the court could seek an adjournment, and thereby extinguish the parties' right to substitution. This interpretation would also be ripe for abuse; a party could request an adjournment of a hearing for the sole purpose of preventing any other party from seeking substitution.

This Court has held that the substitution statute must be interpreted "in a reasonable manner to give the litigant a reasonable period of time to request a substitution after he or she learns which judge is assigned to the case." *Tarney*, 99 Wis. 2d at 235. In *Tarney*, the parties litigated a dispute over alimony before a court commissioner, and the commissioner ruled in favor of the petitioner. *Id.* at 223-24. The petitioner prepared an order, which the commissioner approved, and which was then signed by a judge. *Id.* at 224. On the same day the order was entered, the respondent filed a motion to have the circuit court review the commissioner's decision, and a judge was assigned to hear the motion. *Id.* The petitioner requested substitution. *Id.* at 225. The circuit court denied substitution, finding "there is no procedure for filing a substitution of judge in a case that is being brought to court before the motion judge in a family court matter." *Id.*

This Court reversed, holding that the judge's "signing of the proposed order adopting the recommendations of the family court commissioner" was not a preliminary contested matter, so the substitution request was timely. *Id.* at 233-34. The

Court noted that if the judge's signing of the order extinguished the right to substitution, "petitioner's right of substitution would come into being and would be terminated before petitioner was aware of the identity of the judge before whom the matter would be heard." *Id.* at 235. The Court observed that this was an unusual Milwaukee County procedure, but that prohibiting substitution "would defeat the legislative purpose of allowing substitution of a judge and would be contrary to this court's practice of interpreting the statutory substitution provisions in a reasonable manner to give the litigant a reasonable period of time to request a substitution after he or she learns which judge is assigned to the case." *Id.*

It is immaterial that the court had *scheduled* a probable cause hearing. No party presented evidence, no party argued about probable cause, and the court made no findings relevant to probable cause. Although the probable cause hearing was scheduled, the court simply adjourned the hearing that neither party was prepared for. To put controlling weight on what was *expected* to happen at the hearing—and not what actually occurred—would irrationally elevate form over substance. *See Nichols v. Bennett*, 199 Wis. 2d 268, 274-75, 544 N.W.2d 428 (1996).

It is also irrelevant that the court made an *ex parte* finding of probable cause before Mr. Matthews was served with the ch. 980 petition. The circuit court ruled that this *ex parte* finding was a preliminary

contested matter.[5] This ruling is flatly contradicted by precedent; *ex parte* decisions do not affect a party's right to substitution. *Threlfall v. Town of Muscoda*, 152 Wis. 2d 308, 311, 448 N.W.2d 274, 275 (Ct. App. 1989). Mr. Matthews was not even served with the ch. 980 petition until after the *ex parte* review. (2; 3.) If the *ex parte* review were a preliminary contested matter, Mr. Matthews' "right of substitution would come into being and would be terminated before [he] was aware of the identity of the judge before whom the matter would be heard. Such an interpretation of sec. 801.58, Stats., would defeat the legislative purpose of allowing substitution of a judge and would be contrary to this court's practice of interpreting the statutory substitution provisions in a reasonable manner to give the litigant a reasonable period of time to request a substitution after he or she learns which judge is assigned to the case." *Tarney*, 99 Wis. 2d 220, 235.[6]

Mr. Matthews requested substitution before the court resolved any preliminary contested matters

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[5] The circuit court mistakenly called this an "*Arends* review." While an *Arends* review involves a similar *ex parte* finding, it occurs only in discharge proceedings, not an initial commitment. *State v. Arends*, 2010 WI 46, 325 Wis. 2d 1, 784 N.W.2d 513.

[6] "[A]n ex parte temporary restraining order is not issued in a 'contested' matter within the meaning of sec. 801.58(1), Stats. Issuing such an order is analogous to signing an order to show cause. The latter is not a preliminary contested matter." *Threlfall*, 152 Wis. 2d at 311 (citing *In Matter of Civil Contempt of Kroll*, 101 Wis.2d 296, 303, 304 N.W.2d 175 (Ct.App.1981)).

in his case because the court had not decided any substantive issues in the case. The circuit court lost competency to hear the case after the substitution was timely filed. "A literal reading of sec. 801.58 (2), Stats. 1979–80, requires the conclusion that the trial judge was not competent to proceed with the case after substitution was requested, except for the limited purposes specified in connection with the request." *Jiracek*, 108 Wis. 2d 684, 697. Once Mr. Matthews requested substitution, the court was only empowered to take the steps necessary to effectuate the substitution, as outlined in Wis. Stat. § 801.58(2). Therefore, this Court should reverse and remand for assignment of a new judge.

C. The circuit court's dissatisfaction with the substitution request does not make it untimely.

This Court's caselaw is clear; the "preliminary contested matters" language reflects the intent "that substitution be requested before the circuit court reaches a substantive issue." *Serocki*, 163 Wis. 2d at 156. However, this Court has also articulated a *purpose* for that intent, which the court of appeals misapplied in this case. In *Tarney*, this Court recognized that "[t]he reason for the statutory requirement is that a litigant who does not like the way a judge is handling the matter should not be able to substitute a second judge simply because the litigant believes things are going badly before the first judge and hopes to obtain a more favorable tribunal." 99 Wis. 2d at 234.

The court of appeals found that this language supported denying Mr. Matthews' substitution request because the circuit court judge was openly hostile to his request for an adjournment. *Matthews*, No. 2018AP2142, unpublished slip op., ¶ 9; (App. 105). The circuit court indicated it was "disappoint[ed]" in the late adjournment request, and was annoyed because it was a "waste of the [c]ourt's time. It's a waste of the parties' time. It's a waste of the family members' time. Mr. Matthews had been brought all the way down here for this hearing, and we're not able to do it." (13:5-6; App. 118-19.)

The circuit court's displeasure with the request for an adjournment does not transform that routine, procedural request into a ruling on a substantive issue. Rather, the language from *Tarney* is directed at preventing substitution after "the circuit court reaches a substantive issue." *Serocki*, 163 Wis. 2d 152, 156-56. A litigant cannot "test the waters" with a judge on the substantive matters in the case, then seek substitution after things appear to be going badly. Mr. Matthews would be barred from seeking substitution if the substance of the ch. 980 case appeared to be going badly. But the substance of the ch. 980 petition was not going poorly; the judge was simply displeased with counsels' failure to notify the court that they would need an adjournment.

The judge's displeasure with the adjournment has nothing to do with substitution. Under this reading, a civil litigant's right to substitution would be contingent on factors having nothing to do with the merits of the case. What if the judge had a

particularly busy calendar, and welcomed the chance to take this hearing off the schedule? That judge may have been predisposed to granting the adjournment; things would not have been going poorly, and Mr. Matthews' right to substitution would have remained intact. Mr. Matthews's right to substitution was not terminated simply because the court granted the adjournment reluctantly. The law of substitution does not turn on the judge's disposition to grant or deny an adjournment. The law requires the court to reach a substantive matter, which did not occur here.

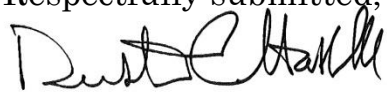
Mr. Matthews requested substitution before the court heard any preliminary contested matters. The only matter that had come before the court was a request to adjourn a hearing, which the court granted. This hearing was completely unrelated from the substance of the ch. 980 petition, and could have no impact on the presentation of the case at trial. Consequently, Mr. Matthews' request was timely, so this Court should reverse and remand for assignment of a new judge.

CONCLUSION

For the reasons argued above, Mr. Matthews asks that this Court reverse the decisions of the court of appeals and circuit court, and remand with instructions to enter an order granting his request for judicial substitution.

Dated this 24th day of September, 2020.

Respectfully submitted,



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I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,261 words.

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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 24th day of September, 2020.

Signed:

DUSTIN C. HASKELL
Assistant State Public Defender

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 § 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.

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Signed:

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TO
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