

FILED**01-27-2020****CLERK OF COURT OF APPEALS
OF WISCONSIN****STATE OF
WISCONSIN****COURT OF
APPEALS**

STATE OF WISCONSIN,

Date: December
12, 2019

Plaintiff-

Respondent,

District: 3

v.

Appeal No.

NHIA LEE,

2019AP000221 CR

Defendant-Appellant.

Circuit Court

Case No.

2018CF001025

BRIEF OF DEFENDANT-APPELLANT

ON APPEAL FROM THE HONORABLE LAMONT JACOBSON
BRANCH III OF THE MARATHON COUNTY CIRCUIT COURT
MARATHON COUNTY CASE NUMBER 2018CF1025

Attorney Julianne M. Lennon
Defendant Appellant's Counsel
Law Offices of Attorney Julianne M. Lennon
634 Werle Ave.
Wausau, WI 54401
(715) 551-7442
julielennon44@yahoo.com

TABLE OF CONTENTS

Table of Authorities iii

Statement of the Issues Presented vi

Statement Whether Oral Argument is Necessary vii

Statement Whether the Opinion Should be Published vii

Statement of the Case 1

Arguments

I. The trial court did not have jurisdiction to determine probable cause at the preliminary Hearing 17

1. The ten-day limit for conducting a preliminary hearing was violated 17

2. The court lacked personal jurisdiction to conduct a preliminary hearing because sufficient good cause was not shown to support the three-month delay in conducting the preliminary examination 25

II. The court erred by failing to appoint counsel at county expense when the Wisconsin Office of the State Public Defender was unable to locate counsel to represent Lee 30

III. Lee's confinement in custody with process deferred
for over three months violated due

process 43

CONCLUSION 50

CERTIFICATION viii, ix, x, xi

APPENDIX 100

TABLE OF AUTHORITIES

Cases

<i>Armstrong v. State</i> , 55 Wis.2d 282, 198 N.W.2d 357 (1972)	18
<i>Board of Regents of State Colleges v. Roth</i> , 408 U.S. 564, 572, 92 S.Ct. 2701, 33 L.Ed. 548 (1972)	44
<i>Carpenter v. Dane County</i> , 9 Wis.2d 249 (1859)	31
<i>Dent v. West Virginia</i> , 129 U.S. 114, 123 (1889)	44
<i>Doggett v. United States</i> , 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed. 2d 520 (1992)	23
<i>Douglas County v. Edwards</i> , 137 Wis.2d 65, 85, 403 N.W.2d 438, 447 (1987)	41, 45, 49
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 Sup. Ct. 792, 9 L.Ed. 2d 799 (1963)	31
<i>Jauch v. Choctow County</i> , 874 F.3d 425 (5 th Cir., 2017) (cert. denied)	45, 46, 48, 50
<i>Jones v. State</i> , 37 Wis.2d 56, 69, 154 NW2d 278 (1967)	36
<i>Kirby v. Illinois</i> , 409 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion)	35

Logan v. State, 43 Wis.2d 128, 168 N.W.2d 171 (1969) . . . 18

Miranda v. Arizona (1966), 384 U.S. 436, 86 Sup. Ct. 1602,
16 L. Ed. 2d 694 36, 47, 48

Rothgery v. Gillespie County, Texas, 554 U.S. 191, 128
S.Ct. 2578, 2592 (2008) 35, 36

State v. Dean, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App.
1991) 24, 27, 28, 32, 38, 39, 40, 45, 50

State Ex. Rel. Fitas v. Milwaukee County, 65 Wis.2d 130,
134, 221 N.W.2d 902 (1974) 31

State v. Lemay, 155 Wis.2d 202, 210, 455 N.W.2d 233
1990) 23

State v. Selders, 163 Wis.2d 607, 613, 472 N.W.2d 526 (Ct.
App. 1991) 26

United States v. Wade (1967), 388 U.S. 218, 87 Sup. Ct.
1926, 18 L. Ed. 2d 1149) 36

Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 41
L.ED.2d 935 (1974) 44

Constitution, Statutes and Rules

"I'm going to stand up': Northern Wisconsin judge demands answers from state on public defender crisis," Milwaukee Journal Sentinel, by Bruce Viclmetti (Nov.1,2018) . 41, 42

Wis. Stat. § 809.22 vii

Wis. Stat. § 809.23(1)(a)1 viii

Wis. Stat. § 809.23(1)(a)5 vii

Wis. Stat. § §970.03(1). 17

Wis. Stat. § 970.03(2) . . vi, 10, 18, 21, 22, 24, 25, 26

Wis. Stats. § 971.10(2)(a) 23

In re the Petition to Amend SCR 81.02, S. Ct. Order

No. 17-06, 2018 WI 83 (issued June 27, 2018, eff.

Jan. 1, 2020) 9

10, 24, 28, 29, 30, 31, 32, 34, 38, 39, 43, 45, 49, 50

Rule Petition with Appendix, 1706,

(www.wicourts.gov/scrules/1706.htm) 33, 34

Wis. Stats. Ann. 970.03(2), 1969 AB 603, Ch. 225, L. 1969

(<http://docs.legis.wisconsin.gov/1969/related/acts/255.pdf>)

electronic page 3 21, 22

STATEMENT OF THE ISSUES PRESENTED

- 1) Did the trial court have jurisdiction to determine probable cause at a preliminary hearing since the ten-day time limit allowed under Wis. Stat. § 970.03(2) had expired by 104 days?

The trial court violated the ten-day deadline in Wis. Stat. § 970.03(2), therefore, it lost personal jurisdiction over the case. The Hon. LaMont Jacobson ruled that the delay was not a statutory or constitutional violation.

- 2) Was it error for the court to fail to appoint counsel at county expense when the Wisconsin Office of the State Public Defender was unable to locate counsel to represent Lee?

Judge Jacobson ruled that the failure to appoint an attorney for Lee at county expense was not a constitutional violation.

- 3) Did Lee's confinement in custody with process deferred for over three months violate due process?

Judge Jacobson ruled that there was not a constitutional or statutory violation.

STATEMENT WHETHER ORAL ARGUMENT IS NECESSARY

There should be oral arguments pursuant to Wis. Stats. § 809.22 to permit questions to be asked and answered.

STATEMENT WHETHER THE OPINION SHOULD BE PUBLISHED

The opinion should be published because it decides an issue of substantial and continuing public interest pursuant to Wis. Stats. § 809.23(1)(a)5 by determining whether due process was violated by the extraordinary delay between the initial appearance and the preliminary hearing.

The opinion should be published because it decides an issue of substantial and continuing public interest pursuant to § 809.23(1)(a)5 Wis. Stats. by determining whether the failure to appoint counsel at a defendant's first appearance, or promptly thereafter, irreparably damages the indigent defendant's substantive right to the assistance of counsel.

The opinion should be published because it decides an issue of substantial and continuing public interest pursuant to § 809.23(1)(a)5 Wis. Stats. by determining

whether the failure to appoint counsel to enable a timely preliminary hearing, irreparably damages the indigent defendant's substantive right to the assistance of counsel.

The opinion should be published because it will clarify an existing rule of law pursuant to § 809.23(1) (a) 1 Wis. Stats. specifically, whether a Court must appoint an attorney to represent indigent defendants when the Public Defender is unable to locate an attorney to represent the individual.

The opinion should be published because it will clarify an existing rule of law pursuant to § 809.23(1) (a) 1 Wis. Stats. specifically, when a Court must appoint an attorney for an indigent defendant?

STATEMENT OF THE CASE

The criminal complaint for Marathon County Case Number 2018CF1025 charged Nhia Lee with three crimes. (1). Attorney Pauline Toulouse appeared with Lee in person, and in custody on September 10, 2018 (40:2). Attorney Toulouse requested that Lee's case be re-called the next day. (40:3). The Court found probable cause based upon the complaint and continued the initial appearance. (40:3). At the adjourned initial appearance, Attorney Toulouse requested a signature bond. (41:2). The Court set a \$25,000 cash bond. (41:2). Attorney Toulouse requested that the preliminary hearing be held within ten days. (41:3). The Court set a review hearing for September 14, 2018, a preliminary hearing for September 19, 2018. (41:4).

Lee appeared without counsel, in custody, by video from the jail, and the State did not appear at the September 14, 2018, review hearing. (42:2). The purpose of the review hearing was to check on Lee's attorney status. (42:2). Lee was eligible for a Public Defender but the Public Defender was still looking for an attorney to represent him. (42:2). Lee's preliminary hearing was set

for September 19, 2018. (42:2). Lee stated that he wanted an attorney. (42:2). The Court took the preliminary hearing off the calendar and scheduled a hearing to determine if an attorney had been appointed to represent him. (42:2). The Court found good cause to extend the time limits. (42:2).

Review hearings were also held on September 21, 2018, (43), September 28, 2018, (44) October 5, 2018, (45) and October 12, 2018. (46). At each review hearing, the Public Defender was still searching for counsel to represent Lee, and the Court extended the time limits for cause. (43:2), (44:2), (45:2), (46:2).

The Court said Lee had the right to have the preliminary examination within ten days if he was in custody and his bond was at least \$500, but if there was good cause the time limit could be extended. (46:3). The Court stated the good cause finding was due to the need for counsel and the shortage of attorneys taking Public Defender cases. (46:3). The statute does not set a limit on the number of extensions. (46:3).

The Court could not give him advice about what to do.

(46:4). The Court found good cause to extend the time limits for the preliminary hearing. (46:5).

Lee appeared without counsel, in custody, by video from the jail, and the State did not appear at the review hearing on October 19, 2018. (47:2). The Court stated that Lee was eligible for an attorney through the Public Defender but the agency was still searching for counsel to represent him. (47:2). The Court stated, there is not a definitive answer by a higher court as to when it would become a due process violation. (47:2-3). The Court found good cause to extend the time limits. (47:3).

Lee appeared without counsel, in custody, by video from the jail, and the State did not appear at the review hearing on October 26, 2018. (48:2). The Court stated that Lee was eligible for a Public Defender but the agency was still seeking counsel to represent him. (48:2). Lee advised the Court that he had sent a letter to the Judge. (48:2).

Lee's letter to Judge Jacobson stated that he had been in jail for over one and one-half months and had not had a preliminary hearing. (9:2). Lee's letter stated that he was entitled to a preliminary hearing within ten days of

his initial appearance, a preliminary hearing had not been held, and he had not been given good cause for the failure to have a preliminary hearing. (9:1-2). Lee's letter stated that his due process rights had been violated and requested that the Court dismiss his case. (9:2).

The Court found good cause to extend the time limits for the preliminary hearing and set a review hearing. (48:2-3).

Lee appeared without counsel, in custody, by video from the jail, and the State did not appear at the review hearing on November 2, 2018. (49:2). The Court stated that Lee was eligible for the Public Defender but the agency was still searching for representation for him. (49:2). The Court found good cause to extend the time limits for the preliminary hearing and set a review hearing in one week. (49:3).

Lee appeared in person and without counsel on November 7, 2018. (50:2). Assistant District Attorney Kyle Mayo appeared for the State. (50:2). Attorney Suzanne O'Neill appeared at Judge LaMont Jacobson's invitation to provide information to the Court about the Public Defender's Office

attempts to find an attorney for Lee. (50:3). The Court set the hearing in response to Lee's letter. (50:3). The Court stated that Lee's letter requested a preliminary hearing, a dismissal or a bond hearing due to the delays in an attorney being appointed to represent him. (50:3).

Attorney O'Neill stated that at least 100, if not more attorneys had been contacted. (50:4). Attorney O'Neill stated that the Public Defender contacted local attorneys by telephone and also sent out e-mail messages to attorneys throughout the State to try to locate an attorney to represent Lee, but they were unsuccessful. (50:4).

The Court stated the constitutional requirement for a probable cause finding was satisfied because probable cause findings were made on September 4, 2018, and September 10, 2018. (50:6). The Court stated the adjourned initial appearance held on September 11, 2018, started the cycle of Public Defender appointment review hearings. (50:5). The Court stated review hearings were held on September 14th, September 21st, September 28th, October 5th, October 12th, October 19th, October 26th, and November 2nd. (50:5).

The Court stated that Lee's letter raised his

statutory right to have a preliminary hearing within ten days if he is held on a cash bail of \$500 or more. (50:6). The Court stated the right to have a preliminary hearing within ten days is subject to court review to find out if there is good case to extend the time limits for having the preliminary examination. (50:6).

The Court stated, that review hearing procedure was developed in Marathon County to deal with the ongoing shortage of attorneys accepting Public Defender appointments or conflict cases. (50:6). The Court stated that Lee's situation had gone on for a long time, in excess of two months. (50:6). The Court stated that at each stage there were reviews and the Court found good cause to extend the time limits. (50:6).

The Court conceded that Lee was "getting very, very close to the point where the Court could find a constitutional violation." (50:7). The Court denied the motion to dismiss on constitutional grounds because there were probable cause findings. (50:7). The Court denied the motion to dismiss on statutory grounds for failing to hold the preliminary hearing within ten days because the review

hearings were held and the statute allows for cause extensions of the time limits for the preliminary hearing. (50:7).

The Court ruled that Lee's right to counsel had not been denied. (50:7).

The Court denied Lee's request to modify his bond. (50:7-8). The Court set Lee's case for another review hearing on November 9, 2018. (50:8).

Lee appeared without counsel, in custody, by video from the jail, and the State did not appear at the review hearing on November 9, 2018. (51:2). The Court told Lee the Public Defender was still looking for an attorney for him. (51:2). The Court said there were other people who had been waiting almost twice as long for an attorney. (51:2). The Court reiterated that at some point the delays would become a constitutional problem. (51:3). The Court extended the time limits for good cause for one week. (51:3).

Lee appeared without counsel, in custody, by video from the jail, and the State did not appear at the review hearing on November 16, 2018. (52:2). The Court stated

that the Public Defender was still looking for an attorney to represent Lee. (52:2). The Court advised Lee of his right to appeal and reiterated that the longer the delay in appointing counsel the worse the situation, and that at some point it could be a constitutional violation. (52:2). The Court told Lee he could send another motion to the Court. (52:2). The Court stated there was not any legal authority to explain when a constitutional violation has occurred. (52:3). The Court found good cause to extend the time limits for the preliminary hearing. (52:3).

At the November 30, 2018, hearing, Lee still had not been appointed counsel and the Court extended the time limits for the preliminary hearing for cause. (53:2).

The Court said the review hearings would be scheduled every two-weeks. (53:2-3). The Court stated at some point an attorney might have to be appointed at county expense, But "I know they're trying not to have to do that . . ." (53:3).

On December 14, 2018, Judge Michael Moran tolled the time limits for cause and set another review hearing. (54:2).

Lee wrote another letter to Judge Jacobson stating that his constitutional rights had been violated. (18:1).

The Wisconsin Office of the State Public Defender appointed an attorney to represent Lee on December 21, 2018. (17). Lee's attorney filed a Notice of Motion and Motion to Dismiss with Prejudice on December 28, 2018. (20). The motion stated, that Lee's preliminary hearing was set for September 19, 2018. (20:1). Lee requested counsel. (20:1). Lee was financially eligible to have an attorney appointed by the Wisconsin Office of the State Public Defender. (20:1). The Wisconsin Office of the State Public Defender was unable to locate an attorney to represent Lee until December 21, 2018. (20:1). The motion argued that when the Public Defender's Office is unable to locate an attorney, the Court shall appoint an attorney at county expense pursuant to Wisconsin Supreme Court order, *In re the Petition to Amend SCR 81.02, S. Ct. Order No. 17-06*, 2018 WI 83 (issued June 27, 2018, eff. Jan. 1, 2020). (20:1-2). The motion sought dismissal with prejudice because the failure to appoint counsel at county expense deprived of Lee of his constitutional right to counsel for more than 90 days. (20:2).

The motion argued that if Lee had been appointed counsel at county expense, he could have had a preliminary hearing, a bond hearing, motions and a speedy trial, all within the timeframe during which he sat in custody waiting for an attorney to be appointed. (20:2). The motion argued that a preliminary hearing had not been held for Lee within 10 days as required by Sec. 970.03(2) Wis. Stats. (20:2).

Lee appeared in custody by video from the jail at the review hearing on December 28, 2018. (55:2). Lee's attorney appeared in the court room and advised Court Commissioner Douglas Bauman that she had electronically filed a Motion to Dismiss With Prejudice prior to appearing at the hearing. (55:2). Counsel also provided a paper copy of the motion to Court Commissioner Bauman at the hearing. (55:2).

When the Public Defender's Office is unable to locate an attorney, the Court is required to appoint an attorney at county expense pursuant to Wisconsin Supreme Court order, *In re the Petition to Amend SCR 81.02, S. Ct. Order No. 17-06*, 2018 WI 83 (issued June 27, 2018, eff. Jan. 1, 2020). Court Commissioner Bauman deferred ruling on the motion. (55:2-3).

Court Commissioner Bauman stated that a preliminary hearing was set for January 2, 2019. (55:3). Lee's attorney stated she was appointed on December 21, 2018, and objected to the preliminary hearing being set more than 10 days after the appointment of counsel. (17) (55:3). Court Commissioner Bauman stated, that the court had been extending the time limits due the Public Defender being unable to locate counsel. (55:3). The Court Commissioner found good cause to extend the time limits until January 2, 2019. (55:3). Lee's attorney asked the Court to state the basis for finding good cause to hold the preliminary hearing on January 2, 2019. (55:3).

Court Commissioner Bauman stated the delay in finding an attorney and getting the hearing dates scheduled was the good cause for extending the time limit. (55:4). Lee's attorney placed on the record that she had a preliminary hearing on December 26, 2018, and preliminary hearings for other individuals were held the same day. (55:4). Counsel stated that Lee's preliminary hearing could have been set on December 26, 2018. (55:4).

Lee appeared in custody with counsel at the preliminary hearing on January 2, 2019. (56:3). Attorney

Robert Southwell appeared for the State. (56:3). Attorney Lennon advised the court that she had previously filed a notice of motion and motion to dismiss, and then amended the motion to add additional arguments. (56:3). Judge Jill Falstad declined to rule on the motion. (56:3). Judge Falstad said to set the motion for a hearing in Branch 3. (56:4). Judge Falstad heard testimony at the preliminary hearing. (56:4-15). Judge Falstad found probable cause that a felony was committed and that Lee committed it and bound him over for trial. (56:16). The information was filed electronically on January 2, 2019. (22).

The court entered an order declining to rule on Lee's motion, but preserving the issue, and finding probable cause to bind Lee over. (25; App. 101). The Court of Appeals acknowledged receipt of Lee's permissive appeal by letter dated January 28, 2019. Lee filed a motion to supplement the record to include his motion to dismiss and amended motion to dismiss with prejudice, attaching those documents to the motion to supplement. (Lee's Mot. To Suppl.); (20); (23).

The Court of Appeals granted Lee's motion to supplement on March 11, 2019, and ordered Lee to provide

Transcripts from Lee's hearings by April 28, 2019, with an explanation of whether and when the circuit court intended to rule on the pending motion to dismiss with prejudice.

Judge Jacobson said the local public defender's office was having difficulty finding attorneys to accept appointments. (57:13; App. 104). Judge Jacobson stated that all Marathon County circuit branches were encountering cases where defendants had requested counsel, but had not been appointed counsel by the preliminary hearing date. (57:13; App. 104). Judge Jacobson stated, "In an attempt to deal with this problem, all branches in Marathon County began scheduling review hearings prior to the date of the scheduled preliminary hearing." (57:13; App. 104). Judge Jacobson said, the review hearings were held "[t]o make sure that an attorney was present to represent someone at a preliminary hearing when they requested an attorney . . .". (57:13-14; App. 104).

Judge Jacobson stated that the court reviewed Lee's criminal complaint on September 10, 2018, found probable cause and reset the initial appearance for September 11,

2018. (57:15; App. 104). Judge Jacobson ruled that the probable cause finding satisfied the constitutional requirement. (57:17-18; App. 104). Judge Jacobson stated that Lee's initial appearance was held on September 11, 2018, and bail was set at \$25,000. (57:15; App. 104). Judge Jacobson said pursuant to Marathon County policies a review hearing was set for September 14, 2018, and a preliminary hearing was set for September 19, 2018. (57:15; App. 104).

Judge Jacobson stated that at the September 14, 2018, review hearing, "the court noted no attorney had been appointed by the Public Defenders Office." (57:15; App. 104). Judge Jacobson said because an attorney had not been appointed the court set another review hearing. (57:15; App. 104). Judge Jacobson said the court found good cause to extend the statutory time limits for conducting the preliminary hearing. (57:15; App. 104).

Judge Jacobson said that due to the State Public Defender's inability to appoint counsel for Lee, additional review hearings were held on September 21st, September 28th, October 5th, October 12th, October 19th, October 26th, and November 2nd. (57:15; App. 104).

Judge Jacobson said Lee's motion to dismiss, or modify bond was denied by the court on November 7, 2018. (57:16; App. 104); (9).

Review hearings were held on November 9th, November 16th, November 30th, and December 14th. (57:16; App. 104). Judge Jacobson stated "[a]t each review hearing the presiding judge set the matter over due to the necessity for additional time to locate an attorney willing to accept the case." (57:16; App. 104).

The final review hearing was held on December 28th, and the Court Commissioner declined to rule on Lee's original motion to dismiss. (57:16; App. 104); (20).

The court deferred ruling on the Amended Motion to Dismiss. (57:17; App. 104); (23). An order was prepared and appeal was filed. (57:17; App. 104); (25; App. 101).

Judge Jacobson ruled that the failure to conduct a preliminary hearing within the statutory time frame was not a constitutional violation. (57:18; App. 104). Judge Jacobson ruled that the failure to appoint counsel was not a violation of Lee's constitutional right to counsel. (57:18-19; App. 104). Judge Jacobson found there was no

authority for the proposition that failing to appoint counsel within the ten-day time frame of the preliminary hearing was contemplated by the statute or that it would rise to the level of a constitutional violation. (57:18-19; App. 104).

Judge Jacobson stated, “[i]f the Court appointed attorneys in any but the most extreme cases, considerable resources would have to be devoted by the court to the task of securing attorneys to represent people in criminal cases . . . ”. (57:19; App. 104).

Judge Jacobson stated that the fact that the court could have appointed an attorney earlier at county expense does not mean that it was required to make such an appointment. (57:20; App. 104).

Judge Jacobson stated the circumstances were extreme but Lee was not unconstitutionally denied his right to assistance of counsel by the delay in finding an attorney to represent him. (57:20; App. 104).

ARGUMENTS

I. The trial court did not have jurisdiction to determine probable cause at the preliminary hearing.

1. The ten-day limit for conducting a preliminary hearing was violated.

Judge Jacobson said the court found good cause to extend the statutory time limits for conducting the preliminary hearing. (57:15; App. 104).

The ten-day time limit for conducting Lee's preliminary hearing had expired by 103 days. Lee's adjourned initial appearance was September 11, 2018. (41:2). Lee had a \$25,000. (41:2). Attorney Toulouse requested that the preliminary hearing be held within ten days. (41:3). Lee's preliminary hearing was conducted on January 2, 2019. (56:4-16).

"A preliminary examination is a hearing before a court for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant." §970.03(1) Wis. Stats.

"The preliminary examination shall be commenced within

20 days after the initial appearance of the defendant if the defendant has been released from custody or within 10 days if the defendant is in custody and bail has been fixed in excess of \$500. On stipulation of the parties or on motion and for cause, the court may extend such time.” Wis. Stat. §970.03(2).

To comply with the 10-day statutory time limit, Lee’s preliminary examination should have been held by September 21, 2018. Lee’s preliminary examination was delayed until January 2, 2019. (56:4-16).

Failure to hold a preliminary hearing within the statutory time limits results in a loss of personal jurisdiction. *Logan v. State*, 43 Wis.2d 128, 168 N.W.2d 171 (1969); *Armstrong v. State*, 55 Wis.2d 282, 198 N.W.2d 357 (1972). The Court stated the right to have a preliminary hearing within ten days is subject to court review to find out if there is good cause to extend the time limits for having the preliminary examination. (50:6).

Marathon County has review hearings for indigent client’s in custody who have not been appointed counsel by the Public Defender. (57:13; App. 104). The court routinely found good cause to extend the time limits for the

preliminary examination at review hearings on September 14, 2018, (42:2); September 21, 2018, (43:2); September 28, 2018, (44:2); October 5, 2018, (45:2); October 12, 2018, (46:5); October 19, 2018, (47:3); October 26, 2018, (48,2-3); and November 2, 2018, (49:3).

The sole basis for extending the time limits for Lee's preliminary hearing was the inability of the Public Defender to find an attorney to represent Lee. (42:1); (43:2); (44:2); (45:2); (46:2); (47:2); (48:2-3); (49:2).

Even after Attorney O'Neill appeared and advised the Court of the significant efforts made to try to obtain counsel for Lee, the Court failed to appoint counsel and set another review hearing. (50:8).

The time limits for Lee's preliminary hearing were repeatedly extended at review hearings on November 9, 2018, (51:3); November 16, 2018, (52:4); November 30, 2018 (53:2-3); December 14, 2018, (54:2); December 28, 2018, (55:3).

Even after counsel was appointed, the Court extended the time limits for the preliminary hearing. Lee's preliminary examination was set more than 10 days after counsel was appointed. Court Commissioner Bauman said the preliminary

hearing was set for January 2, 2019. (55:3). Lee's attorney told the Court that she was appointed on December 21, 2018, and objected to the preliminary hearing being set more than 10 days after the appointment of counsel.

(17) (55:3). Court Commissioner Bauman said the court had been extending time limits for good cause based on being unable to find an attorney. (55:3). Court Commissioner Bauman found good cause to extend the time limits until January 2, 2019. (55:3). Lee's attorney asked the Court to state the basis for finding good cause to hold the preliminary hearing on January 2, 2019, when counsel had been appointed on December 21, 2018. (55:3).

Commissioner Bauman stated the delay in finding an attorney and getting the hearing dates scheduled was the good cause for extending the time limit. (55:4). Lee's attorney said she had a preliminary hearing on December 26, 2018, and preliminary hearings for other individuals were held the same day. (55:4). Lee's attorney said her client's preliminary hearing could have been set on December 26, 2018. (55:4).

The Public Defender's Office appointed counsel for Lee on December 21, 2018. (17). Lee's preliminary hearing was

held twelve days later. (56). The Court's interpretation of the statute is that the preliminary examination time limits may be extended an unlimited number of times. (46:3).

Lee disagrees with the court's interpretation that the statute allows an unlimited number of time limit extensions. The court's interpretation vitiates the time limits set forth in Wis. Stat. §970.03(2).

The legislative history establishes that the preliminary hearing time limits were carefully considered as part of a complete redrafting of the criminal code. Wis. Stats. Ann. 970.03(2), 1969 AB 603, Ch. 225, Laws of 1969, at 602-604, (<http://docs.legis.wisconsin.gov/1969/related/acts/255.pdf>) electronic page 3. (App. 128). "In 1967 the Judicial Council established the Criminal Rules Committee to prepare a complete redraft of those statutes which deal with procedure in criminal cases." Wis. Stats. Ann. 970.03(2), 1969 AB 603, Ch. 225, Laws of 1969, at 602-603. (App. 128) The bill was a completely redrafted Wisconsin criminal procedure statutes. *Id.* at 603. (App. 128). "The bill attempts to codify statutory and case law in

systematic form beginning with the initiation of the criminal process (the issuance of complaints and warrants) and ending with post conviction remedies." *Id.* (App. 128)

"Procedural revisions of other states and the federal system have been studied as well as various model acts of such groups as the American Law Institute." *Id.* (App. 128).

"Also considered wherever applicable were the recently published reports of the American Bar Association project of minimum standards for criminal justice." Wis. Stats. Ann. 970.03(2), 1969 AB 603, Ch. 225, Laws of 1969, at 603. (App. 128).

The 20-day limit for preliminary examinations created by the act was part of general effort to encourage speedy trials. *Id.* at 604. "In an attempt to speed up the criminal justice procedures, provisions for a speedy trial set out at length the time in which a preliminary examination must be commenced (20 days after initial appearance), the time for filing an information (30 days after the preliminary examination or waiver thereof) and provisions for the commencement of felony and misdemeanor trials." *Id.* (App. 128)

The repeated extensions of the time limits for the preliminary hearing circumvents the specific intent of the legislation which created time limits as part of a general effort to encourage speedy trials.

Due to the delay in appointing counsel for Lee, the Wisconsin statutory speedy trial could not be implemented by demand because the arraignment had not occurred. Wis. Stats. § 971.10(2)(a). Although Lee was unable to demand his statutory right to speedy trial, he still had a constitutional right to speedy trial. Speedy trial attaches when the defendant is formally accused or when the complaint and warrant are issued. *State v. Lemay*, 155 Wis.2d 202, 210, 455 N.W.2d 233 (1990).

Constitutional speedy trial analysis requires the court to examine: "whether the delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserts his right to a speedy trial, and whether he suffered prejudice as the delay's result." *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed. 2d 520 (1992).

In Lee's case, the delay between his initial appearance and the appointment of counsel was exceedingly long. Lee's proceedings were delayed because the Public Defender could not locate an attorney to represent him and the court refused to appoint an attorney to represent him. Lee's November 27, 2018, letter to the court stated that his right to speedy trial, due process and assistance of counsel were being violated. (18).

The criminal rules committee note establishes that the preliminary hearing time limits were created as a legislative mechanism to protect Lee's constitutional right to speedy trial, therefore, the time limits for conducting a preliminary hearing are really a constitutional rule which should create a higher barrier to finding good cause to avoid the time limits. § 970.03(2) Wis. Stats.

The Wisconsin Supreme Court has prescribed a cure for the delays by mandating court appointment of an attorney per Dean. *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991). *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83, at 15 (issued June 27, 2018,

eff. Jan. 1, 2020). In some counties, judges are appointing attorneys to avoid delay.

2. The court lacked personal jurisdiction to conduct a preliminary hearing because sufficient good cause was not shown to support the three-month delay in conducting the preliminary examination.

“On stipulation of the parties or on motion and for cause, the court may extend such time.” Wis. Stat. §970.03(2).

The review hearings were not meaningful hearings to determine if there was good cause to repeatedly delay Lee’s preliminary hearing. The court routinely found good cause to extend the time limits for the preliminary examination on September 14, 2018, (42:2); September 21, 2018, (43:2); September 28, 2018, (44:2); October 5, 2018, (45:2); October 12, 2018, (46:5); October 19, 2018, (47:3); October 26, 2018, (48,2-3); and November 2, 2018, (49:3).

The sole basis for extending the time limits for Lee’s preliminary hearing was that the Public Defender had been unable to find an attorney to represent Lee. (42:1); (43:2); (44:2); (45:2); (46:2); (47:2); (48:2-3); (49:2).

Even after Attorney O'Neill advised the Court of the significant efforts made to try to obtain counsel for Lee, the Court failed to appoint counsel. (50:8).

At the review hearings, the court extended the time limits for Lee's preliminary hearing without weighing the factors for adjournment, specifically, without 1) weighing the justification for the relief sought; and 2) the possible prejudice to the opposing party. *State v. Selders*, 163 Wis.2d 607, 614-615, 472 N.W.2d 526 (Ct. App. 1991).

Lee does not agree with the court's interpretation that Section 970.03(2) Wis. Stats. permits an unlimited number of adjournments. By comparison, in *Selders* the State moved the court for one adjournment. *State v. Selders*, 163 Wis.2d 607, 613, 472 N.W.2d 526. The basis for the State's motion to adjourn the preliminary hearing for cause was to conduct an untainted identification at a line-up. *State v. Selders*, 163 Wis.2d at 613.

The Court failed to consider the harm to Lee in finding that there was good cause to justify the repeated delay of his preliminary hearing. Specifically, the court did not

consider how the failure to appoint counsel harmed Lee. Lee did not have counsel to investigate the charges, preserve evidence, or consult with when law enforcement sought a custodial interrogation. Lee did not have counsel to obtain a proffer or cooperation agreement prior to custodial interrogations.

The court's good cause findings were erroneous because the extended delay in securing counsel for Lee did not constitute good cause in light of the Wisconsin Supreme Court's rule. The review hearings repeatedly found good cause to extend the time limits for Lee's preliminary examination instead of appointing counsel at the county's expense. September 14, 2018, (42:2); September 21, 2018, (43:2); September 28, 2018, (44:2); October 5, 2018, (45:2); October 12, 2018, (46:5); October 19, 2018, (47:3); October 26, 2018, (48,2-3); November 2, 2018, (49:3); November 9, 2018 (51:3); November 16, 2018, (52:4); November 30, 2018 (53:2-3); December 14, 2018, (54:2); December 28, 2018, (55:3). *State v. Dean* (Ct. App. 1991), 163 Wis. 2d 503, 471 N.W.2d 310; *In re the Petition to Amend SCR. 81.02*, S. Ct. Order No. 17-06, 2018 WI 83 (issued June 27, 2018, eff. Jan. 1, 2020).

The Court stated, at some point counsel might need to be appointed for Lee at County expense but it was trying not to appoint counsel. (53:3).

The court resisted appointing counsel to avoid the expense to the county. "If lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of \$40/hour, as is increasingly the case, then judges must appoint a lawyer under SCR 81.02, at county expense. See *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991)." *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83 at 15.

The Supreme Court does not give the legal reasoning behind its directive that counsel should be appointed by the court but it is quite clear that it is because of due process, the defendant's right to counsel, and the preliminary hearing time limits.

Judge Jacobson stated, "[i]f the Court appointed attorneys in any but the most extreme cases, considerable resources would have to be devoted by the court to the task of securing attorneys to represent people in criminal cases, . . . ". (57:19; App. 104). Judge Jacobson said that the fact that the court could have appointed an

attorney earlier at county expense does not mean that it was required to make such an appointment. (57:20; App. 104).

The Wisconsin Supreme Court mandated that when an attorney is not available through the SPD, then judges must appoint an attorney under SCR 81.02, at county expense. *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83, at 15. The circuit court violated the Supreme Court mandate at the review hearing on September 14, 2018, by failing to appoint an attorney for Lee at county expense. *Id.*

The Wisconsin Supreme Court articulated the criteria which trigger the requirement that the circuit court appoint counsel at county expense. The circuit court must appoint counsel when an attorney is unavailable or unwilling to represent a client. *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83, at 15.

The circuit court repeatedly violated the Wisconsin Supreme Court mandate by failing to appoint counsel for Lee at county expense at each of Lee's review hearings. The court's ruling that it was not required to appoint

counsel at county expense contradicts the plain language of the Supreme Court which stated the circuit court must appoint counsel when an attorney is unavailable or unwilling to represent a client. *In re the Petition to Amend SCR 81.02, S. Ct. Order No. 17-06, 2018 WI 83, at 15* (issued June 27, 2018, eff. Jan. 1, 2020).

The Court was aware that the Public Defender could not locate counsel to represent Lee because that was the basis for extending the time limits.

II. The court erred by failing to appoint counsel at county expense when the Wisconsin Office of the State Public Defender was unable to locate counsel to represent Lee.

The Court has an obligation to ensure the timely provision of counsel to a defendant who is entitled to court appointed counsel. The Court had the authority to appoint counsel at each of the review hearings. "We conclude, without difficulty, that the appointment of counsel ought to be made by a judge or under the aegis of the judicial system. Attorneys are officers of the court and the duty to furnish representation derives from

constitutional provisions that place the responsibility upon courts. That responsibility has been traditionally discharged by courts." *State Ex. Rel. Fitas v. Milwaukee County*, 65 Wis.2d 130, 134, 221 N.W.2d 902 (1974) (citing *Carpenter v. Dane County*, 9 Wis.2d 49 (1859); *Gideon v. Wainwright*, 372 U.S. 335, 83 Sup. Ct. 792, 9 L.Ed. 2d 799 (1963)).

After receiving extensive public comment, the Wisconsin Supreme Court held that if "lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of \$40/hour, as is increasingly the case, then judges must appoint a lawyer under SCR 81.02, at county expense." *In re the Petition to Amend SCR 81.02*, S. Ct. Order 17-06, 2018 WI 83, at 15.

The Supreme Court directive used the word "must" to order that courts' shall appoint an attorney when the public defender is unable to locate counsel for an indigent defendant. *Id.*

The circuit court repeatedly violated the Supreme Court mandate at the review hearings by failing to appoint an attorney for Lee at county expense. September 14, 2018, (42:2); September 21, 2018, (43:2); September 28, 2018,

(44:2); October 5, 2018, (45:2); October 12, 2018, (46:5); October 19, 2018, (47:3); October 26, 2018, (48,2-3); November 2, 2018, (49:3); November 9, 2018 (51:3); November 16, 2018, (52:4); November 30, 2018 (53:2-3); December 14, 2018, (54:2). *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991); "In re the Petition to Amend SCR. 81.02, S. Ct. Order No. 17-06, 2018 WI 83 (issued June 27, 2018, eff. Jan. 1, 2020).

Even after Attorney O'Neill appeared and advised the Court of the significant efforts that had been made to try to obtain counsel for Lee, the Court set another review hearing. (50:8). Attorney O'Neill told the Court that at least 100, or more attorneys had been contacted in an attempt to locate counsel for Lee. (50:4).

The shortage of attorneys who are willing to accept appointments through the Wisconsin Office of the State Public Defender's Office has a state wide impact on indigent criminal defendants and the justice system.

In re Petition to Amend SCR 81:02, sought to change the rate of compensation for court appointed attorneys to \$100 an hour. *In re the Petition to Amend SCR 81.02*, S. Ct. Order 1706, 2018 WI 83. The court solicited public

comment on March 17, 2018, and May 1, 2018. *Id.* at 4.

“The court received over 100 written comments from judges, lawyers, administrators, legal organizations, and members of public.” *Id.* at 4.

Petitioners seeking to amend SCR 81:02 cited empirical evidence from two studies to bring clarity to the “constitutional crisis” a) Rationing Justice: The Underfunding of Assigned Counsel Systems, National Association of Criminal Defense Lawyers (NACDL) (2013) (App. 11); and b) Justice shortchanged: Assigned Counsel Compensation in Wisconsin, Sixth Amendment Center (6 AC) (214) (App 47). *Rule Petition with Appendix*, 1706, at 5 (www.wicourts.gov/scrules/1706.htm).

“The United States Department of Justice has determined that Courts may act preemptively to prevent constructive denial of counsel rather than waiting to resolve issues retrospectively through Strickland.” *Rule Petition with Appendix*, 17-06, at 14, (www.wicourts.gov/scrules/1706.htm). The DOJ has opined that when a constructive denial of counsel under the Sixth Amendment occurs due to a state or local government

creation of structural impediments that make the appointment of counsel "superficial" to the point of "non-representation", a court may step in and presume prospectively that the representation is ineffective. *Rule Petition with Appendix*, 17-06, at 14, (www.wicourts.gov/scrules/1706.htm). The types of government interference articulated by the DOJ include critical understaffing of public defender agencies. *Id.* at 14. A "'constructive denial of counsel violating Gideon occurs where traditional markers of representation are frequently absent or significantly compromised a result of systemic, structural limitations.'" *Rule Petition With Appendix*, 1706, at 15, (www.wicourts.gov/scrules/1706.htm).

Lee remained without counsel from his initial appearance on September 11, 2018, until December 21, 2018. (41) (17). "The right to counsel in criminal proceedings is a fundamental constitutional right and a cornerstone of our justice system. U.S. Const. amend. VI; Wis. Const. art. I, § 7." *In re the Petition to Amend SCR 81.02*, S.Ct. Order No. 17-06, 2018 WI 83 (issued June 27, 2018, eff. Jan. 1, 2020) at 4.

"A criminal defendant's initial appearance before a

magistrate, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 2592 (2008). "This Court has twice held that the right to counsel attaches at the initial appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 2584.

Following the initiation of adversarial proceedings an accused such as Lee, is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substance and procedural criminal law that define his capacity and control his actual ability to defend himself against a formal accusation that he is a criminal. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 2583. (*citing Kirby v. Illinois*, 409 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion)).

Once the right to counsel has attached, the state has an "obligation to appoint counsel within a reasonable time once a request for assistance is made." *Id.* at 2591.

In some situations, an individual may have a constitutional right to counsel prior to an initial appearance such as a custodial interrogation. *Miranda v. Arizona* (1966), 384 U.S. 436, 86 Sup. Ct. 1602, 16 L. Ed. 2d 694. A lineup. *United States v. Wade* (1967), 388 U.S. 218, 87 Sup. Ct. 1926, 18 L. Ed. 2d 1149).

To minimize delays in the criminal justice system, the Wisconsin Supreme Court held that at an indigent defendant's initial appearance before a court he is to be advised of his right to counsel and that counsel be appointed at that time, unless intelligently waived. *Jones v. State*, 37 Wis.2d 56, 69, 154 NW2d 278 (1967).

"This rule will assure the invaluable assistance of counsel at a time close to the threshold of the criminal process, when, following his arrest, the accused makes his initial appearance before a magistrate or court. This earlier appointment of counsel will afford the accused the assistance of counsel in setting his bail at a reasonable

figure. Such counsel can aid the accused in making important decisions on whether to have, waive, or postpone the preliminary hearing." *Id.* at 69.

"The most compelling reason for appointing counsel at the initial appearance is that counsel's presence undeniably aids the fact finding, guilt-determining ends of our criminal justice system. Counsel will be better able to locate possible alibi witnesses and preserve their testimony. The earlier appointment will afford an accused a better opportunity to effectively prepare his defense not only at the preliminary but also at the trial itself." *Id.* at 69.

"The rule enunciated here establishes the precise point "prior to" a preliminary examination when an accused is entitled to counsel . . . ". *Id.* at 69. The court was greatly disturbed by a twenty-eight day interval between arrest and advising a defendant of his right to counsel, and an additional four-day in delay in the appointment of counsel. *Id.* at 69.

The plain language of the Supreme Court states the circuit court must appoint counsel when an attorney is

unavailable or unwilling to represent a client. *In re the Petition to Amend SCR 81.02*, S. t. Order No. 17-06, 2018 WI 83, at 15, (issued June 27, 2018, eff. Jan. 1, 2020).

The court should have appointed counsel for Lee on September 14, 2018, because the record establishes counsel was not available through the Public Defender. (42:2). Court Commissioner Bauman stated, "you have been found eligible for a Public Defender but they are still looking for somebody to represent you" (42:2).

It was error for the court to refuse to appoint counsel at county expense. The court was advised at each review hearing that counsel was not available for Lee through the Public Defender. Instead of appointing counsel at county expense as required, the court repeated the error at each hearing, by extending the time limits with the expectation that eventually an attorney would be located to represent Lee. *See*, (42:2) (43:2); (44:2-3); (45:2); (46:2-5); (47: 2-3); (48: 2-3); (49:2-3); (50:2-8); (51:2-3); (52:2-4); (53:2-3); (54:2). *See, State v. Dean*, 163 Wis.2d 503, 515, 471 N.W.2d 310, (one of the reasons the court resisted appointing counsel was to avoid the expense to the county).

Court Commissioner Bauman stated, "you're here because you are eligible for a Public Defender and they still haven't found one for you yet." (46:2). Court Commissioner Bauman told Lee he had the right to have his preliminary hearing within ten days, but "what we've been doing is finding good case based upon the need to have a lawyer, and the State has a shortage of Public Defender attorneys that are, you know, taking cases." (46:3). Court Commissioner Bauman stated that the statute does not set a limit on the number of times the time limits for conducting a preliminary examination may be extended. (46:3).

The court erred by refusing to appoint counsel for Lee in violation of Dean and SCR 81.02. *State v. Dean*, 163 Wis.2d at 515. *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83, at 15.

Court Commissioner Bauman stated at some point the court may have to appoint an attorney at county expense but "they're trying not to have to do that." (53:4).

The county's procedure violates Dean and SCR 81.02. *State v. Dean*, 163 Wis.2d at 515. *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83, at 15.

Judge Jacobson stated, the local public defender's office was having difficulty finding attorneys to accept appointments. (57:13; App. 104). Judge Jacobson stated that all of branches in the Marathon County circuit court were encountering cases where defendants had requested counsel but had not been appointed counsel by the preliminary hearing date. (57:13; App. 104). Judge Jacobson stated, "In an attempt to deal with this problem, all branches in Marathon County began scheduling review hearings prior to the date of the scheduled preliminary hearing." (57:13; App. 104). Judge Jacobson stated, the review hearings were held to make sure that an attorney had been appointed for the preliminary hearing. (57:13-14; App 104.).

The sole reason for the delays in Lee's case was to avoid appointing an attorney at county expense by delaying any substantive proceedings so that the Public Defender could have more time to try and locate an attorney for Lee. One reason Judge Race resisted Dean's argument that the trial court possessed inherent power to appoint counsel was because he was reluctant to impose the cost on the county. *State v. Dean*, 163 Wis.2d 503, 515. These "cases stand for the proposition that when the state public defender

declines to act, the 'necessities of the case' and the demand of 'public justice and sound policy' require that the county be obligated to pay" for counsel. *Id.* at 515-516. *Douglas County v. Edwards*, 137 Wis.2d 65, 85, 403 N.W.2d 438, 447 (1987).

In other counties, judges are appointing attorneys at county expense. Sawyer County Circuit Judge John Yackel appointed attorneys to represent individuals 116 times in one year. "I'm going to stand up': Northern Wisconsin judge demands answers from state on public defender crisis," *Milwaukee Journal Sentinel*, by Bruce Vielmetti, (Nov.1, 2018). "He said he's disturbed that other judges and the State Public Defender's Office may be growing numb to the growing problem of defendants sitting for weeks and months without legal counsel." *Id.*

"Without question, this has been and continues to be a frustrating experience for the courts, the agency and our clients," State Public Defender Spokesman Randy Kraft said. *Id.* "It is having a marked impact on defendants and victims, court calendars, county jails and county budgets." *Id.*

Michael Plaisted, a Milwaukee attorney, said he finally agreed to represent a defendant in Lincoln County, 200 miles away, after seeing the man had been waiting five months for a lawyer and over four months in jail awaiting his preliminary hearing. *Id.*

In Wood County, a judge and prosecutor went ahead with a preliminary hearing for an 18-year-old charged with burglary, armed robbery and child abuse even though he was still waiting for a lawyer. *Id.* Trequelle Vann-Marcouex of Wisconsin Rapids was charged Aug. 3. *Id.* Eleven days later, while he was still jailed on \$25,000 bail, an officer testified about the crimes and how Vann-Marcouex became a suspect, all as he watched without counsel. *Id.*

Circuit Judge Todd Wolfe found probable cause and told Vann-Marcouex he was being bound over for trial. *Id.* Vann-Marcouex hung himself in the jail that night and died five days later in a hospital. *Id.*

The Court should have appointed counsel for Lee at sooner and cited the petition. (57:6; App. 104). Judge Jacobson said the fact that the the court could have

could have appointed an attorney earlier at county expense does not mean that it is required to make such an appointment. (57:20; App. 104). Delays such as those in Lee's case continue on a daily basis because trial courts continue to refuse to follow the Supreme Court order to appoint counsel at county expense when an attorney is unavailable or unwilling to represent a client. *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83, at 15.

The court's failure to appoint counsel for Lee in a timely fashion violated due process, the Sixth Amendment right to counsel, and the Wisconsin Constitution.

III. Lee's confinement in custody with process deferred for over three months violated due process.

Judge Jacobson ruled that the failure to conduct a preliminary hearing within the statutory time frame was not a constitutional violation or a violation of Lee's right to counsel. (57:18-19); App. 104). The practice of requiring indigent defendants who rely upon the state for appointed

counsel to wait for extended periods of time to secure counsel violates due process.

“The touchstone of due process is the protection of the individual against arbitrary action of government.” *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.ED.2d 935 (1974) (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)).

Liberty includes “not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572, 92 S.Ct. 2701, 33 L.Ed. 548 (1972).

A unanimous panel of the Fifth Circuit reversed a district court holding that excessive pre-trial detention which deprived an individual of liberty without due process

violated the Fourteenth Amendment. *Jauch v. Choctow County*, 874 F.3d 425 (5th Cir., 2017) (cert. denied).

Lee was subjected to excessive pretrial detention which deprived him of liberty without due process in violation of the Fourteenth Amendment. *See, Id.* Lee's review hearings were held so the court could extend the time limits for the preliminary hearing in order to avoid appointing an attorney at county expense. Thus, the review hearings are a mechanism to avoid complying with the Supreme Court order to appoint attorneys at county expense. *See, In re the Petition to Amend SCR 81.02*, 2018 WI 83, P. 15, No. 17-06 (6/27/18). *See also, State v. Dean*, 163 Wis.2d 503, 515, 471 N.W.2d 310 (1991); *Douglas County v. Edwards*, 137 Wis.2d 65, 85, 403 N.W.2d 438, 447 (1987).

The pretrial detention of three months violated Lee's procedural and substantive due process rights. *See, Jauch v. Choctow County*, 874 F.3d 425, 435. Lee's case is factually similar to *Jauch* in that it is a case about confinement with process deferred. *Jauch v. Choctow County*, 874 F.3d 425, 431. "Ninety-six days after being taken into

custody, Jauch's case moved forward. *Jauch v. Choctow County*, 874 F.3d 425, 428. Lee's adjourned initial appearance was held on September 11, 2018. (41). Due to the failure to appoint counsel, Lee's case did not move forward until the preliminary hearing was held on January 2, 2019. (56).

After ninety-six days, Jauch received an appointed attorney, waived arraignment, had bail set, and had a trial date set. Six days later, on August 6, 2012, she posted bail. Before the end of the month, the prosecutor reviewed the evidence and moved to dismiss Jauch's charge. *Jauch v. Choctow County*, 874 F.3d 425, 428.

The delay in providing counsel to Lee violated due process because it delayed, and irreparably harmed his ability to effectuate his other rights including his ability to investigate his case, secure witnesses and evidence, and to utilize his right against self-incrimination. Lee was irreparably harmed because he did not have counsel to negotiate a cooperation agreement with the State prior to custodial interrogations by law enforcement. Lee was irreparably harmed because he could not consult with counsel or have counsel attend custodial

interrogations. Lee was irreparably harmed because he did not have counsel to obtain physical evidence, specifically his phone. Lee was irreparably harmed because the phone was taken by a member of law enforcement and he was not given a receipt, therefore, he does not know who has his phone. Lee asserts that his phone contained information which would assist in his defense.

Lee was harmed because due to the failure to appoint counsel because he did not have counsel to arrange an agreement with the State prior to being interrogated. The failure to appoint counsel earlier violated Miranda. Lee did not have counsel to represent him in court proceedings; nor did he have counsel to represent him at custodial interrogations. Therefore, the Miranda warning was vitiated.

"Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner

and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda v. Arizona*, 384 U.S. 436, 444-445, 86 S.Ct. 1602, 16 L.Ed.2d 694. (1966).

The local procedures subjected Lee to indefinite detention without counsel. *Jauch v. Choctow County*, 874 F.3d 425, 435.

When the State "brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Ake v. Oklahoma*, 470 U.S. 68, 70, 105 S.Ct. 1087, 84 L.Ed. 53 (1985).

Delays such as those in Lee's case occur on a daily basis because trial courts continue to refuse to follow the

Supreme Court order to appoint counsel at county expense. *In re the Petition to Amend SCR 81.02*, 2018 WI 83, at 15, No. 17-06 (6/27/18).

Court Commissioner Bauman recognized the harm to Lee, "the problem with not having an attorney is that nobody can give you advice." (46:4).

Judge Jacobson stated that if the court appointed counsel in any but the most extreme cases, "considerable resources would have to be devoted by the court to the task of securing attorneys to represent people in criminal cases . . .". (57:19; App. 104).

The record establishes that the court repeatedly extended the time limits for the preliminary examination to avoid appointing counsel at county expense in direct violation of the Supreme Court's prescription for the delays and current caselaw. *See, In re the Petition to Amend SCR 81.02*, 2018 WI 83, P. 15, No. 17-06 (6/27/18). *See also, State v. Dean*, 163 Wis.2d 503, 515, 471 N.W.2d 310 (1991); *Douglas County v. Edwards*, 137 Wis.2d 65, 85, 403 N.W.2d 438, 447 (1987).

CONCLUSION

Lee suffered irreparable harm due to the delay in the appointment of counsel for more than three months, therefore, he asks this court to dismiss his case with prejudice. *Jauch v. Choctow County*, 874 F.3d 425 (5th Cir., 2017) (cert. denied); *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991); *In re the Petition to Amend SCR 81.02*, *S. Ct. Order No. 17-06*, 2018 WI 83, at 15.

Lee asks this court to direct courts to appoint attorneys for indigent defendants as required by Dean and the Petition. *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991); *In re the Petition to Amend SCR 81.02*, *S. Ct. Order No. 17-06*, 2018 WI 83, P. 15 (issued June 27, 2018, eff. Jan. 1, 2020).

Dated January 22, 2020.

Respectfully submitted,

Electronically Signed by: Attorney Julianne M. Lennon

State Bar # 1021933

Attorney Julianne M. Lennon
Law Offices of Attorney Julianne M. Lennon
634 Werle Ave.
Wausau, WI 54401

**STATEMENT OF COMPLIANCE WITH RULE 809.19(2) (a) and
809.19(2) (b)**

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 s. 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 reading those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in 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 one or more initials or other appropriate pseudonym or designation instead of

the 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.

Electronically Signed by: Attorney Julianne M. Lennon
State Bar # 1021933

**STATEMENT OF COMPLIANCE WITH RULE 809.19(8) (a) and (c), and
Rule 809.19(8) (d)**

I hereby certify that this brief conforms to the form and length rules contained in Rule 809.19(8) (b) and (c) Wis. Stats., and to the form described in Rule 809.19(8) (d) for a brief produced with monospaced font. The length of the brief is 11,029 words.

Electronically Signed by: Attorney Julianne M. Lennon
State Bar # 1021933

STATEMENT OF COMPLIANCE WITH RULE 809.19(12)(f) and (13)(f)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Rule Governing Electronic Filing in the Court of Appeals and the Supreme Court.

Electronically Signed by: Attorney Julianne M. Lennon
State Bar # 1021933