STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2019AP221-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NHIA LEE,

Defendant-Appellant.

APPEAL FROM NON-FINAL ORDER DENYING MOTION TO DISMISS ENTERED IN THE MARATHON COUNTY CIRCUIT COURT, THE HONORABLE LAMONT K. JACOBSON, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

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STATEMENT OF THE ISSUES

1. Did the circuit court erroneously exercise its discretion when finding good cause existed for multiple extensions to the 10-day deadline for a preliminary hearing; and if so, what is the remedy?

The circuit court ruled that each postponement was based on the delays associated with obtaining representation for Nhia Lee through the State Public Defender's Office (SPD), such that good cause existed and it retained jurisdiction.

This Court should affirm. Alternatively, it should hold that dismissal without prejudice is the appropriate remedy if the circuit court erroneously exercised discretion such that the court lacked personal jurisdiction to bind Lee over for trial.

2. Are circuit courts required to appoint counsel at county expense if SPD is unable to appoint counsel within 10 days of a defendant's initial appearance, even if SPD is actively seeking counsel?

The circuit court ruled that it was not required to appoint Lee counsel at county expense while SPD sought representation.

This Court should affirm and rule that so long as SPD is actively seeking counsel for a defendant, counsel is not "unavailable," such that counsel must be appointed at county expense.

3. Was Lee's right to due process violated by his pretrial confinement awaiting appointment of permanent counsel?

The circuit court implicitly concluded that Lee's right to due process was not violated.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

While Lee attempts to frame this appeal as an opportunity to address the previous SPD funding crisis, the State believes this appeal can be resolved on narrow grounds such that neither oral argument nor publication are necessary. That said, publication *may* be warranted to the extent this Court decides to issue guidance as to when circuit courts are required to appoint counsel at county expense.

INTRODUCTION

Lee asks this Court to declare that all circuit courts are required to appoint counsel to incarcerated indigent defendants at county expense if SPD is unable to secure representation within 10 days of the initial appearance, regardless of whether SPD is still searching for representation. Lee says that he is entitled to a dismissal with prejudice because he was not appointed permanent counsel within 10 days of his initial appearance. But no authority compels the result he seeks, and his claims are without merit.

First, the circuit court did not err in finding good cause to extend the 10-day statutory deadline for holding the preliminary examination based on SPD's continued efforts to locate counsel. Because good cause existed, the extensions were proper, and the circuit court did not lose personal jurisdiction. If the court did lose personal jurisdiction, then the remedy is a dismissal *without* prejudice.

Second, there is no authority for Lee's assertion that a circuit court is required to appoint counsel for an incarcerated indigent defendant at county expense if SPD cannot do so within 10 days of the defendant's initial appearance. Lee's constitutional rights to a speedy trial and to counsel were not violated by the court's failure to appoint counsel at an earlier date.

Finally, neither Lee's procedural or substantive due process rights were violated by the delay between his initial appearance and the preliminary hearing. Lee was represented by counsel when the court found probable cause for his detainment and set bail, when his bail was reviewed, and when the preliminary hearing was held. And Lee cannot show actual prejudice from any alleged constitutional violation because he expressly chose to not make an evidentiary record of his alleged harm, and no assessment of prejudice can be made before Lee is tried.

Therefore, this Court should affirm the circuit court's order denying Lee's motion to dismiss.

STATEMENT OF THE CASE

Background regarding State Public Defender

Due to the nature of the issues raised, the State believes some background information concerning SPD may be helpful to the Court.

SPD is a statewide, independent, executive agency that was created to represent indigent criminal defendants and meet Wisconsin's obligations under *Gideon v. Wainwright*, 372 U.S. 335 (1963). SPD provides representation to indigent individuals in two ways. First, some indigent defendants receive representation from staff counsel that SPD directly employs. Wis. Stat. §§ 977.05(4)(i), 977.08(3)(d). Second, SPD delegates the representation of some indigent defendants to private members of the Wisconsin Bar. Wis. Stat. § 977.05(5)(a). This latter method typically occurs when SPD staff attorneys cannot assume a representation due to either resource constraints or a conflict of interest.[1]

[1] Wis. State Pub. Def.'s, *Facts-At-A-Glance*, https://wispd.org/index.php/about-the-spd/spd-facts-at-a-glance (last visited May 8, 2020).

To find private counsel for indigent defendants, SPD first asks attorneys in each Wisconsin county to sign up on a list of attorneys willing to represent indigent defendants. Wis. Stat. § 977.08(2). When SPD needs to find a private attorney to represent an indigent defendant, it typically contacts private attorneys on this list. Wis. Stat. § 977.08(3)(c). SPD also can appoint a private attorney who previously represented the defendant. Wis. Stat. § 977.08(3)(e). During the fiscal year of 2018, around 40% of statewide indigent defense cases were assigned to SPD-appointed private counsel.[2]

When SPD finds a private attorney willing to serve as counsel for an indigent defendant, the attorney's compensation rate is fixed by statute. Wisconsin Stat. § 977.08(4m)(c) previously provided that a private attorney shall be paid $40 per hour for time spent on the case (excluding travel). Effective January 1, 2020, that hourly rate increased to $70. Wis. Stat. § 977.08(4m)(d).

It takes time to locate private counsel willing to accept representation of an indigent defendant. Based on 2018 statistics, in some northern counties (Ashland, Bayfield, and Iron), it takes SPD an average of 24 days and 39 contacts to find a private attorney willing to accept an appointment.[3] In Marathon County in 2018, it took SPD an average of 17 days and 80 contacts to locate counsel.[4] SPD has tried to speed the process up by redeploying SPD-employed staff attorneys and

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[2] *Id.*

[3] Letter from Kelli S. Thompson, State Pub. Def., Wis. State Pub. Def.'s, to Sheila Reiff, Clerk, Wisconsin Supreme Court & Court of Appeals, at 4 (May 1, 2018), https://wicourts.gov/supreme/docs/1706commentsthompson.pdf.

[4] *Id.* at 3.

support staff to regions of heightened need and offering free training to private attorneys who accept appointments.[5]

Each branch of Wisconsin state government has concluded that compensation should be increased for private defense counsel, and efforts continue to do so. The Wisconsin Supreme Court recently raised the compensation rate for court-appointed defense counsel set by SCR 81.02 from $70 to $100 per hour, effective January 1, 2020. S. Ct. Order at 18, *In re the Petition to Amend SCR 81.02*, 2018 WI 83 (June 27, 2018) (No. 17-06) [hereinafter *Petition to Amend*].[6] And the Wisconsin Legislature recently raised the rate for SPD-appointed counsel from $40 to $70 per hour. 2019 Wis. Act. 9, §§ 2244–45 (amending Wis. Stat. § 977.08(4m)(c) and creating Wis. Stat. § 977.08(4m)(d)), effective Jan. 1, 2020.

Case specific facts

On September 10, 2018, the State charged Lee with possession with intent to distribute methamphetamines in an amount greater than 10 grams but not more than 50 grams, unauthorized use of an individual's personal identifying information or documents, and possession of drug paraphernalia. (R. 1:1–2.)

Lee initially provided a false name to police upon arrest (because he had a Department of Corrections warrant against him) and had an initial appearance under the false name. (R. 40:2–3.) Once police learned his real name, a new complaint was filed and Lee had another initial appearance on September 10, 2018, which was continued to September 11. (R. 40:2–3.)

Lee appeared by counsel at the September 11 hearing, who explained that Lee was "on extended supervision hold"

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[5] *Id.* at 4.

[6] Included in Respondent's Supplemental Appendix at R-App. 101.

and that it was "unlikely that the hold will be lifted." (R. 41:2.) The court set a $25,000 cash bond. (R. 41:3.)

On September 14, 2018, the circuit court held a review hearing. (R. 42:1.) Lee appeared without counsel; the court noted that Lee had a preliminary hearing scheduled for September 19 but did not yet have an attorney. (R. 42:2.) Lee said he wanted an attorney, and the court found good cause to extend the preliminary-hearing time limits. (R. 42:2.) The court explained that it would hold another review hearing in a week to see if SPD had located counsel by that time. (R. 42:2.)

The court conducted regular hearings at weekly and then bi-weekly intervals to check if SPD had appointed counsel for Lee. (R. 42–49; 51–55.) SPD was unable to appoint permanent counsel for Lee until December 21, 2018. (R. 17.) In the roughly 100 days between Lee's initial appearance on September 10 and SPD's appointment of counsel on December 21, the circuit court held 12 review hearings; at each hearing, Lee appeared without counsel, and the circuit court found good cause to extend the preliminary-hearing time limits. (R. 42–49; 51–55.) The details of these review hearings are discussed in the Argument section below. But in each instance, the court found that SPD's continuing efforts to locate counsel for Lee constituted good cause to extend the 10-day deadline. (R. 42–49; 51–55.)

Lee wrote the circuit court on October 15, 2018, arguing that the State had not established probable cause to hold him, had not established good cause to extend his preliminary hearing date, and that his due process rights were being violated. (R. 9:1–2.) Lee requested a preliminary hearing or dismissal. (R. 9:2.)

On November 7, 2018, Lee appeared in front of the circuit court for a bail review hearing, the Honorable Lamont K. Jacobson now presiding; Assistant State Public

Defender Suzanne O'Neill also appeared for Lee and discussed SPD's efforts to locate permanent counsel for him. (R. 50:1–2.) Attorney O'Neill estimated that the SPD had contacted at least 100 attorneys but had not yet found someone willing to represent Lee and was still searching. (R. 50:4.)

The circuit court denied Lee's pro se motion to dismiss that he had filed on October 15. (R. 50:6–7.) The court noted that the SPD was "still looking," but to date had not been able to find an attorney for Lee. (R. 50:7.) The court explained there had been a probable cause finding on September 4 and that there was then a probable cause finding on September 10, following the new complaint. (R. 50:4–5.) The court explained that those findings "satisfy the constitutional requirement that there be probable cause established." (R. 50:6.)

Addressing the delays, the court explained that "at each stage there have been reviews and the Court has found good cause to extend the [statutory] time limits." (R. 50:6.) The court noted they were getting "very, very close to the point where the Court could find a constitutional violation," but it did not believe they had reached that point. (R. 50:6–7.)

Lee wrote another letter to the circuit court on November 27, 2018, objecting to being held without appointed counsel; he requested that the court dismiss his case. (R. 18.)

On December 28, 2018, Lee appeared in court with counsel. (R. 55.) The court commissioner noted a preliminary hearing was scheduled for January 2, 2019 and found good cause to extend the deadline a final time; defense counsel asked the court to explain its good cause determination. (R. 55:3–4.) The court explained that it was not involved in scheduling that date but assumed it would have been the earliest available. (R. 55:3–4.)

On December 28, 2018, Lee, by counsel, filed a motion to dismiss the complaint against him without prejudice; he filed an amended motion to dismiss with prejudice on January 2, 2019. (R. 20; 23.)

On January 2, 2019, the circuit court held the preliminary hearing; Lee appeared by counsel. (R. 56:1–2.) The officer testifying at the preliminary hearing explained that police found over 40 grams of methamphetamine in Lee's car following a traffic stop. (R. 56:5–7.) On cross-examination, the officer explained that, when confronted about the drugs, Lee neither admitted nor denied knowledge of them. (R. 56:12–13.)

The court found probable cause and ordered Lee bound over for trial. (R. 56:16.) A written order to that effect was entered on January 17, 2019. (R. 25.) That order also indicated that the court declined to rule on Lee's motion to dismiss, but that it was "preserv[ing] the issue." (R. 25.)

Procedural posture

On January 28, 2019, Lee, by counsel, filed a petition for leave to appeal the circuit court's order declining to decide his motion to dismiss. (Lee's Pet. Appeal Non-Final Order Jan. 28, 2019.) The State filed a response opposing Lee's petition. (State's Resp. Opposing Pet. Leave to Appeal Mar. 1, 2019.) On March 11, 2019, this Court granted Lee's motion to supplement; it also ordered Lee to obtain and provide transcripts. (Order Mar. 11, 2019.)

Before Lee could do so, the circuit court heard argument and ruled on the motion to dismiss at Lee's arraignment on March 25, 2019. (R. 57.) Defense counsel asserted that Lee was prejudiced by the delay in holding his arraignment because he had been interviewed by law enforcement and did not have "anyone to negotiate a cooperation agreement." (R. 57:5–6.) Counsel argued that "Lee's case is about pretrial confinement with process deferred." (R. 57:7.) Defense

counsel further argued that the delay prejudiced Lee because counsel did not know where his cell phone was located and did not have any records of which officers Lee spoke to. (R. 57:8–9.) Counsel argued that "critical evidence becomes unavailable or lost" and that Lee's *Miranda* warning "rings hollow" under these circumstances. (R. 57:8–9.)

The court asked if counsel wanted an evidentiary hearing to establish the claimed items of prejudice as she was making "representations that, frankly, aren't part of the record." (R. 57:9.) Counsel declined the opportunity for an evidentiary hearing, stating she did not want her client to testify. (R. 57:9.) The court remarked that the potential harms counsel raised "would seem to have independent remedies," rather than a dismissal. (R. 57:12.)

Addressing the merits of the motion, the court noted that the reason for the delays in holding the preliminary hearing was the shortage of attorneys willing to accept SPD cases. (R. 57:12.) The court explained that to deal with this problem, all Marathon County Circuit Court branches "began scheduling review hearings prior to the date of the scheduled preliminary hearing." (R. 57:13.) When an attorney is not appointed in time, the branches hold review hearings. (R. 57:14.)

The court further explained that Lee had a *Riverside* probable-cause hearing on September 1, 2018, following his arrest, and the court made a probable-cause determination on September 2. (R. 57:14.)[7]

The court therefore denied Lee's motion to dismiss with prejudice. (R. 57:17–21.) In so ruling, the court rejected Lee's argument that he has a constitutional right to a preliminary

[7] There appears to be some incongruity as to when the first initial appearance was held. At the bail review hearing, the court stated that the first initial appearance (when Lee used a false name) occurred on September 4. (R. 50:4–5.)

hearing, noting that he had prompt probable-cause determinations. (R. 57:17–18.) As to his right to counsel, the court explained that the statutory preliminary-hearing time limits did not control the constitutional right to counsel. (R. 57:18–19.) The court noted that the fact that the "court probably could have appointed an attorney earlier at county expense does not mean that it's required to make such an appointment." (R. 57:20.) The court recognized that Lee's case involved "extreme" circumstances, but concluded the delays were "not long enough" to present a constitutional violation. (R. 57:20–21.)

The court also rejected Lee's argument that the delays violated his statutory right to a timely preliminary hearing. (R. 57:20–21.) The court noted that at every review hearing, the magistrate found good cause in accordance with the preliminary-hearing statute "under the circumstances"—i.e., based on the fact that SPD was trying to locate counsel for Lee. (R. 57:21.) Lastly, the court agreed to take judicial notice that Lee has been eligible for SPD counsel since his initial appearance. (R. 57:22.)

Thereafter, this Court granted Lee's petition for leave to appeal. (Order Nov. 20, 2019.)

Lee's extended supervision status

At the time Lee was taken into custody, he was on an extended supervision hold in another case; his counsel remarked at Lee's initial appearance that "it's unlikely that the hold will be lifted." (R. 41:2.) The hold related to Lee's sentence in Brown County Case Number 2015-CF-1190 for

failing to register as a sex offender.[8] Lee's supervision ultimately was revoked on or about May 30, 2019.[9]

STANDARD OF REVIEW

Jurisdictional questions present issues of law reviewed de novo on appeal. *Socha v. Socha*, 183 Wis. 2d 390, 393, 515 N.W.2d 337 (Ct. App. 1994). But, "whether to adjourn a preliminary examination for cause is within the trial court's discretion." *State v. Selders*, 163 Wis. 2d 607, 613, 472 N.W.2d 526 (Ct. App. 1991).

Whether a defendant's Sixth Amendment right to counsel was violated presents a question of constitutional fact: the circuit court's historical findings are upheld unless clearly erroneous, but this Court independently applies the law to those facts. *State v. Jennings*, 2002 WI 44, ¶ 21, 252 Wis. 2d 228, 647 N.W.2d 142. The same standard applies to the questions of whether a defendant's constitutional right to a speedy trial was violated and whether a defendant was denied due process. *State v. David J.K.*, 190 Wis. 2d 726, 738, 528 N.W.2d 434 (Ct. App. 1994); *State v. Borhegyi*, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998).

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[8] *State v. Lee,* No. 2015-CF-1190 (Wis. Cir. Ct. Brown Cty.), https://wcca.wicourts.gov/caseDetail.html?caseNo=2015CF001190&countyNo=5&index=0&mode=details (last visited May 8, 2020) (circuit court case log).

[9] *Id.* ("Notice of case status change" dated May 30, 2019).

ARGUMENT

I. The circuit court did not erroneously exercise its discretion when finding good cause to extend the 10-day deadline for a preliminary hearing; the court did not lose personal jurisdiction.

A. The 10-day deadline under Wis. Stat. § 970.03(1) may be extended for cause; failure to adhere to the deadline results is a dismissal without prejudice.

Section 970.03(1) provides a criminal defendant with a "preliminary examination . . . before a court for the purpose of determining if there is probable cause to believe a felony has been committed." If the defendant is in custody and bail has been set in excess of $500, the hearing must be held "within 10 days" of the initial appearance. Wis. Stat. § 970.03(2). However, "[o]n stipulation of the parties or on motion and for cause, the court may extend such time." Wis. Stat. § 970.03(2).

The failure to hold a preliminary hearing within the 10 days specified by the statute does not result in a loss of subject-matter jurisdiction. *Logan v. State*, 43 Wis. 2d 128, 138, 168 N.W.2d 171 (1969). Instead, the result of failure to adhere to the statutory deadline is that "the state ha[s] no jurisdiction over the person of the defendant at the particular time and place" such that the defendant may be "recharged and, under the proper procedure, again be brought by the state to arraignment before the trial court." *Id.* at 138–39 (citing *State ex rel. Klinkiewicz v. Duffy*, 35 Wis. 2d 369, 151 N.W.2d 63 (1967)).

B. The circuit court properly exercised its discretion in determining that good cause existed for multiple extensions beyond the 10-day deadline based on SPD's continuing efforts to locate counsel for Lee.

Lee argues that the circuit court lacked personal jurisdiction over him because it failed to hold the preliminary hearing within 10 days of the initial appearance as required by section 970.03(2). (Lee's Br. 17–18.) Lee claims that the court erroneously found cause existed for extending the deadline based on SPD's continuing efforts to locate permanent counsel; he also argues that the court failed to consider the potential prejudice to him. (Lee's Br. 17–25.) Lee is wrong both on the facts and the law.

As set forth above, Lee's jurisdictional argument has merit only if this Court concludes that the circuit court erroneously exercised its discretion in extending the deadline for the preliminary hearing. If the court properly did so, then there is no jurisdictional issue.

Lee ignores that the decision to extend a statutory deadline for cause is a matter left to the circuit court's discretion. *Selders*, 163 Wis. 2d at 613. Under *Selders*, a court must consider "the justification for the relief sought," "the possible prejudice to the opposing party," and, "in criminal cases, the public interest." *Id.* at 615. In *Selders*, this Court concluded that the circuit court did not erroneously exercise its discretion when postponing the preliminary hearing for one day for police to conduct a line-up, such that the alleged victim's in-court identification would not be tainted. *Id.* at 613–15.

As set forth below, the circuit court properly exercised its discretion in finding that cause existed to extend the 10-day deadline for the preliminary examination under *Selders*.

1. The circuit court found good cause to extend the deadline based on SPD's continuing efforts to locate counsel.

As the circuit court concluded when denying Lee's motion to dismiss, at every review hearing, the magistrate found good cause in accordance with the preliminary-hearing statute "under the circumstances"—i.e., based on the fact that SPD was trying to locate counsel for Lee. (R. 57:21.) The circuit court was correct.

As detailed below, at each of the review hearings, the court commissioner found good cause existed to extend the statutory deadline based on SPD's continuing efforts to locate counsel for Lee.

At the review hearing on September 14, 2018, the circuit court commissioner noted that Lee was eligible for public defender representation and that "they are still looking for somebody." (R. 42:2.) The court asked if Lee still wanted to have an attorney at the preliminary hearing; Lee said he did. (R. 42:2.) The court found good cause to extend the 10-day deadline and scheduled another review hearing for a week later to "see if they have found an attorney." (R. 42:2.)

On September 21, 2018, the circuit court commissioner noted that Lee had been found eligible for a public defender, but the SPD was still looking for someone to represent him; the court found good cause to adjourn the preliminary hearing time limits. (R. 43:2.) On September 28, 2018, the circuit court commissioner explained that the SPD was still looking for an attorney to represent Lee; the court found good cause to adjourn the preliminary hearing time limits and scheduled another hearing. (R. 44:2–3.)

On October 5, 2018, the court commissioner noted that the SPD had found attorneys for other people but not yet for Lee, stating "they are still looking for someone." (R. 45:2.) The

court found good cause and extended the preliminary-hearing time limits. (R. 45:2.)

On October 12, 2018, the court commissioner noted that the SPD still had not found an attorney for Lee. (R. 46:2.) The court asked Lee how long he had been in custody, and he answered "[a] month"; the court did not know why it was taking so long for the SPD to appoint an attorney. (R. 46:2–3.) The commissioner noted that "obviously at some point it will become a problem." (R. 46:2.) The commissioner explained to Lee that he had the right to the preliminary hearing and the 10-day statutory timeframe given his custodial status; the court noted that it could extend that deadline for good cause, and it had been "finding good cause based on the need to have a lawyer." (R. 46:3.)

The court also noted that the statute did not set a limit on the number of good cause adjournments, but "at some point it would be a due process violation." (R. 46:3.) The court commissioner explained that if Lee wanted, he could write a letter to the judge explaining his concerns. (R. 46:5.) The court found good cause to extend his preliminary-hearing time limit. (R. 46:5.)

On October 19, 2018, the court commissioner asked Lee to confirm if SPD was "still looking" for counsel for him and Lee responded, "Yes." (R. 47:2.) The commissioner explained that Lee could write to the judge if concerned about the delays and found good cause to extend the preliminary-hearing time limits. (R. 47:2–3.) On October 26, 2018, the commissioner confirmed that SPD was still searching for counsel. (R. 48:2.) Lee advised that he had sent a letter to the judge about the delays. (R. 48:2–3.) The court commissioner found good cause to extend his preliminary-hearing time limits for another week. (R. 48:2–3.)

On November 2, 2018, the court commissioner advised Lee that SPD was "still looking for somebody to represent

you." (R. 49:2.) The commissioner acknowledged that "it's got to be frustrating to sit there and be waiting" and indicated that it would "try to figure out what's going on with [his] letter between now and next Friday." (R. 49:2–3.) The court found good cause to extend the preliminary-hearing time limits. (R. 49:3.)

Two days after the bail/bond hearing, on November 9, 2018, the court commissioner held another review hearing. (R. 51:1.) The court commissioner noted the SPD was still looking for an attorney and found good cause to adjourn the preliminary-hearing time limits. (R. 51:2–3.)

On November 16, 2018, the court commissioner found good cause to extend the deadline based on SPD's continuing efforts to locate counsel. (R. 52:2–4.) The commissioner told Lee that he could appeal the judge's decision denying his motion to dismiss or file another motion with the circuit court judge if he wished. (R. 52:2.) The commissioner explained that both Lee's Fifth Amendment and Sixth Amendment rights could be implicated by the delays. (R. 52:2–3.)

On November 30, 2018, the court commissioner advised Lee that the SPD was "still looking for someone to represent you." (R. 53:2.) The court asked Lee if he sent in a new motion to dismiss. (R. 53:2.) The commissioner advised Lee his review hearings would be held on a two-week cycle until SPD located counsel. (R. 53:2–3.) The court again found good cause to extend the time limits. (R. 53:2–3.) The court stated that "at some point they're going to have to do something different and that might mean appointing somebody for you at County expense." (R. 53:4.) On December 14, 2018, the circuit court commissioner again advised Lee that the SPD had not yet found an attorney, found good cause, and scheduled a new hearing date. (R. 54:2.)

Lee was appointed counsel by SPD on December 21, 2018. (R. 17.)

At the next scheduled review hearing, on December 28, 2018, Lee appeared with counsel. (R. 55.) The court commissioner noted the preliminary hearing was scheduled for January 2 and found good cause that the time limits be extended until then because the date was the first available on the court's calendar. (R. 55:3–4.) As the circuit court later explained, this delay was caused by the fact that it "encompass[ed] a weekend, Christmas Day, and New Years Day," and that the hearing "got on the calendar as quickly as possible." (R. 57:20.)

Therefore, at all but the final review hearing, the court found good cause to extend the statutory deadline to hold the preliminary hearing based on SPD's continuing efforts to locate counsel for Lee.

There is absolutely no authority to support Lee's argument that good cause does not exist when the SPD is actively searching for counsel for the defendant. Although Lee attempts to argue that the 10-day timeline in section 970.03(2) should be treated as a "constitutional rule" prohibiting extensions to locate counsel, he cites no authority to support this assertion other than a vague reference to "[t]he criminal rules committee note." (Lee's Br. 24.) But, the 1990 Judicial Council Notes to section 970.03 says nothing of the sort, and instead states only that "[t]he right to confront one's accusers does not apply to the preliminary examination." Wis. Stat. § 970.03, 1990 Judicial Council Note.

To the extent Lee challenges the final delay from appointment of counsel on December 21 to the preliminary hearing on January 2, the delay was less than the ten-day statutory limit because holidays and weekends are excluded. Wis. Stat. § 801.15(1)(b). And it is well-established that good cause exists to extend statutory deadlines based on the court's or litigants' calendars and scheduling conflicts. *See, e.g., State v. Quinsanna D.*, 2002 WI App 318, ¶ 39, 259 Wis. 2d 429, 655 N.W.2d 752.

In short, there is no basis for Lee's argument that the circuit court erred in finding good cause to extend the 10-day deadline for a preliminary hearing based on SPD's continuing efforts to locate permanent counsel for him.

2. The court considered potential prejudice to Lee.

Lee also argues that the circuit court's good cause findings were erroneous because, according to him, the court did not consider the potential prejudice to him as a result of the repeated delays. (Lee's Br. 26.) The record belies this assertion. In fact, the court commissioner went out of its way to make sure that Lee still wanted to be represented and offered suggestions for how Lee could bring his concerns to the circuit judge's attention.

As detailed above, the commissioner found good cause at each of the review hearings to extend the 10-day deadline precisely because it wanted to ensure that Lee was represented at the preliminary hearing and was not prejudiced by the lack of counsel. And the frequency of the review hearings—weekly, then bi-weekly—demonstrates that the court was being conscientious of Lee' situation.

Additionally, the court commissioner expressed frustration with the delay in finding counsel and acknowledged that continued delays could implicate Lee's constitutional rights. (R. 45:2; 46:2–3; 47:2–3; 49:2–3; 52:2–3; 53:2–3.) The court commissioner also advised Lee to write the circuit court judge and file motions to make sure his concerns with the delays were heard and the commissioner checked on the status of Lee's letters/motions. (R.46:5; 47:3; 48:2–3; 49:2–3; 52:2–3; 53:2.)

Thus, the record demonstrates that the court was aware of and considered the potential prejudice to Lee when granting further extensions of the preliminary hearing.

3. The court considered the public interest.

Finally, the court properly considered the public interest implicated by the delay in finding Lee counsel and the alternative of appointing counsel at county expense. In deciding whether to extend the date of the preliminary hearing, the court noted that there were multiple defendants in the same position as Lee. (R. 45:2; 47:2.) The court commissioner also acknowledged that "you know, at some point they're going to have to do something different and that might mean appointing somebody for you at County expense. I know they're trying not to have to do that, but at some point that might have to be what the answer is." (R. 53:4.)

When denying Lee's motion to dismiss, the circuit court acknowledged the "statewide crisis regarding public defender representation" and that the "same problem is present and it's present in Marathon County." (R. 57:12–13.) The court noted that to address the problem, Marathon County had established the review hearing process in order to make sure defendants had counsel at the preliminary hearing and to avoid the time and expense of having police officers attend scheduled hearings that were then postponed due to lack of counsel. (R. 57:13–14.) And the court noted the enormous expense that the county would incur "[i]f the Court appointed attorneys in any but the most extreme cases." (R. 57:19.)

Therefore, the record conclusively demonstrates that the circuit court considered the factors set forth in *Selders*, 163 Wis. 2d at 615, when finding good cause to extend the deadline for the preliminary hearing. Lee simply disagrees with how the court balanced these factors in his case. However, when a circuit court's discretionary act requires it to consider, weigh, and balance various factors, how the court does so is itself a discretionary act. *State v. Jones*, 151 Wis. 2d 488, 495, 444 N.W.2d 760 (Ct. App. 1989) (sentencing).

4. Lee's constitutional right to a speedy trial was not violated.

a. The right to a speedy trial is consistent with scheduling delays and not violated by a three-month delay.

Lee also appears to argue that the circuit court's exercise of discretion was erroneous because the multiple extensions allegedly violated his constitutional right to a speedy trial. (Lee's Br. 23.) Lee is wrong.

A defendant has a right to a speedy trial under both the United States and Wisconsin constitutions. U.S. Const. amends. VI, XIV; Wis. Const. art. I, § 7. In *Barker v. Wingo*, 407 U.S. 514, 521–22 (1972), the United States Supreme Court recognized that the right to a speedy trial is different from other constitutional rights in that there is no "fixed point" where the right is violated. The right to a speedy trial also differs from other constitutional rights in that if a court finds a constitutional violation, the only remedy is the "severe" remedy of vacating the judgment and releasing the defendant. *Id.* at 522.

For these reasons, the United States Supreme Court has eschewed bright-line rules for determining if a Sixth Amendment violation has occurred and instead utilizes a "functional analysis" that is heavily dependent upon the facts in each case. *Id.* The right to a speedy trial thus is "necessarily relative" and "consistent with delays." *Id.* (citation omitted).

Under the *Barker* analysis, courts employ a four-part balancing test considering (1) the length of delay, (2) the reason for the delay, (3) whether the defendant timely asserted his right to a speedy trial, and (4) whether the delay resulted in any prejudice to the defendant. *Barker*, 407 U.S. at 530; *Borhegyi*, 222 Wis. 2d at 509. Courts determine whether a constitutional violation occurred under the totality

of the circumstances. *State v. Urdahl*, 2005 WI App 191, ¶ 11, 286 Wis. 2d 476, 704 N.W.2d 324.

The Seventh Circuit has explained that under the *Barker* analysis, "there is no per se rule of constitutional law that requires the states to bring their criminal defendants to trial within a fixed time failing which charges must be dropped." *U.S. ex rel. Mitchell v. Fairman*, 750 F.2d 806, 810 (7th Cir. 1984). In fact, in *Barker*, 407 U.S. at 534–36, the United States Supreme Court found that the defendant's right to a speedy trial was not violated by a *five-and-half-year* delay caused primarily by the need to prosecute a co-defendant.

Importantly, the *Barker* analysis is triggered only when there is a delay significant enough to raise a constitutional issue. That is, a delay of over a year is considered "presumptively prejudicial" such that it "triggers further review of the allegation under the other three *Barker* factors." *State v. Lemay*, 155 Wis. 2d 202, 212–213, 455 N.W.2d 233 (1990).

b. Lee's right to a speedy trial was not violated.

Contrary to Lee's assertion, the three-month delay between his initial appearance and preliminary hearing was not "exceedingly long" (Lee's Br. 24), for purposes of the Sixth Amendment. As noted, the United States Supreme Court has held that a delay of over five years may be justified in appropriate circumstances. *Barker*, 407 U.S. at 534–36. The delay here, while unfortunate, is not sufficiently long to be "presumptively prejudicial" under *Barker*.

Even if this Court finds presumptive prejudice and applies the *Barker* analysis, no constitutional violation occurred. As to the reason for the delay, courts are primarily concerned with intentional delays caused by the State "in order to hamper the defense," which are "weighed heavily

against" the State. *Urdahl*, 286 Wis. 2d 476, ¶ 26. In contrast, delays for "valid" reasons are "taken off the scale entirely." *United States v. Black*, 918 F.3d 243, 272 (2d Cir. 2019). And, delays caused by government negligence or the court's docket "though still counted, are weighted less heavily." *Urdhal*, 286 Wis. 2d 476, ¶ 26.

A delay caused by the need to find counsel for a defendant is "valid" and does not violate the Sixth Amendment. For instance, in *York v. United States*, 389 F.2d 761, 762 (9th Cir. 1968), the court held that no constitutional violation occurred due to "twenty-three month delay between the lineup and the appointment of counsel and arraignment." Likewise, in *Cowart v. Hargett*, 16 F.3d 642, 648 (5th Cir. 1994), the court rejected the assertion that a delay caused by "the failure to arraign and therefore appoint an attorney in a timely manner" violated the defendant's right to a speedy trial. *See also United States v. Varca*, 896 F.2d 900, 904 (5th Cir. 1990) (11-month delay between indictment and trial due to the defendant's "need for additional time to retain conflict-free counsel" was not a constitutional violation).

Finally, as to prejudice, while "a showing of prejudice is not a prerequisite to finding a [S]ixth [A]mendment violation, courts generally have been reluctant to find a speedy trial violation in the absence of genuine prejudice." *United States v. Jones*, 129 F.3d 718, 724 (2d Cir. 1997) (citation omitted). Indeed, in *United States v. Trotman*, 406 F. App'x 799, 807 (4th Cir. 2011), the court found no Sixth Amendment violation due to a *17-year delay* between indictment and trial because the defendant "ha[d] not identified any true prejudice that he suffered as a result of the delay in bringing his case to trial." Wisconsin courts agree that the actual prejudice is "an important factor in the analysis." *Urdahl*, 286 Wis. 2d 476, ¶ 34.

Under *Barker*, the appropriate inquiry for actual prejudice is whether the defendant can show an "inability . . .

[to] adequately prepare his case." *Barker*, 407 U.S. at 532. Accordingly, courts look for whether the defendant has "identified any witness that was unavailable as a result of the delay" or "exculpatory evidence [that] was lost," or a witness who was "unable accurately to recall the events in question." *United States v. Grimmond*, 137 F.3d 823, 830 (4th Cir. 1998).

Here, Lee cannot show actual prejudice because no trial has yet occurred and because his attorney expressly declined the opportunity for an evidentiary hearing to establish a factual record of prejudice. (R. 57:9–11.) As the circuit court noted, Lee's allegations of prejudice, including the allegedly lost cell phone, "frankly, aren't part of the record." (R. 57:9.) Accordingly, Lee's speedy trial claim is without merit.

Therefore, the circuit court properly exercised its discretion when finding good cause existed to extend the deadline for holding the preliminary hearing based on SPD's continuing efforts to locate counsel for Lee. Because section 970.03(2) expressly allows the deadline to be extended upon a finding of cause, Lee's jurisdictional argument fails.

C. If the court lacked personal jurisdiction, the remedy is a dismissal *without* prejudice.

If this Court concludes that the circuit court erroneously exercised its discretion when extending the deadline for Lee's preliminary hearing, well-established law holds that the proper remedy is a dismissal without prejudice. *Logan*, 43 Wis. 2d at 138–39. Lee has not cited any authority for the proposition that the lack of personal jurisdiction operates as an adjudication on the merits and prevents the State from refiling charges.

II. The court was not required to appoint counsel at county expense within 10 days of the initial appearance because SPD was actively searching for permanent counsel.

Invoking both state law and the Sixth Amendment, Lee argues that the circuit court was required to appoint him counsel at county expense on September 14, 2018 because SPD was unable to locate permanent counsel within 10 days of his initial appearance. (Lee's Br. 30–42.) Coupled with his first argument concerning extensions of time under section 970.03(2), Lee effectively asks this Court to rule that circuit courts are required to appoint counsel at county expense anytime SPD cannot appoint counsel within 10 days after the defendant's initial appearance.

However, there is no constitutional provision, case, statute, or judicial rule that *requires* a circuit court to appoint an indigent defendant counsel at county expense at any particular date, much less 10 days after the initial appearance. And, there is no authority that requires such an appointment under the facts of this case—when the defendant is represented at the initial appearance, SPD is actively seeking representation, and the preliminary hearing is postponed so counsel can be appointed.

A. Wisconsin law does not require counsel to be appointed at county expense within 10 days of the initial appearance if SPD is searching for counsel.

Lee asserts that as a matter of state law, the circuit court was required to appoint him counsel at county expense "when the Wisconsin office of the State public Defender was unable to locate counsel to represent Lee." (Lee's Br. 30.) Lee claims the court was required to appoint counsel at the first review hearing on September 14, 2018. (Lee's Br. 38.)

Lee's argument under state law fails for three reasons. First, Lee ignores that counsel was appointed for him and that he was represented by counsel at all critical stages of the proceeding. Second, *Petition to Amend* does not require a circuit court to appoint counsel at county expense 10 days after the initial appearance if SPD is still searching for counsel. Third, neither *State v. Dean* nor *State v. Lehman* are applicable because there is no evidence here that SPD stopped looking for counsel or failed to act.

1. SPD was not unable to locate counsel.

Lee's argument fails at the outset because SPD *did* locate counsel to represent him. Lee made his initial appearance on September 11, 2019, at which time his bond was set. (R. 41:3.) Lee was represented by Attorney Pauline Toulouse from SPD at this hearing. (R. 41:1.) Lee was represented by Attorney Suzanne O'Neill from SPD at the November 7, 2016 bond review hearing. (R. 50:1.) And Lee was represented by current counsel at the December 28, 2018 review hearing and thereafter. (R. 55:1; 56:1; 57:1.)

There is no factual record as to why Attorneys Toulouse or O'Neil were not appointed as permanent counsel for Lee or why current counsel was not available earlier. And SPD never informed the court that it had ceased its efforts to locate counsel. To the contrary, the record demonstrates that the court confirmed with Lee at each review hearing that SPD was still searching for permanent counsel.

2. *Petition to Amend* does not require appointment of counsel at county expense within 10 days of the initial appearance.

Lee relies primarily on a single sentence from *Petition to Amend* to support his argument that the circuit court was required to appoint counsel at county expense within 10 days

of the initial appearance. But *Petition to Amend* requires nothing of the sort.

In *Petition to Amend*, the Wisconsin Supreme Court, using its rulemaking authority, amended SCR 81.02 to change the rate compensation for court-appointed attorneys to $100 per hour. *Petition to Amend*, 2018 WI 83, at 18. In so ruling, the court discussed the problems created by the chronic underfunding of SPD, which at that time "ha[d] reached a crisis point" due to the then-existing compensation rate of $40 per hour. *Id.* at 2–15. The court recognized that increasing the rate of compensation for court-appointed attorneys would "have a profound impact on existing county budgets." *Id.* at 15. The court then stated: "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." *Id.*

Lee's entire appeal rests on this single sentence from the Wisconsin Supreme Court. However, his reliance is misplaced because: (a) the sentence he cites is not part of the mandate; (b) it does not apply to the situation in this case, even if read literally; and (c) Lee's proposed reading of the decision is unsound.

First, nothing in the court's mandate in *Petition to Amend* says that circuit courts must appoint counsel at county expense anytime SPD cannot make an appointment within 10 days of the initial appearance. The petition at issue asked the Wisconsin Supreme Court to amend SCR 81.02(1), repeal SCR 81.02(1m), and to adopt proposed SCR 81.02(3), under which the court would declare the then rate of compensation for SPD appointments "unreasonable." *Id.* at 18. The court granted the first item of requested relief, amending SCR 81.02(1), but refused to grant the other two items of relief. *Id.*

Simply put, the rule that Lee asks this Court to adopt was outside the scope of the petition and not part of the Wisconsin Supreme Court's mandate in *Petition to Amend*. And Lee identifies no authority that would authorize *this* Court to "direct courts to appoint attorneys" in the specific manner he desires. (Lee's Br. 50.) Such relief would require a separate rule petition directed to the Wisconsin Supreme Court under Wis. Stat. § 751.12.

Second, even if this Court construes the Wisconsin Supreme Court's statement in *Petition to Amend* as a literal mandate, Lee still is not entitled to the relief he seeks. That is because *Petition to Amend* does not dictate when counsel is deemed "unavailable or unwilling to represent indigent clients" or when the duty to appoint is triggered. Nothing in *Petition to Amend* refers to the 10-day statutory deadline for the preliminary hearing or even suggests that counsel must be appointed at county expense if SPD cannot locate representation within 10 days of the initial appearance.

Additionally, the supposed duty to appoint counsel applies only "[i]f lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of $40/hour." *Petition to Amend*, 2018 WI 83, at 15. There are other reasons, aside from funding, why it may take more than 10 days for SPD to locate counsel, including the lack of qualified attorneys in the geographical area, actual or potential conflicts of interest, or existing caseloads. Here, the record does not establish why SPD had difficulty securing representation for Lee. Although the circuit court alluded to the crisis in SPD funding generally as a reason for delays in securing appointments (R. 57:12–13), it made no specific findings as to why SPD could not locate permanent counsel *for Lee specifically* earlier than it did. There is no explanation for why attorneys Toulouse or O'Neil could not continue their representation of Lee after the hearings at which they appeared. Nor is there any explanation for why current

counsel was not previously available. Thus, even if read as a literal mandate, the sentence Lee relies on from *Petition to Amend* does not govern the outcome of this case.

Third, the 10-day rule Lee derives from *Petition to Amend* is unsound. To begin with, the rule Lee proposes would result in some counties having to appoint counsel at county expense in most criminal cases. As noted above, as of 2018, in some northern counties (Ashland, Bayfield, and Iron), it takes SPD an average of 24 days and 39 contacts to find a private attorney willing to accept an appointment.[10] The average time to appoint SPD counsel in Marathon County was 17 days in 2018, meaning that if Lee's rule were adopted, counsel would need to be appointed at county expense in most cases referred to SPD. Accordingly, the 10-day rule Lee proposes is not practical.

And, as noted, if *Petition to Amend* is read literally, then circuit courts need to inquire as to the reason *why* SPD has been unable to locate counsel. This presents a host of issues involving attorney-client privilege, burden of proof, and SPD's internal operating procedures that Lee does not even consider.

Finally, Lee's reading of *Petition to Amend* implicates broad policy and fiscal considerations about which level of state government should primarily fund representation for indigent defendants—questions better left to the Legislature or the Wisconsin Supreme Court's rulemaking powers.

For these reasons, *Petition to Amend* cannot and *should not* be read as imposing a mandate on circuit courts to appoint counsel at county expense anytime SPD is unable to appoint counsel within 10 days of the initial appearance. A much more reasonable interpretation of *Petition to Amend*, when read in

[10] Letter from Kelli S. Thompson to Sheila Reiff, *supra* note 3, at 4.

conjunction with section 970.03(2) and the practical realities of securing SPD appointments, is that circuit courts are not required to appoint counsel at county expense, so long as the SPD is actively seeking representation for a defendant. If the SPD concludes that counsel is unavailable, then it can inform the court, at which time, the court can make the appointment.

Here, according to Attorney O'Neill, as of the date of the November 7, 2018 bond hearing, SPD was "in the process still of trying to locate an attorney." (R. 50:3.) The court specifically found that SPD was "still looking." (R. 50:7.) The court commissioner made similar findings at every review hearing, as detailed above. And counsel was, in fact, appointed on December 21, 2019. (R. 17.)

For these reasons, the Wisconsin Supreme Court's decision in *Petition to Amend* did not require the circuit court to appoint counsel for Lee at county expense on September 14, 2018.

3. Case law does not mandate the result Lee seeks.

As noted, Lee also relies on *State v. Dean* 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991) and *State v. Lehman*, 137 Wis. 2d 65, 403 N.W.2d 438 (1987).[11] (Lee's Br. 39–41.) But neither case required the circuit court to appoint counsel for Lee at county expense on September 14, 2018.

The issue presented in *Dean* was "whether the trial court's refusal to appoint counsel based solely on the state public defender's determination of non-indigency was a denial of Dean's right to counsel." *Dean*, 163 Wis. 2d at 509–10. The court ruled that the circuit court erroneously exercised its discretion and denied Dean his constitutional right to counsel by relying solely on SPD's determination of indigency under

[11] Lee refers to this case as "*Douglas County v. Edwards*". (Lee's Br. 41.)

Wis. Stat. § 977.07. *Dean*, 163 Wis. 2d at 514. The court in *Dean* held that the circuit court should have considered "all relevant evidence presented by the defendant that is material to the defendant's present ability to retain counsel." *Id.*

Unlike the defendant in *Dean*, there is no dispute in this case that Lee qualified for SPD representation. And, while Lee relies on the court's statements in *Dean* concerning the desire to prompt appointment of counsel (Lee's Br. 39–40), *Dean* simply does not answer the unique issue presented here—the precise time the court is legally *required* to appoint counsel at county expense when SPD is still seeking representation.

Likewise, *Lehman*, 137 Wis. 2d 65, is inapposite. *Lehman* addressed whether SPD should be required to pay fees for a court-appointed attorney when SPD was not involved in the appointment process. *Id.* at 85. The court ruled that "when the State Public Defender's Office declines to act, and is therefore not involved, and even though there is no specific statute governing attorney fees, this cost may be imposed on the county." *Id.* But unlike *Lehman*, SPD did not "decline[ ] to act" in this case. SPD was "involved" in this case from Lee's initial appearance. The fact that SPD had difficulty locating permanent counsel does not mean it failed to act to seek representation, as Lee suggests. (Lee's Br. 40–41.)

Therefore, Lee has not provided any authority under state law that compelled the circuit court to appoint counsel at county expense on September 14, 2018.

B. Lee's Sixth Amendment right to counsel was not violated by the circuit court's decision to not appoint counsel at county expense.

While Lee discusses his constitutional right to counsel under the Sixth Amendment at length, he does not claim outright that he was denied his constitutional right to

counsel. (Lee's Br. 34–37.) However, to the extent that this Court construes his argument as stating such a claim, it fails.

"Under the Sixth Amendment, a person formally charged with a crime has a right to counsel at every critical stage of the proceedings." *State v. Hornung*, 229 Wis. 2d 469, 476, 600 N.W.2d 264 (Ct. App. 1999). The right to counsel "attaches when a warrant is issued or a complaint filed." *Id.* However, the fact that the right to counsel attaches at a particular point does not mean it is a "critical stage" that requires the presence of counsel, for instance, when the prosecutor files the complaint. *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 212 (2008). That said, it is undisputed that an indigent defendant has a constitutional right to representation before the preliminary hearing. *See Jones v. State*, 37 Wis. 2d 56, 69, 154 N.W.2d 278 (1967).

As discussed above, Lee was represented by counsel at his initial appearance, his bail review hearing, and at his preliminary hearing. (R. 41:2; 50:1–2; 56:1–2.) While Lee complains he did not have representation at the review hearings (Lee's Br. 3–4, 7), Lee cites no authority for the novel proposition that he has a constitutional right to counsel at a review hearing to determine if representation is available. Lee ignores that the entire point of the review hearings was to ensure that he was *not* denied his right to counsel at the preliminary hearing. Lee has not identified any "critical stage of the proceedings" where he was denied counsel. *Hornung*, 229 Wis. 2d at 476.

Therefore, Lee's Sixth Amendment right to counsel was not violated by the circuit court's refusal to appoint counsel at county expense on September 14, 2018.

III. Lee's due process rights were not violated, and he cannot establish actual prejudice from any alleged violation.

Relying on *Jauch v. Choctaw Cty.*, 874 F.3d 425 (5th Cir. 2017), Lee argues that "[t]he pretrial detention of three months violated [his] procedural and substantive due process rights." (Lee's Br. 45.) Lee asserts that the failure to appoint him counsel earlier prejudiced him in a variety of ways. (Lee's Br. 46–47.) Lee's due process arguments are without merit because he cannot establish either a procedural or substantive due process violation and he suffered no demonstrable prejudice.

While Lee treats his substantive and procedural due process rights as one and the same (Lee's Br. 43–49), they are separate rights, designed to protect separate interests, and have separate legal frameworks. As such, the State discusses each separately.

A. Lee's right to procedural due process was not violated because he has no constitutional right to a preliminary hearing and the court already had found probable cause at the initial appearance.

1. Procedural due process protects a person's right to notice and opportunity to be heard.

As explained by the Wisconsin Supreme Court in *State v. Thompson*, 2012 WI 90, ¶ 46, 342 Wis. 2d 674, 818 N.W.2d 904, procedural due process protections safeguard individuals' right to "*notice* and an opportunity to be heard,'" which "must be extended at a meaningful time and in a meaningful manner," before a suffering a deprivation of their rights. *Thompson*, 342 Wis. 2d 674, ¶ 46 (quoting 16C C.J.S. *Constitutional Law* § 1444, at 188 (2005)). "The elements of procedural due process are *notice* and an opportunity to be

heard, or to defend or respond, in an orderly proceeding, adapted to the nature of the case in accord with established rules." *Id.* (quoting 16C C.J.S. *Constitutional Law* § 1444, at 188 (2005)).

Procedural due process claims thus require a two-step analysis: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *State v. Stenklyft*, 2005 WI 71, ¶ 64, 281 Wis. 2d 484, 697 N.W.2d 769 (quoting *Kentucky Dep't of Corrs. v. Thompson*, 490 U.S. 454, 460 (1989)). In the criminal context, the question of "how much process is due" is determined with heavy deference to state court criminal procedural rules. *Medina v. California*, 505 U.S. 437, 445–56 (1992).

2. Lee was provided with a meaningful notice and opportunity to be heard prior to the deprivation of his liberty at his initial appearance.

The State does not dispute that Lee has a protected liberty interest that is implicated by his pretrial detainment. Lee argues that his procedural due process rights were violated because the State did not hold a prompt preliminary hearing. (Lee's Br. 43.) However, "[t]here is no federal or state constitutional right to a preliminary hearing in Wisconsin." *State v. Gillespie*, 2005 WI App 35, ¶ 4, 278 Wis. 2d 630, 693 N.W.2d 320. As explained by the Wisconsin Supreme Court in *State v. O'Brien*, 2014 WI 54, ¶ 19, 354 Wis. 2d 753, 850 N.W.2d 8, while a defendant has a *statutory* right to a preliminary hearing and probable cause determination under Wis. Stat. § 970.03, "[t]he right to a preliminary examination is not constitutionally guaranteed and is solely a statutory right." Thus, as the circuit court correctly concluded, it naturally follows that "the statutory time frame does not dictate the scope of the Constitutional right." (R. 57:19.)

Instead, the scope of Lee's right to procedural due process before extended pretrial confinement is established in *Riverside v. McLaughlin*, 500 U.S. 44 (1991). There, the United States Supreme Court held that, following a warrantless arrest, due process requires that there must be a probable cause determination within 48 hours. *Id.* at 56–58. *Riverside* was expressly adopted by the Wisconsin Supreme Court in *State v. Koch*, 175 Wis. 2d 684, 696, 499 N.W.2d 152 (1993). "The probable cause determination can be made at the initial appearance or in combination with any other pre-trial proceeding, so long as the determination is made within 48 hours of the arrest." *Id.* at 698–99. This process "fulfill[s] the same function for suspects arrested without warrants as the pre-arrest probable cause determination fulfills for suspects arrested with warrants." *Id.* at 698.

Here, Lee had two initial appearances in this matter; one on September 4, 2018, at which he appeared under a false name, and the second on September 10, 2018 under his actual name, which was continued until September 11, 2018. (R. 57:17; 40:1–2.) Lee was represented by Attorney Toulouse, and probable cause was found at both appearances. (R. 40; 41; 57:17–18.) Accordingly, Lee's constitutional right to a probable cause determination before extended pretrial confinement was satisfied.

Lee's reliance on *Jauch*, 874 F.3d 425, is entirely misplaced. In *Jauch*, the plaintiff was taken into custody on several traffic tickets and an alleged outstanding warrant and held in custody without an attorney or bail for 96 days, pending the next term of the circuit court. *Id.* at 428. After she was appointed counsel and posted bail, the prosecutor reviewed the case and dismissed the charges; it was "undisputed that Jauch was innocent all along." *Id.*

Jauch then filed a civil action under 42 U.S.C. § 1983, claiming a variety of constitutional right violations, including procedural and substantive due process claims under the

Fourteenth Amendment. *Id.* at 428. On appeal, the court determined that the procedure used to hold Jauch without counsel or the opportunity for bail or an appearance before a judicial officer for 96 days violated Jauch's constitutional rights to a speedy trial, habeas relief (bail), and right not to be deprived of liberty without due process. *Id.* at 434–35. The court's chief concern was the plaintiff's inability to have bail set or appear before a judicial officer to review the basis of the charges against her. *Id.*

Aside from the fact that *Jauch* is not binding precedent, the decision is of little value in this case because Lee's case is so factually dissimilar. First, unlike the plaintiff in *Jauch*, Lee had a prompt appearance before a judicial officer, represented by counsel, at which probable cause was found and bail was set. (R. 41:3.) Second, Lee had another bail hearing on November 7, 2018, at which time he was represented by counsel. (R. 50.) Third, unlike the plaintiff in *Jauch* who was innocent of the charges brought against her, Lee had a probable cause hearing on January 2, 2019, at which time he was bound over for trial. (R. 56:16.)

Fourth, unlike the plaintiff in *Jauch,* Lee would have been subject to incarceration even absent the delay in obtaining counsel because he was simultaneously being detained on a supervision hold. (R. 41:2.) And finally, unlike the plaintiff in *Jauch* who waited behind bars without being brought before a judicial officer for 96 days, Lee had repeated review hearings in front of a court commissioner to determine if counsel was available, during which time he was advised of his rights, as detailed above. Accordingly, *Jauch* does not establish that Lee's right to procedural due process was violated in this case.

B. Lee's right to substantive due process was not violated.

Whereas the right to procedural due process is concerned with the sufficiency of the procedural safeguards employed before depriving a person of a protected interest, the substantive due process clause of the Fourteenth Amendment to the United States Constitution, and its companion provision in article I, section 8 of the Wisconsin Constitution, protect "individuals against governmental actions that are arbitrary and wrong," regardless of the process used. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 45, 235 Wis. 2d 610, 612 N.W.2d 59.

However, a person "who wishes to pursue a claim for an alleged violation of the right to substantive due process embarks on a difficult undertaking." *Eternalist Found., Inc. v. City of Platteville*, 225 Wis. 2d 759, 775, 593 N.W.2d 84 (Ct. App. 1999). That is because, as the United States Supreme Court explained in *Sacramento v. Lewis*, 523 U.S. 833, 842 (1998), the substantive due process clause does not expand the scope of existing constitutional rights. That is, "where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Eternalist Found., Inc.*, 225 Wis. 2d at 775.

Lee asserts that "[t]he practice of requiring indigent defendants who rely upon the state for appointed counsel to wait extended periods of time to secure counsel violates due process." (Lee's Br. 43–44.) Lee's substantive due process claim implicates his Sixth Amendment rights to counsel and a speedy trial, as well as his Fifth and Fourteenth Amendment rights to procedural due process. However, the State has already shown Lee cannot establish his constitutional rights under any of these provisions were

violated. Where the same allegations have already been shown insufficient to establish a violation of a textually based constitutional right, a court "necessarily do[es] not address them with regard to the substantive due process claim." *Thorp*, 235 Wis. 2d 610, ¶ 50.

For these reasons, Lee fails to state a substantive due process violation.

C. Lee cannot demonstrate actual prejudice from any alleged constitutional violation because he has not yet been tried and he never made an evidentiary record.

Most errors, even constitutional ones, are subject to the harmless-error rule. *State v. Kramer*, 2006 WI App 133, ¶ 25, 294 Wis. 2d 780, 720 N.W.2d 459. An error can be deemed harmless or nonprejudicial in a criminal case when "it appears 'beyond a reasonable doubt that the error complained of did not contribute'" to the result of the proceeding. *See Hannemann v. Boyson*, 2005 WI 94, ¶ 57, 282 Wis. 2d 664, 698 N.W.2d 714 (quoting *State v. Harvey*, 2002 WI 93, ¶ 44, 254 Wis. 2d 442, 647 N.W.2d 189). However, there is a very narrow class of "structural errors" that affect the overall framework of the trial in such a "profound manner" that the "trial cannot reliably serve its function as a vehicle for determination of guilt or innocence," which are not subject to a harmless-error analysis and require automatic reversal. *State v. Martin*, 2012 WI 96, ¶ 43, 343 Wis. 2d 278, 306, 816 N.W.2d 270 (citation omitted).

Here, Lee does not argue structural error.[12] Instead, he argues that he was "irreparably harmed" in a variety of ways

[12] *Compare State v. Flynn*, 190 Wis. 2d 31, 56, 527 N.W.2d 343 (Ct. App. 1994) ("total deprivation of right to counsel" constitutes structural error) *with Coleman v. Alabama*, 399 U.S. 1, 11 (1970) (deprivation of counsel at preliminary hearing subject to harmless error analysis).

by the alleged violation of his due process rights. (Lee's Br. 46–47.) However, Lee's argument is fundamentally flawed for three reasons: (1) he failed to develop a factual record; (2) he has not been denied a right to present a defense; and (3) it is premature to assess harmless error.

First, while Lee asserts several items of alleged harm—such as loss of physical evidence (a cell phone), being subject to a custodial interrogation without counsel to negotiate a cooperation agreement, and being unable to identify the officers who spoke with him—Lee made a conscious decision to *not* create an evidentiary record to substantiate these claims. When Lee made these same arguments to the circuit court, the court asked if counsel wanted an evidentiary hearing to establish the claimed items of prejudice as she was making "representations that, frankly, aren't part of the record." (R. 57:9.) Counsel declined the opportunity for an evidentiary hearing, explaining she didn't want her client testifying. (R. 57:9–11.)

A defendant asserting prejudice based on a delay in appointing counsel is required to make a factual record to establish actual harm for a court to find a constitutional violation. *See Rothgery*, 554 U.S. at 213 (remanding section 1983 action for determination of whether six-month delay in appointment of counsel actually prejudiced defendant). As Lee failed to timely make an evidentiary record of the harm he alleges, he forfeited the argument. *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612.

And, even if the court accepts counsel's allegations at face value, they do not establish that Lee's ability to present a defense has been compromised. Lee does not argue that he gave incriminating statements to officers when he was interviewed; instead he is upset he wasn't able to negotiate a plea deal. While Lee asserts that "his phone contained information that would assist in his defense" (Lee's Br. 47), he does not explain how so.

Finally, it is entirely premature to assess the impact of any of these alleged harms because Lee has not been tried. The test for harmless error looks to whether it "contribute[d] to the verdict obtained." *Hannemann*, 282 Wis. 2d 664, ¶ 58. Accordingly, the impact of the errors Lee alleges cannot, by definition, be assessed until he has been tried. *See State v. Mills*, 107 Wis. 2d 368, 371, 320 N.W.2d 38 (Ct. App. 1982) (applying harmless error rule to deprivation of counsel when jury instructions read); *Whitty v. State*, 34 Wis. 2d 278, 289, 149 N.W.2d 557 (1967) (holding that denial of preliminary hearing was subject to the harmless error analysis).

In short, Lee cannot prove actual prejudice from the alleged due process violations and therefore he is not entitled to any relief.

CONCLUSION

This Court should affirm the circuit court order denying Lee's motion to dismiss.

Dated this 13th day of May 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,951 words.

Dated this 13th day of May 2020.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

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.

Dated this 13th day of May 2020.

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Supplemental Appendix
State of Wisconsin v. Nhia Lee
Case No. 2019AP221-CR

Description of Document	Page(s)
S. Ct. Order, *In re Petition to Amend SCR 81.02*, 2018 WI 83 (June 27, 2018) (No. 17-06)	101-131

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

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

Dated this 13th day of May 2020.

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I certify that I have submitted an electronic copy of this appendix 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.

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