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STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT III

Case No. 2019AP000221-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NHIA LEE,

Defendant-Appellant.

On Appeal from Non-Final Order Denying Motion to
Dismiss Entered in the Marathon County Circuit
Court, the Honorable LaMont K. Jacobson, Presiding

AMICUS CURIAE BRIEF OF
WISCONSIN STATE PUBLIC DEFENDER

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TABLE OF CONTENTS

	Page
ARGUMENT	1
I. Background.	1
II. Whether the court was deprived of personal jurisdiction.	4
III. Whether the court was required to appoint counsel for Mr. Lee.	5
IV. Whether Mr. Lee was deprived of his due process rights when the court did not appoint counsel.	9
CONCLUSION.....	14

CASES CITED

<i>Carpenter v. Cnty. of Dane</i> , 9 Wis. 249, 274 (1859).....	2
<i>City of S. Milwaukee v. Kester</i> , 2013 WI App 50, 347 Wis. 2d 334, 830 N.W.2d 710.....	9, 10
<i>Cnty. of Riverside v. McLaughlin</i> , 500 U.S. 44 (1991).....	10
<i>Dep't of Corr. v. Thompson</i> , 490 U.S. 454 (1989).....	10

<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975).....	10
<i>Gideon v. Wainwright</i> , 372 U.S. 335 (1963).....	1
<i>In re the Termination of Parental Rights to Daniel R.S.</i> , 2005 WI 160, 286 Wis. 2d 278, 706 N.W.2d 269.....	10
<i>State v. Dean</i> , 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991).....	6
<i>State v. Horton</i> , 151 Wis. 2d 250, 445 N.W.2d 46 (Ct. App. 1989)	5
<i>State v. Lagrone</i> , 2016 WI 26, 368 Wis. 2d 1, 878 N.W.2d 636.....	10
<i>State v. O'Brien</i> , 2014 WI 54, 354 Wis. 2d 753, 850 N.W.2d 8.....	11
<i>State v. Schaefer</i> , 2008 WI 25, 308 Wis. 2d 279, 746 N.W.2d 457.....	4, 11
<i>State v. Schulpius</i> , 2004 WI App 39, 270 Wis. 2d 427, 678 N.W.2d 369.....	9
<i>State v. Selders</i> , 163 Wis. 2d 607, 472 N.W.2d 526 (Ct. App. 1991)	4, 5

**CONSTITUTIONAL PROVISIONS
AND STATUTES CITED**

United States Constitution

Sixth Amendment 1

Wisconsin Statutes

48.13 6

48.23(2m) 7

48.233 7

970.03(2) 1, 4, 11

977.05(1)&(5)(a) 2, 5

977.05(4)(i)&(5)(a) 2

977.05(5)(b) 2

977.07 2

977.08(1) 2, 5

977.08(3)(d) 2

977.08(4m)(a) 3

977.08(4m)(b) 3

977.08(4m)(c) 2

977.08(4m)(d) 3

Chapter 29, § 1600, Laws of 1977 2

Chapter 977 2, 7, 8

OTHER AUTHORITIES CITED

In re the Petition to Amend SCR 81.02,
 S.Ct. Order 17-06, 2018 WI 83 3, 7

Kaeding, Danielle, *Rural Wisconsin Lacking
 Lawyers, Especially Up North*, WPR
 (Aug. 23, 2016) at
[https://www.wpr.org/rural-wisconsin-
 lacking-lawyers-especially-north](https://www.wpr.org/rural-wisconsin-lacking-lawyers-especially-north)3

SCR 20:1.2(c)d..... 12

Wis. Admin. Code Ch. PD 1.....5

Wis. Admin. Code § PD 1.04.....5

Wis. Admin. Code § PD 2.12.....5

ARGUMENT

I. Background.

This Court invited amicus curiae participation by the Wisconsin State Public Defender (SPD) in this matter. In an order dated September 15, 2020, this Court directed the SPD to address: (1) whether the circuit court was deprived of personal jurisdiction over the defendant due to alleged noncompliance with Wis. Stat. § 970.03(2), (2) whether the circuit court was required to appoint counsel at county expense, and (3) whether the failure to do so deprived the defendant of his constitutional due process rights.

The SPD is not in a position to give an opinion as to the ultimate legal questions at issue in this case, as Mr. Lee is an SPD client (appointed to private counsel) and the issues in this case stem from the SPD's difficulties in timely appointing counsel. Still, this brief addresses relevant background about the SPD and, where appropriate, addresses the legal analysis underlying the claims at issue here.

In all criminal prosecutions, the person accused has the right to counsel. U.S. Const. amend. VI. Over 50 years ago, the United States Supreme Court made clear that this right includes people that cannot afford an attorney. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

Wisconsin has an even longer tradition of ensuring indigent defendants are represented by counsel. *Carpenter v. Cnty. of Dane*, 9 Wis. 249, 274, 278 (1859) (determining circuit courts have the power and duty to appoint an attorney for a defendant who cannot afford one). In 1977, consistent with this tradition, the Legislature created our statewide public defender system in Chapter 977. Ch. 29, § 1600, Laws of 1977. In doing so, the Legislature created specific indigency standards for appointment of counsel through the SPD. Wis. Stat. § 977.07. The authority to appoint counsel was entrusted to the State Public Defender, currently Kelli S. Thompson, who is appointed by the State Public Defender Board. Wis. Stat. §§ 977.05(1)&(5)(a), 977.08(1). Pursuant to s. 977.05(5)(b), the State Public Defender has delegated indigency determinations and appointment authority to SPD staff.

The SPD appoints cases to SPD staff attorneys and private attorneys. Wis. Stat. §§ 977.05(4)(i)&(5)(a), 977.08(3)(d). The SPD is funded by the state, and therefore, pay for staff and private attorneys is primarily allocated through the state budget process. Because of this, between July 29, 1995 and January 1, 2020, the SPD was only permitted to pay private attorneys \$40 an hour for their work. Wis. Stat. § 977.08(4m)(c). The \$40 an hour rate had not changed significantly from the SPD's creation in 1977.¹

¹ For cases appointed before December 1, 1992, the SPD paid private attorneys \$45 an hour for in-court time and \$35 an

In 2018, when the SPD was seeking counsel for Mr. Lee, it was the height of the SPD's private bar crisis. At that time, the SPD had a difficult time finding attorneys to accept SPD appointments at \$40 an hour because the rate was often insufficient to cover the cost of an attorney's operations. *In re the Petition to Amend SCR 81.02*, S.Ct. Order 17-06, 2018 WI 83, 3. As the Wisconsin Supreme Court explained, the fact the \$40 an hour rate was "abysmally low [was] not in dispute." *Id.* at 2. The problem was exacerbated in more rural areas because the number of attorneys practicing in those locations has generally decreased. *Id.* at 6.²

However, the pay rate for private counsel appointed by the SPD increased to \$70 an hour as of January 1, 2020. Wis. Stat. § 977.08(4m)(d). The increased rate will undoubtedly help SPD staff find attorneys willing to take cases, but the breadth of the improvement is unknown as the rate is still new and the increase began just before the coronavirus pandemic hit, which has significantly impacted all operations within the criminal justice system.

hour for out-of-court time. Wis. Stat. § 977.08(4m)(a). From December 1, 1992 until July 29, 1995, the SPD paid private attorneys \$50 an hour for in-court time and \$40 an hour for out-of-court time. Wis. Stat. § 977.08(4m)(b).

² See also Kaeding, Danielle, *Rural Wisconsin Lacking Lawyers, Especially Up North*, WPR (Aug. 23, 2016) at <https://www.wpr.org/rural-wisconsin-lacking-lawyers-especially-north>.

II. Whether the court was deprived of personal jurisdiction.

This Court directed the SPD to address whether the circuit court was deprived of personal jurisdiction over Mr. Lee due to alleged noncompliance with s. 970.03(2). A defendant has the right to counsel at all critical stages of the prosecution, which includes the preliminary hearing. *State v. Schaefer*, 2008 WI 25, ¶84, 308 Wis. 2d 279, 746 N.W.2d 457. Although a defendant's right to counsel at a preliminary hearing is constitutional, the right to a preliminary hearing itself is a statutory right. *Id.*

A preliminary hearing “shall be commenced” within 10 days of the initial appearance if the defendant is in custody and bail has been fixed in excess of \$500, as was the case with Mr. Lee. Wis. Stat. § 970.03(2). The court may extend the time limit “[o]n stipulation of the parties or on motion and for cause.” *Id.*

From the parties' briefs, it appears the court made good cause findings at the hearings where Mr. Lee did not have counsel appointed but not at the hearing after counsel was appointed. (Response, 16-17). Whether a deadline should be extended is a discretionary decision made by the trial court. *State v. Selders*, 163 Wis. 2d 607, 613, 472 N.W.2d 526 (Ct. App. 1991). “A decision whether to grant authorized relief from a deadline must be based on an analysis of two major factors: 1) the justification for

the relief sought; and 2) the possible prejudice to the opposing party.” *Id.* at 614-15. The delay in *Selders* was only one day, which the court of appeals found reasonable. *Id.* at 615.

If this Court finds that the circuit court erroneously exercised its discretion in finding good cause to extend the deadline for conducting a preliminary hearing, then the circuit court lacked personal jurisdiction to proceed with the preliminary hearing. “Failure to hold a preliminary hearing within the statutory time limits results in a loss of personal jurisdiction.” *State v. Horton*, 151 Wis. 2d 250, 255, 445 N.W.2d 46 (Ct. App. 1989) (citation omitted).

III. Whether the court was required to appoint counsel for Mr. Lee.

The SPD, alone, was given the authority to appoint cases for SPD-eligible clients. Wis. Stat. §§ 977.05(1)&(5)(a), 977.08(1). As a result, the SPD has an entire structure established to certify and assist private attorneys in representing their SPD clients. Wis. Admin. Code Ch. PD 1. Certification requirements vary by case type, as different case types require different expertise. Wis. Admin. Code § PD 1.04. The SPD also reimburses appointed attorneys when investigators or experts are retained to assist in representing SPD clients. Wis. Admin. Code § PD 2.12. SPD-appointed private attorneys often utilize resources from the SPD training division and from the SPD’s specialty practice coordinators.

There are circumstances where the SPD is not authorized to appoint counsel but the client is still indigent, therefore the court is permitted to appoint counsel at county expense. *See State v. Dean*, 163 Wis. 2d 503, 511, 471 N.W.2d 310 (Ct. App. 1991). The most common example is where a criminal defendant does not meet the SPD's statutorily mandated eligibility standards, but is still considered indigent. *Id.*

In that circumstance, the court should and does appoint. In *Dean*, the court explained:

[T]he public defender's office is not the exclusive means of providing counsel to indigent defendants. *State ex rel. Chiarkas v. Skow*, 160 Wis.2d 123, 138, 465 N.W.2d 625, 630 (1991) (quoting *Douglas County v. Edwards*, 137 Wis.2d 65, 77, 403 N.W.2d 438, 444 (1987)). There are situations, as here, where a defendant does not meet certain indigency criteria, but nevertheless is unable to afford counsel. *See* 2 W. LaFave & J. Israel, *Criminal Procedure* sec. 11.2, at 28 (1984).

Id. at 511-12. The court concluded, “although the legislature's indigency criteria are not met, the court can still declare the defendant indigent for purposes of appointing counsel to protect the defendant's constitutional right to counsel.” *Id.* at 513.

Another example of when courts appoint counsel where the SPD is not authorized to do so are cases under s. 48.13 (children alleged to be in need of protection or services – CHIPS). The SPD is not

authorized to appoint counsel for parents in CHIPS cases, unless “an Indian child is the subject of the proceeding” (s. 48.23(2m)) or it is a part of the five-county pilot program for SPD representation (s. 48.233). In some counties, judges will appoint counsel for indigent parents in CHIPS cases where the SPD is not authorized to appoint counsel.

At the height of the private bar crisis, some judges did appoint counsel at county expense, paying the appointed attorney at a rate greater than \$40 an hour. S.Ct. Order 17-06 at 7. It was not a frequent occurrence and the process varied both in when such appointments occurred and in the rate the county paid.³ In those circumstances, the SPD did not reimburse the county because there is no authority in Ch. 977 allowing the SPD to reimburse for county-appointed cases.

Here, the question is whether the court is required to appoint counsel when the SPD has a difficult time finding counsel able to represent clients, in large part because of gaps in funding.⁴

³ Some counties paid up to \$125 an hour.

⁴ The former \$40 an hour rate was a large part of the challenge in finding counsel at the time Mr. Lee needed counsel appointed. However, it is not the only challenge. The SPD appoints counsel in cases where it would be a conflict to appoint SPD staff and where SPD staff cannot take any more cases, as staff attorneys can only take cases they are competently able to handle and are already asked to take a very high volume of cases. Increased turnover in SPD staff because of burnout from the increasingly high volume of work

Chapter 977 provides the SPD with the authority to appoint counsel for SPD-eligible clients. In this case, and in all SPD-eligible cases, SPD staff will continue to seek counsel to represent its clients. At the height of the private bar crisis, this meant in certain cases SPD staff would make hundreds of calls and send hundreds of emails to attorneys throughout the state. At times, it would be the second or third time SPD staff contacted an attorney before that attorney agreed to take the case. SPD staff attorneys took, and continue to take, as many non-conflict cases as they can competently handle and some private and staff attorneys would take cases far from their office just to ensure the client had representation.

The SPD has the necessary structure in place to assist SPD-appointed attorneys in representing their clients. As mentioned earlier, when an attorney is SPD-appointed, that attorney is only appointed in cases where the attorney has been certified for that specific case type. And, the appointed attorney, like a staff attorney, has access to resources for investigators, experts, training materials, and specialty practice coordinators. The rate increase to \$70 an hour will significantly assist the SPD in

and relatively low pay, create challenges in appointing counsel. Also, in rural areas there often are not enough private attorneys to take SPD (or any) cases. Finally, the conditions of practice in individual counties have a significant impact on the willingness of attorneys to accept appointments in various counties.

finding private attorneys able to represent SPD clients.

IV. Whether Mr. Lee was deprived of his due process rights when the court did not appoint counsel.

This Court asked whether the circuit court's failure to appoint counsel for Mr. Lee violated his constitutional due process rights. When a person's liberty is impacted, that person has both procedural and substantive due process rights. Here it is procedural due process that is implicated.⁵

“Procedural due process requires that a party whose rights may be affected by government action be given an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.” *City of S. Milwaukee v. Kester*, 2013 WI App 50, ¶13, 347 Wis. 2d 334, 830 N.W.2d 710 (citation omitted). “A fundamental guarantee of due process of law is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *In re the Termination of Parental Rights to Daniel R.S.*,

⁵ Substantive due process protects persons from government conduct that either “shocks the conscience” or “interferes with rights implicit in the concept of ordered liberty.” *State v. Schulpius*, 2004 WI App 39, ¶35, 270 Wis. 2d 427, 678 N.W.2d 369 (citation omitted). “This is true irrespective of the procedural due-process safeguards.” *Id.*

2005 WI 160, ¶64, 286 Wis. 2d 278, 706 N.W.2d 269. Due process claims raise questions of law that are reviewed de novo. *Kester*, 247 Wis. 2d 334, ¶13.

Procedural due process claims are assessed “in two steps: 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. Lagrone*, 2016 WI 26, ¶49, 368 Wis. 2d 1, 878 N.W.2d 636 (quoting *Kentucky Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989)).

First, Mr. Lee has a protected liberty interest because he was being detained pre-trial. As the state points out, states “must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.” *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975), emphasis omitted). Mr. Lee did have an initial determination of probable cause where he had the assistance of counsel.

However, as explained earlier, for felony cases in Wisconsin there must be a second probable cause determination after a preliminary hearing. Although the right to a preliminary hearing is a statutory right, the right to be represented by counsel at the preliminary hearing is constitutional because it is a

critical stage of the proceeding. *Schaefer*, 308 Wis. 2d 279, ¶84. “[E]very defendant charged with a felony in Wisconsin is constitutionally entitled to the assistance of counsel at a preliminary hearing.”⁶ *Id.*; see also *State v. O’Brien*, 2014 WI 54, ¶40, 354 Wis. 2d 753, 850 N.W.2d 8. Therefore, the question is whether Mr. Lee had an opportunity to be heard “at a meaningful time and in a meaningful manner” when he was not provided counsel to represent him at a critical stage for over 100 days while the SPD was trying to find counsel, even though s. 970.03(2) mandates that a preliminary hearing – where he has the right to counsel – should occur within 10 days unless there is a stipulation or cause to extend it.

Although the SPD is not in a position to weigh in on the ultimate question here, some clarification is needed regarding the limited scope representation SPD staff attorneys provide at bail hearings and initial appearances prior to the appointment of counsel. The procedure for this representation varies by county but generally an SPD staff attorney is assigned to evaluate whether individuals scheduled for initial appearances or bail hearings qualify for

⁶ In the Appellant’s Brief, Mr. Lee cites an example in Wood County where a defendant who qualified for SPD representation – but had not received counsel yet – was required to represent himself at the preliminary hearing. (Appellant’s Brief, 42). While not at issue here, it should be noted that no indigent defendant should be required to represent oneself at a preliminary hearing simply because he or she is still awaiting appointment of counsel.

SPD representation and to provide limited scope representation. *See* SCR 20:1.2(c)d. The assigned attorney is provided with limited information about the case (e.g. complaint or probable cause statement) often right before or at the hearing. The attorney also likely has had limited contact with the defendant prior to the hearing. Therefore, the SPD staff attorney is representing the defendant for purposes of bail and potentially initial problems with the complaint (e.g. obvious omissions in the complaint). This limited representation is all that is possible prior to a conflict check and given time constraints and the limited information available. Thus, it was this limited scope representation Mr. Lee had at his first two hearings in September.

Additionally, the state alleges that Mr. Lee was represented on November 7, 2018. (Response, 35). However, in Mr. Lee's brief, it explains Mr. Lee appeared *without counsel*, and Attorney Suzanne O'Neill appeared at the court's request to provide information about the SPD's attempts to find counsel. (Appellant's Brief, 4). Attorney O'Neill explained the SPD contacted at least 100 attorneys. (Id. at 5). She also explained the SPD contacted attorneys both by phone and email and at that point had not found counsel. (Id.) Attorney O'Neill was the Regional Attorney Manager at that time. It does not appear to be a fair characterization to say that Mr. Lee was "represented by counsel" at the hearing simply because an attorney from the SPD was present.

The state also questions why the staff attorney representing Mr. Lee at his initial appearances was not appointed or why current counsel was not appointed earlier (Response, 27-28). It appears the record does not answer this question but it should be noted a staff attorney may be unable to provide representation due to a conflict or because the staff attorneys in that office are already at the limit of cases they can competently handle. And, Mr. Lee's current counsel should certainly not be faulted for not being appointed earlier, as there are a variety of reasons why an attorney would be available at a later time.

CONCLUSION

The SPD sought to provide information about the SPD and the analysis underlying the claims at issue.

Dated this 15th day of October, 2020.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,990 words.

Dated this 15th day of October, 2020.

Signed:

Electronically signed by Katie York

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Appellate Division Director

**CERTIFICATION OF ELECTRONIC FILING
AND SERVICE**

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 Supreme Court.

I further certify that a copy of this certificate has been served with this brief, filed with the Court, and served on all parties either by electronic filing or by paper copy.

Dated this 15th day of October, 2020.

Signed:

Electronically signed by Katie York

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Appellate Division Director