STATE OF WISCONSIN

IN 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.

REPLY BRIEF OF RESPONDENT-APPELLANT-PETITIONER

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ARGUMENT

I. Mr. Matthews' substitution request was timely because it was filed before the court heard any preliminary contested matters.

The simple question presented by this case is whether Mr. Matthews' substitution request was timely. For it to be timely, it had to be filed "preceding the hearing of any preliminary contested matters." Wis. Stat. § 801.58(1). Contrary to the State's arguments, this Court has held that for a matter to be a preliminary contested matter, it must "concern[] a substantive issue which went to the merits of the case." *State ex rel. Sielen v. Cir. Ct. for Milwaukee*, 176 Wis. 2d 101, 113, 499 N.W.2d 657 (1993). Mr. Matthews' request was timely because it was filed before the circuit court heard any substantive issues in the case. Therefore, this Court should reverse.

The State argues that a "preliminary contested matter" does not necessarily have to be a *substantive* matter. (State's Brief at 19.) The State concedes that this Court has repeatedly held that the statute's *purpose* is that "substitution be requested before the court reaches a substantive issue," but the State argues that this legislative intent is irrelevant because the plain language of the statute does not require the court to hear a substantive issue. (State's Brief at 7-8, 11-13.)

But this Court has unequivocally held that the statute itself requires the court to hear a substantive issue before it can be said to have heard a preliminary contested matter. In *Sielen*, this Court held that when determining whether the circuit court heard a preliminary contested matter, "the dispositive question is whether the hearing concerned a substantive issue which went to the merits of the case." 176 Wis. 2d at. Moreover, the current substitution statute is the codification of this Court's rule that a party loses the right to substitution only after "the judge is allowed to receive evidence which of necessity is to be used and weighed in deciding the ultimate issues[.]"*Pure Milk Products Co-op. v. NFO*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974) (internal quotation omitted).

To adopt the State's reading of the statute, this Court would have to overrule *Sielen*, ignore the purpose of the statute as defined in *Pure Milk*,[1]

[1] *Pure Milk Products Co-op. v. NFO*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974). Although *Pure Milk* precedes the current substitution statute, that statute is simply a codification of the rule from *Pure Milk* that "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.* at 250 (quoting *Marsin v. Udall*, 279 P.2d 721, 725 (Ariz. 1955)).

Tarney,[2] *Serocki*,[3] and *Carkel*,[4] and upend decades of practice for the judges and litigants who have relied on this Court's clear test that substitution is permitted until the court hears a substantive issue in the case. The State's argument that "preliminary contested matters" include non-substantive issues is unsupported in law and is flatly contradicted by *Sielen*.

The State argues that Mr. Matthews' request was untimely because it was filed after the adjourned probable cause hearing, which was a preliminary contested matter. But this argument fails because it ignores the statutory requirement that the court *hear* a preliminary contested matter, not merely schedule one. The State's reasons that a probable cause hearing is a "preliminary contested matter," and Matthews' requested substitution after the scheduled probable cause hearing; therefore, Matthews' request was untimely. (State's Brief at 8.) But this reasoning requires the court to find that an adjourned probable

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[2] *State ex rel. Tarney v. McCormack*, 99 Wis. 2d 220, 298 N.W.2d 552 (1980) ("The legislative intent is that the [substitution request] be filed before the court reaches the substantive issues.")

[3] *State ex rel. Serocki v. Cir. Ct. for Clark Cnty.*, 163 Wis. 2d 152, 471 N.W.2d 49 (1991) ("The legislative intent is that substitution be requested before the circuit court reaches a substantive issue.")

[4] *State ex rel. Carkel v. Cir. Ct. for Lincoln Cnty.*, 141 Wis. 2d 257, 414 N.W.2d 640 (1987) ("In [*Pure Milk*] the court said that 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.")

cause hearing—where the court heard no argument and took no evidence—is the same thing as a completed probable cause hearing.

The State is conflating what was scheduled to happen at the hearing with what actually occurred. The statute required Mr. Matthews to request substitution "preceding the *hearing* of any preliminary contested matters," not preceding the *scheduling* of any preliminary contested matters. Even if a completed probable cause hearing were a preliminary contested matter, an adjourned probable cause hearing is not. When determining whether a hearing relates to the substantive issues in the case, the Court must look to the content of the hearing, not merely what was *expected* to happen at the hearing.

Next, the State argues that the legislative intent of the statute actually supports its reading. (State's Brief at 11-13.) As both parties have noted, the substitution statute "prohibits parties who present their views in a preliminary contested matter from requesting substitution 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 tribunal." *Carkel*, 414 Wis. 2d at 265. But the State concedes that the trial judge's displeasure with Mr. Matthews' request for an adjournment is irrelevant to determining whether the adjourned hearing was a preliminary contested matter. (State's Brief at 12 n.6, 19.) Rather, this legislative intent is directed at preventing parties from testing out the

first judge on the *substantive* matters in the case before seeking substitution. The judge's displeasure in this case related only to the procedural request for an adjournment, so it has no bearing on whether the court heard a preliminary contested matter.

The State also argues that caselaw supports its position (State's Brief at 14-18), but it is unable to cite any case where an adjourned hearing was found to be a preliminary contested matter. The State cites *Sielen* and *Galaxy Gaming*,[5] two cases where the circuit court ruled on a motion to compel discovery before a party sought substitution. In *Sielen*, this Court held that the "dispositive question [was] whether the hearing concerned a substantive issue which went to the merits of the case." 176 Wis. 2d at 113. The Court held that a motion to compel discovery was substantive because 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.* at 114.

Galaxy Gaming is materially indistinguishable from *Sielen*. One party sought substitution after the court had already heard discovery motions. 267 Wis. 2d 233, ¶¶ 36-38. The court of appeals concluded it was bound by *Sielen* and found the request untimely. *Id.*

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[5] *DeWitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship*, 2003 WI App 190, 267 Wis. 2d 233, 670 N.W.2d 74.

Again, these cases only support the State if the Court ignores the difference between a probable cause hearing and an adjourned probable cause hearing. The litigants in *Sielen* and *Galaxy Gaming* lost the right to substitution because the court heard and decided discovery motions, not because the court adjourned a hearing on those motions.

In this case, the court could grant the adjournment or deny it; this decision would have no bearing on the merits of the case. The State argues that the ruling on the adjournment related to the merits of the case because the court could have denied the adjournment and proceeded with the probable cause hearing, which was a preliminary contested hearing. (State's Brief at 15-16.) But the State is again conflating the probable cause hearing itself with the decision about whether to adjourn the probable cause hearing. Even if the probable cause hearing related to the merits of the case, that does not mean that deciding when to have that hearing also relates to the merits of the case. There is a meaningful difference between a hearing relating to the merits of the case, and the procedures used to schedule that hearing.

Finally, the State argues that the request for an adjournment was itself a preliminary contested matter because the prosecutor objected to the adjournment. (State's Brief at 16.) There are two problems with this argument. First, it requires this Court to overrule the *Sielen* holding that whether the hearing concerned a substantive issue is the "dispositive question" when deciding whether the

court heard a preliminary contested matter. 176 Wis. 2d at 113.

Second, even if the Court finds that a ruling on a motion to adjourn *could* be a preliminary contested matter, it was not in this case because it was not legitimately contested. The State argues that the adjournment request was contested because the prosecutor objected. But the prosecutor's objection was disingenuous; its only witness was not present. (13:3-4; App. 116-17.) Had the court actually denied Mr. Matthews' requested adjournment, the State would have been forced to join in the request for an adjournment, instead of posturing by objecting "for the record." The prosecutor did its witness a courtesy by notifying him/her that an adjournment was likely, but the prosecution cannot then claim to have been prepared had the hearing gone forward.

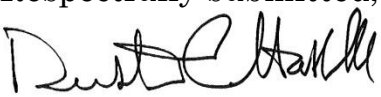
Mr. Matthews' request for substitution was filed before the court heard any substantive issues. It followed only the court's ruling on a procedural motion. Therefore, Mr. Matthews' request was timely, so this Court should reverse the decision of the court of appeals.

CONCLUSION

For the reasons argued above, and the initial brief, 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 17th day of November, 2020.

Respectfully submitted,



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CERTIFICATION AS TO FORM/LENGTH

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 1,707 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 17th day of November, 2020.

Signed:

DUSTIN C. HASKELL
Assistant State Public Defender