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Wis. Stats. Ann. 970.03(2), 1969 AB 603, Ch. 225, L. 1969 selected relevant portion. Complete text available at:

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Lynn Laufenberg and Geoffrey Van Remmen, *Courts: Inherent Power and Administrative Court Reform*, 58 Marq. L. Rev. 133 (1975). Available at:

<http://scholarship.law.marquette.edu/mulr/vol58/iss1/10>. 14

STATEMENT OF THE ISSUES

1. Should circuit courts be required to appoint attorneys when there delays in securing SPD-appointed counsel for the defendant? This issue was not answered by the trial court or the Court of Appeals.
2. Was Lee's right to counsel denied? The trial ruled that the failure to appoint counsel was not a violation of Lee's constitutional right to counsel. The Court of Appeals did not address this issue.
3. Was Lee denied due process? The trial court ruled that there was not a constitutional violation. The Court of Appeals did not address this issue.
4. Was Lee's right to a speedy trial denied? The trial court ruled that there was not a constitutional violation. The Court of Appeals did not address this issue.
5. If the circuit court lost jurisdiction to determine probable cause at a preliminary hearing because the ten-day time limit under Wis. Stat. § 970.03(2) had expired by 104 days, what is the appropriate remedy? The circuit court ruled that the delay was not a statutory or constitutional violation. The Court of Appeals ruled that the court lost personal jurisdiction and the remedy is dismissal without prejudice.

STATEMENT OF THE CASE

Nhia Lee's adjourned initial appearance on Marathon County Case 2018CF1025 was held on September 11, 2018. (41:2). Lee's bond was set at \$25,000 cash. (41:2). The Court had previously found probable cause based on the complaint. (40:3). Lee waited in custody for 101 days without counsel while the Wisconsin Office of the State Public Defender searched for counsel to represent him, and the Court declined to appoint counsel for him. (41:2) (54:2). The State Public Defender appointed an attorney to represent Lee on December 21, 2018 (17).

Attorney Toulouse Pauline requested that Lee's preliminary hearing be held within ten days. (41:3). Lee's preliminary hearing was held 113 days later on January 2, 2019. (55).

The Court set a review hearing for September 14, 2018, and a preliminary hearing for September 19, 2018. (41:4). The Court had previously found probable cause based upon the complaint. (40:3).

Lee appeared without counsel, in custody, by video

from the jail, and the State did not appear at the September 14, 2018, review hearing. (42:2). Lee was eligible for an attorney appointed by the Public Defender, but the Public Defender was still looking for an attorney to represent him. (42:2). Lee stated that he wanted an attorney. (42:2).

The Court removed the September 19, 2018, preliminary hearing from the calendar, found good cause to extend the ten-day time limit for conducting the preliminary hearing, and scheduled a hearing to determine if the Public Defender had appointed an attorney to represent him. (42:2).

Lee appeared in custody, without counsel, and the state did not appear at review hearings on September 21, 2018, (43:2); September 28, 2018, (44:2); October 5, 2018, (45:2); and October 12, 2018. (46:2). At each review hearing, the Public Defender was still searching for counsel to represent Lee, and the Court extended the time limits for cause. (43:2), (44:3), (45:2), (46:5).

Lee told the Court at the October 12, 2018, hearing that he had been in custody for one month. (46:2). The Court told Lee it could not explain the delay in locating

counsel to represent him. (46:2). The Court told Lee that at some point the inability of the State Public Defender to appoint counsel for him would be a problem. (46:2).

The Court said Lee had the right to have the preliminary examination within ten days if he was in custody and his bond was at least \$500, but if there was good cause the time limit could be extended. (46:3). The Court stated the good cause finding was due to the need for counsel and the shortage of attorneys taking Public Defender cases. (46:3). The statute does not set a limit on the number of extensions. (46:3). The Court stated that at some point repeatedly extending the time limits for the preliminary hearing would be a due process violation. (46:3). The Court found good cause to extend the time limits for the preliminary hearing. (46:5).

Lee appeared without counsel, in custody, by video, and the State did not appear at review hearings on October 19, 2018, (47:2); October 26, 2018, (48:2); and November 2, 2018. (49:2). At each hearing the Court said Lee was eligible for an attorney through the Public Defender but they were still looking for an attorney to represent him.

(47:2); (48:2); (49:2). The Court perfunctorily found good cause to extend the time limits. (47:3); (48:2-3); (49:3). The Court stated that another person had waited two months for an attorney and that at some point it would become a due process violation. (47:2).

Lee sent a letter to Judge LaMont Jacobson complaining about the delay in conducting the preliminary hearing, the violation of his due process rights, and requesting dismissal. (9:2).

Judge LaMont Jacobson held a hearing on November 7, 2018, in response to Lee's letter. (50:3). Lee appeared without counsel, and Attorney Kyle Mayo appeared for the State. (50:2). Attorney Suzanne O'Neill appeared at Judge LaMont Jacobson's invitation to provide information to the Court about the Public Defender's Office attempts to find an attorney for Lee. (50:3). The Court stated that Lee's letter requested a preliminary hearing, a dismissal or a bond hearing due to the delays in locating counsel to represent him. (50:3).

Attorney O'Neill stated that at least 100, if not more attorneys had been contacted. (50:4). Attorney O'Neill

stated that the Public Defender contacted local attorneys by telephone and also sent out e-mail messages to attorneys throughout the State to try to locate an attorney to represent Lee, but they were unsuccessful. (50:4).

The Court stated the constitutional requirement for a probable cause finding was satisfied because probable cause findings were made on September 4, 2018, and September 10, 2018. (50:6). The Court stated the adjourned initial appearance held on September 11, 2018, started the cycle of Public Defender appointment review hearings. (50:5).

The Court stated the right to have a preliminary hearing within ten days is subject to court review to find out if there is good cause to extend the time limits for having the preliminary examination. (50:6).

The Court stated, the review hearing procedure was developed in Marathon County to deal with the ongoing shortage of attorneys accepting Public Defender appointments or conflict cases. (50:6). The Court stated review hearings were held on September 14th, September 21st, September 28th, October 5th, October 12th, October 19th, October 26th, and November 2nd. (50:5).

The Court noted that Lee's situation had gone on for a long time, in excess of two months. (50:6). The Court stated that at each stage there were reviews and the Court found good cause to extend the time limits. (50:6).

The Court denied the motion to dismiss on constitutional grounds because there were probable cause findings. (50:7). The Court denied the motion to dismiss on statutory grounds for failing to hold the preliminary hearing within ten days because review hearings were held and the statute allows the time limits to be extended for cause. (50:7). The Court ruled that Lee's right to counsel had not been denied. (50:7).

The Court denied Lee's request to modify his bond. (50:7-8). The Court set another review hearing. (50:8).

Lee appeared without counsel, in custody, by video, and the State did not appear at additional review hearings on November 9, 2018, (51:2); November 16, 2018, (52:2); November 30, 2018 (53:2). The Court said Lee was eligible for an attorney through the Public Defender but they were still looking for an attorney to represent him. (51:2);

(52:2); (53:3). The Court extended the time limits for cause at each hearing. (51:3); (52:3); (53:2).

The Court said there were other people who had been waiting almost twice as long for an attorney. (51:2). The Court remarked that at some point the delays could become a constitutional violation, (52:2) but noted the lack of legal authority to explain when a constitutional violation has occurred. (52:3). The Court said the review hearings would now be scheduled every two-weeks. (53:2-3). The Court stated that at some point the Court may have to appoint counsel at county expense. (52:4).

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

Lee wrote a second letter to Judge Jacobson objecting to the delay in holding the preliminary hearing. (18:1). Lee's second letter requested dismissal for violation of due process, violation of right to counsel, and violation of his right to a speedy trial. (18:2).

The State Public Defender appointed an attorney to represent Lee on December 21, 2018. (17). Lee's attorney

filed a Notice of Motion and Motion to Dismiss with Prejudice. (20). The motion sought dismissal with prejudice because the failure to appoint counsel at county expense deprived Lee of his constitutional right to counsel for an excessive length of time. (20:2).

The motion argued that when the Public Defender's Office is unable to locate an attorney, the Court shall appoint an attorney at county expense pursuant to Wisconsin Supreme Court order, *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83 (issued June 27, 2018, eff. Jan. 1, 2020). (20:1-2).

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

The Court Commissioner found good cause to extend the time limits until the January 2, 2019, preliminary hearing, (55:3), even though counsel objected to the delay. (55:3).

Lee appeared in custody with counsel at the January 2,

2019, preliminary hearing. (56:3). Judge Jill Falstad deferred ruling on counsel's amended motion to dismiss, (56:3) and said to set it for a hearing in Branch 3. (56:4). Judge Falstad heard testimony at the preliminary hearing, (56:4-15), and bound Lee over for trial. (56:16). The information was filed electronically on January 2, 2019. (22).

The court entered an order declining to rule on Lee's motion, preserving the issue, and finding probable cause to bind him over. (25; App.). The Court of Appeals granted Lee's petition for leave to appeal an order denying his motion to dismiss. (App.).

Judge Jacobson held a hearing on Lee's motion on March 25, 2019. (57). Judge Jacobson stated that the local public defender's office was having difficulty finding attorneys to accept appointments. (57:13; App. 151). All Marathon County circuit branches had cases in which defendants had requested counsel, but had not been appointed counsel by the preliminary hearing date. (57:13; App. 151). To address the lack of counsel at the time of the preliminary hearing, the courts set review hearings

prior to the date of the scheduled preliminary hearing.
(57:13; App. 151).

Judge Jacobson ruled that the probable cause finding based on the criminal complaint on September 10, 2018, satisfied the constitutional requirement. (57:15-18; App.). Judge Jacobson found that the probable cause finding satisfied the constitutional requirement. (57:17-18; App. 155-156). Pursuant to Marathon County policies a review hearing was set for September 14, 2018, and a preliminary hearing was set for September 19, 2018. (57:15; App. 153).

Because an attorney had not been appointed prior to the September 14, 2018, review hearing, the court set another review hearing. (57:15; App. 153).

The court found good cause to extend the statutory time limits for conducting the preliminary hearing. (57:15; App.153).

Due to the State Public Defender's inability to appoint counsel for Lee, additional review hearings were held on September 21st, September 28th, October 5th,

October 12th, October 19th, October 26th, and November 2nd. (57:15; App. 153).

Additional Review hearings were held on November 9, 2018, November 16, 2018, November 30, 2018, and December 14, 2018. (57:16; App. 154). "At each review hearing the presiding judge set the matter over due to the necessity for additional time to locate an attorney willing to accept the case." (57:16; App. 154).

At the final review hearing on December 28, 2018, the Court Commissioner declined to rule on the defense motion to dismiss. (57:16; App. 154).

Judge Jacobson ruled that the failure to hold a preliminary hearing within the statutory time frame was not a constitutional violation. (57:18; App. 156). Judge Jacobson found that the failure to appoint counsel was not a violation of Lee's constitutional right to counsel. (57:18-19; App. 156-157). Judge Jacobson stated there was no authority for the proposition that failing to appoint counsel within the ten-day time frame of the preliminary hearing was contemplated by the statute or that it would

rise to the level of a constitutional violation. (57:18-19; App. 156-157).

Judge Jacobson stated, “[i]f the Court appointed attorneys in any but the most extreme cases, considerable resources would have to be devoted by the court to the task of securing attorneys to represent people in criminal cases . . .”. (57:19; App. 157).

Judge Jacobson found that although the court could have appointed an attorney for Lee earlier at county expense it was not required to make such an appointment. (57:20; App. 158).

Judge Jacobson ruled that the delay in finding an attorney to represent Lee did not unconstitutionally deny his right to assistance of counsel. (57:20-21; App. 158-159).

Judge Jacobson denied Lee’s Motion to Dismiss With Prejudice. (29; App. 159). The Court of Appeals granted Lees petition for leave to appeal. (App. 136-137). The Court of Appeals issued a decision on January 20, 2021. (Decision Jan. 20, 2021, App. 100).

The Court of Appeals found that the circuit court and

court commissioner erroneously exercised their discretion, when on their own motions, they continued to find cause to extend the time limit under Wis. Stat. § 970.03(2) for months based solely upon the fact that the SPD had not yet obtained counsel for Lee. The Court found that while the SPD's search for counsel can constitute good cause to delay the preliminary hearing, there should be more thorough consideration of relevant factors than was demonstrated by the record. Lee argued that the trial court was required to appoint an attorney at county expense pursuant to *State v. Dean*, 163 Wis.2d 503, 471 N.W.2d 310 (Ct. App. 1991), and *In re the Petition to Amend SCR 81.02*, S. Ct. Order 17-06, 2018 WI 83, at 15 (eff. Jan. 1, 2020).

The Court of Appeals rejected Lee's argument that the trial court was required to appoint counsel at county expense prior to a November 7, 2018, hearing where the court was informed by the SPD that over 100 potential attorneys had declined to represent Lee. The Court of Appeals declined to rule on any of Lee's constitutional arguments citing the doctrine of constitutional avoidance.

ARGUMENT**1. Circuit courts should be required to appoint counsel at county expense when there are delays in securing SPD-appointed counsel for the defendant.**

Court's should be required to appoint counsel for indigent defendants when the Public Defender is unable to locate counsel to represent a defendant such as Lee. The Court has inherent judicial authority to order court appointment of counsel to avoid prolonged delays. See, Lynn Laufenberg and Geoffrey Van Remmen, *Courts: Inherent Power and Administrative Court Reform*, 58 Marq. L. Rev. 133 (1975). Available at: <http://scholarship.law.marquette.edu/mulr/vol58/iss1/10>.

"A court's "inherent power," as evidenced by the term, arises from the very fact of the court's existence and, therefore, is not dependent upon a special legislative or constitutional grant. The source of this power is found in the constitutional separation of powers principle which sets up an independent judiciary. To insure its independence, the courts have argued, the judiciary must possess the power, not only to protect itself from attacks

by the co-ordinate branches, but also to take the initiative in preserving its existence when the need arises." *Id.* at 135 (*citations omitted*).

The inherent power of the judiciary allows "a constitutional court to do whatever is reasonably necessary to preserve and guarantee the efficient and orderly administration of justice." *Id.* at 136 (*citations omitted*).

The inherent power of the judiciary has been invoked for the appointment, dismissal and compensation of court-related personnel. *Id.* at 136-137, (*citing In re Janitor of the Supreme Court*, 35 Wis. 410 (1874)).

The inherent power of the judiciary has also been used to require adequate courtroom facilities. *Id.* at 144-145, (*citing In re Courtroom and Office of the Fifth Branch Circuit Court*, 148 Wis.109, 134 N.W. 490 (1912)).

"The cases demonstrate that the use of inherent power is justified when the courts perceive any threat to the effective and efficient administration of justice." *Id.* at 151.

Delays in the appointment of counsel and in conducting preliminary hearings for indigent defendants such as Lee

are a threat to the effective and efficient administration of justice. Lee waited in custody for 101 days without counsel while the State Public Defender searched for counsel to represent him, and the Court declined to appoint counsel for him. (41:2) (54:2). Lee had an initial appearance and then his case was on hold for months because he lacked the ability to advance it due to the failure to appoint counsel.

The Court ruled that Dean was denied his right to counsel when the circuit court judges deferred to the public defender's office findings that the defendant was not indigent without further inquiry into the need for appointment of counsel. *State v. Dean*, 163 Wis.2d 503, 508, 471 N.W.2d 310 (Ct. App. 1991). "[T]he appointment of counsel out to be made by the judge or under the aegis of the judicial system." *Id.* at 512. "It is within the inherent power of the courts to appoint counsel for the representation of indigents." *Id.* The trial court is required to "determine whether the 'necessities of the case' and the demand of 'public justice and sound policy' require appointing counsel." *Id.* at 513.

Dean and other right to counsel cases make clear there needs to be court appointment of counsel. This Court needs to clarify that Dean requires court appointment in circumstances such as Lee's case. The necessities of Lee's case, public justice and sound policy required the appointment of counsel.

Lee waited from his initial appearance on September 11, 2018, until December 21, 2018, for counsel to be appointed. (41)(17). "A criminal defendant's initial appearance before a magistrate, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 2592 (2008). "This Court has twice held that the right to counsel attaches at the initial appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 2584.

Once the right to counsel has attached, the state has an

"obligation to appoint counsel within a reasonable time once a request for assistance is made." *Id.* at 2591. The United States Supreme Court declined to rule on what circumstances require counsel to be provided. *Id.* at 2592. This Court should provide direction on what circumstances require circuit courts to appoint counsel.

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

Even after the Court was advised of the significant efforts made by the SPD to try to obtain counsel for Lee, the Court failed to appoint counsel. (50:8).

The Court has an obligation to ensure the timely provision of counsel to a defendant who is entitled to court appointed counsel. The Court had the authority to appoint counsel at each of the review hearings. "We conclude, without difficulty, that the appointment of counsel ought to be made by a judge or under the aegis of the judicial system." *State Ex. Rel. Fitas v. Milwaukee*

County, 65 Wis.2d 130, 134, 221 N.W.2d 902 (1974) (citing *Carpenter v. Dane County*, 9 Wis.2d 49 (1859); *Gideon v. Wainwright*, 372 U.S. 335, 83 Sup. Ct. 792, 9 L.Ed. 2d 799 (1963)).

The Wisconsin Supreme Court has prescribed a cure for the delays by mandating court appointment of an attorney per Dean. *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991). *In re the Petition to Amend SCR 81.02*, S. Ct. Order 17-06, 2018 WI 83, at 15 (eff. Jan. 1, 2020).

The Court of Appeals decision stated "Dean does not directly mandate the appointment of counsel under circumstances present in this case." *State v. Lee*, 2021 App 12,18 ¶ 36 (Ct. App. 2021) (App. 117). The Court of Appeals decision also stated that the Petition does not articulate when a court's obligation to appoint an attorney at county expense is triggered, or what standards should be used. *Id.* at 18, Fn. 16 (App.117).

The Court needs to make clear that when it becomes obvious that the SPD cannot appoint within the proper time

frames there must be court appointment to comply with the time frames.

The Wisconsin Supreme Court held that if "lawyers are unavailable or unwilling to represent indigent clients at the SPD rate of \$40/hour, as is increasingly the case, then judges must appoint a lawyer under SCR 81.02, at county expense." *In re the Petition to Amend SCR 81.02*, S. Ct. Order 17-06, 2018 WI 83, at 15. Some circuit courts are ignoring the fee petition decision. The Court of Appeals decision stated that any mandatory directive to courts to appoint counsel at county expense in all instances where there delays in securing SPD-appointed counsel for the defendant must come from the Wisconsin Supreme Court.

The constitutional underpinnings behind the mandate in the fee petition need to be developed by this Court. It needs to be made clear that when there is a constitutional violation the remedy is dismissal with prejudice. Circuit courts need direction to comply with the mandate to appoint counsel. A decision by the Supreme Court will help develop and clarify the law.

2. Lee's right to counsel was denied.

A structural breakdown in the appointment of counsel for indigent defendants occurs when defendants like Lee languish in custody for months while waiting for counsel. If no actual assistance for the accused defense is provided by counsel, the constitutional guarantee is violated. *United States v. Cronin*, 466 U.S. 648, 654 (1984). "To hold otherwise 'could convert the appointment of counsel into a sham an nothing more than a formal compliance with the Constitution's requirement that the accused be given the assistance of counsel.'" *Id.* (citing *Avery v. Alabama*, 308 U.S. 44, 446 (1940)).

It is well established that the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the assistance of counsel for his defense and that right may not be denied by the State by reason if the defendant's inability to pay for counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Lee's case demonstrates that Gideon's mandate is not being met in practice.

In other states where Gideon's mandate is not being met in practice the courts have provided clear direction.

Indigent defendants in custody waiting for counsel to be appointed were deprived of their right to counsel, and the deprivation resulted in severe restrictions on their liberty and other constitutional interests. *Lavallee v. Hampden Superior Court*, 442 Mass. 228, 232, 812 N.E. 2d 895 (2004). The Court held that upon a showing that no attorney was available to represent an indigent defendant, despite good faith efforts, the defendant may not be held in custody for more than seven days and the criminal case against the defendant may not continue beyond forty-five days. *Id.* at 232.

Counsel's responsibilities include interviewing the defendant and witnesses while events are fresh in the memories, preserving physical evidence that may be important to the defense, and locating potential defense witnesses. *Id.* at 235. "The effects of the passage of time on memory or the preservation of evidence are so familiar that the importance of prompt pretrial preparation cannot be overstated." *Id.* at 235.

Lee was not appointed counsel at the first appearance or promptly thereafter. (41:2) (54:2). His substantive right

to the assistance of counsel was irreparably damaged by the three months delay in the appointment of counsel. The delay in deprived Lee of important pretrial preparation by counsel. *Id.* at 235.

"When the Bill of Rights was adopted, there was no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshaled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceeding where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment to apply to 'critical' stages of the proceedings The plain wording of this guarantee encompasses counsel's assistance whenever necessary to assure a meaningful 'defence'. *United States v. Wade*, 388 U.S. 218, 224-225(1967).

Repeatedly tolling the preliminary hearing time limits without an end in sight prejudiced Lee's Sixth Amendment

right to counsel. "The `right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination'" *Id.* at 226.

3. Lee was denied due process.

The Constitution requires a judicial determination of probable cause as a prerequisite to an extended restraint of liberty following an arrest. *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S.Ct. 854, 863, 43 L.Ed.3d 54 (1975). The probable cause finding in Lee's case may have met the basic requirements of *Gerstein* but the immediacy of the probable cause determination means nothing if the defendant then sits without counsel and without any ability to move his case forward for months.

The *Gerstein* Court recognized "the consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Id.* at 114.

An 18-day detention on an arrest warrant without an appearance before a judge was a deprivation of liberty without due process of law. *Coleman v. Frantz*, 54 F.2d 719,724 (7th Cir. 1985).

"[W]e can discern no reason why prolonged detentions of this sort should be exempt from scrutiny under the requirements of due process." *Id.* "[T]he duration of the detention and the burden placed on state officials in providing procedural safeguards are highly relevant to a constitutional examination of post-arrest detentions." *Id.* The duration of Lee's pretrial incarceration without counsel was 101 days. The burden placed upon the trial court to appoint counsel within a reasonable time of the request for counsel was minimal.

Facing a structural failure in the appointment of counsel to indigent criminal defendants, the Lavallee Court ruled that upon a showing that counsel was not available to represent an indigent defendant, the defendant may not be held in custody for more than seven days and the criminal

case may not continue beyond forty-five days. *Lavallee v. Hampden Superior Court*, 442 Mass. 228, 232, 812 N.E. 2d 895.

The three-month pretrial detention violated Lee's procedural and substantive due process rights. Lee's case is factually similar to Jauch in that it is a case about confinement with process deferred. A unanimous panel of the Fifth Circuit reversed a district court, holding that excessive pre-trial detention which deprived an individual of liberty without due process violated the Fourteenth Amendment. *Jauch v. Choctow County*, 874 F.3d 425 (5th Cir., 2017) (cert. denied). "Ninety-six days after being taken into custody, Jauch's case moved forward. *Jauch v. Choctow County*, 874 F.3d 425, 428. Due to the failure to appoint counsel, Lee's case did not move forward until the preliminary hearing on January 2, 2019. (56).

The review hearings were a mechanism to avoid complying with the Supreme Court order to appoint attorneys at county expense. *In re the Petition to Amend SCR 81.02*, S. Ct. Order No. 17-06, 2018 WI 83, P. 15, (eff. Jan. 1, 2020). Full due process along with speedy trial principles command that Lee's case moves along with dispatch and this is

obviously the intention of the preliminary hearing time limit rule. Violation of the preliminary hearing time limit rule to this extent is not just a violation of personal jurisdiction but an affront to due process, right to counsel and speedy trial. While this Court has previously indicated that preliminary hearings are not constitutionally required, Wisconsin has chosen to have preliminary hearings and long, indefinite delays prior to preliminary hearings obviously offend constitutional principles.

"The true administration of justice is the foremost pillar of good government." *New York County Lawyers' Association v. State*, 196 Misc.2d 761,762, 763 N.Y.S. 2nd 397 (2003). "This pillar is essential to the stability of our political system. It should therefore be continually strengthened and not allowed to crumble into the detritus of a constitutional imbalance among the branches of government. Equal access to justice should not be a ceremonial platitude, but a perpetual pledge vigilantly guarded." *Id.*

Delays due to a lack of available counsel result in

severe and irreparable harm during critical periods, and indigent defendants are deprived of meaningful opportunity to consult with counsel. *Id.* at 771-775.

4. Lee's right to a speedy trial was denied.

"Both the Sixth Amendment to the United States Constitution and article I, section 7, of the Wisconsin Constitution guarantee an accused the right to a speedy trial." *State v. Lock*, 2013 WI App 80, ¶ 20, 348 Wis.2d 334, 833 N.W.2d 189, 195 (2013).

In determining whether a defendant's right to speedy trial has been violated, the court considers: the length of the delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant. *Id.* at ¶ 21. Lee waited three months for counsel to be appointed. The delay was caused by a structural and systematic breakdown of the indigent defense system. The Office of the State Public Defender was unable to locate counsel to represent Lee, and the court declined to appoint counsel for him. A structural breakdown in the indigent defense system should not be counted against Lee.

Lee requested counsel immediately. He repeatedly

requested counsel at the review hearings and complained about the delays. The delays caused by the Public Defender's inability to appoint counsel and the Court's refusal to appoint counsel for Lee are should be counted against the State.

"Since *Barker*, the Supreme Court has indicated in dicta that systemic issues in public defender agencies may be imputed to the State. In *Polk County v. Dodson*, for example, the Court noted that a defender system's 'hiring and firing decisions' are considered made on behalf of the state. Likewise, in *Brillon v. Vermont*, the Court stated that delays resulting from 'a systemic breakdown of the public defender system' may still be counted against the state." Emily Rose, *Speedy Trial as a Viable Challenge to Chronic Underfunding in Indigent-Defense Systems*, 113 Mich. L. REV, Vol. 113, 279, 296 (2014). Available at: <https://repository.law.umich.edu/mlr/vol113/iss2/3>.

Lee's right to a speedy trial was prejudiced by the delay. "Prejudice, of course, should be assessed in the light of interests of the defendants which the speedy trial right was designed to protect. This Court has identified

three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

"[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Id.* at 532.

The delay in appointing counsel for Lee skewed the fairness of the system. Law enforcement officers do not wait three months to take a statement when a crime is reported, conduct an investigation, or collect evidence. The delay in appointing counsel prejudiced Lee because he did not have counsel to interview him, to interview witnesses, to conduct an investigation, or collect and preserve evidence.

The statutory scheme including preliminary hearing time limits were crafted by the legislature to protect a defendant's speedy trial rights. The legislative history reflects that the preliminary hearing time limits were included as part of a complete redrafting of the criminal code. Wis. Stats. Ann. 970.03(2), 1969 AB 603, Ch. 225, Laws of 1969, at 602-604. (App. 174-176). <http://docs.legis.wisconsin.gov/1969/related/acts/255.pdf>) electronic page 3. (App. 174-209).

The 20-day limit for preliminary examinations created by the act was part of general effort to encourage speedy trials. *Id.* at 604. (App. 176).

"In an attempt to speed up the criminal justice procedures, provisions for a speedy trial set out at length the time in which a preliminary examination must be commenced (20 days after initial appearance), the time for filing an information (30 days after the preliminary examination or waiver thereof) and provisions for the commencement of felony and misdemeanor trials." *Id.* at 604. (App. 176.)

Therefore, Lee's case should be dismissed with prejudice for violation of his right to a speedy trial. *State v. Lock*, 2013 WI App 80, ¶ 21, 348 Wis.2d 334, 833 N.W.2d 189, 196.

5. If the circuit court lost jurisdiction to determine probable cause at a preliminary hearing because the ten-day time limit under Wis. Stat. § 970.03(2) had expired by 104 days, what is the appropriate remedy?

The rule is a preliminary examination shall be commenced within 10 days if the defendant is in custody and bail has been set at more than \$500. Wis. Stats. § 970.03(2). The exception to the rule allows time limits to be extended upon "stipulation of the parties or on motion and for cause . . .". Wis. Stats. § 970.03(2).

The 10-day statutory time limit required Lee's preliminary examination to be held by September 21, 2018. Lee's preliminary examination was delayed until January 2, 2019. (56:4-16). The delay was due to the inability of the SPD to procure counsel for Lee and the Court's refusal to appoint counsel for Lee.

At the review hearings, the Court extended the time

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

The Court of Appeals ruled that the failure to hold a preliminary hearing within the prescribed time limits resulted in a loss of personal jurisdiction which required a dismissal without prejudice.

The Court failed to consider the impact on Lee in determining that there was good cause to justify the repeated delay of his preliminary hearing. Specifically, the court did not consider how the failure to appoint counsel harmed Lee. Lee did not have counsel to investigate the charges, preserve evidence, or consult with when law enforcement sought a custodial interrogation. Lee did not have counsel to obtain a proffer or cooperation agreement prior to custodial interrogations.

Lee has been in custody since September 10, 2018. (40). The Court of Appeals granted Lee's petition for leave to

appeal on November 20, 2019. The Court of Appeals decision was issued more than one year later on January 21, 2021. The Court of Appeals ruled that Lee's case should be dismissed without prejudice which means that when the State refiles the charges Lee would not be able to receive credit for the time he has sat in custody waiting for a decision. The remedy of dismissal without prejudice is totally unjust and should not be allowed.

The trial court's failure to comply with the statutory time limits for conducting a preliminary hearing resulted in a loss of the circuit court's competency to adjudicate Lee's case. *Village of Trempealeau v. Mikrut*, 2004 WI 79, 87, ¶ 9. 273 Wis.2d 76, 681 N.W.2d 190 (2004). Therefore, dismissal of Lee's case with prejudice is the appropriate remedy.

Conclusion

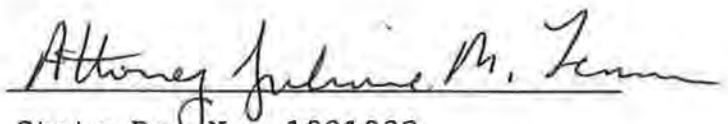
Lee suffered irreparable harm due to the delay in the appointment of counsel for more than three months. Lee's case demonstrates that Gideon's mandate is not being met in practice. The delay in the appointment of counsel violated Lee's right to counsel, Lee's right to due process and his

right to speedy trial. The delay in appointing counsel for Lee skews the fairness of the system. Prompt pretrial investigation by counsel is essential to effective representation and a fair system. Lost memories and missing evidence cannot be recovered. Therefore, the only appropriate remedy is dismissal with prejudice.

The SPD's inability to procure counsel for indigent defendants is a statewide problem. This Court needs to direct circuit courts to appoint counsel for indigent defendant's when the State Public Defender is unable to locate counsel. The Court needs to establish parameters that require the appointment of counsel by circuit courts.

Dated June 16, 2021.

Respectfully submitted,

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

I hereby certify that this brief conforms to the form and length rules contained in Rule 809.19(8) (b) and (c) Wis. Stats., and to the form described in Rule 809.19(8) (d) for a brief produced with monospaced font, 10 characters per inch, double-spaced, a 1.5 inch margin on the left side and a one-inch margin on all other sides. The length of the brief is 38 pages.

Dated June 16, 2021.

By: Attorney Juliana M. Lemm
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STATEMENT OF COMPLIANCE WITH RULE 809.19(12) (f) and (13) (f)

I hereby certify that the text of the electronic copy of the brief and appendix is identical to the text of the paper copy of the brief and appendix.

Dated June 16, 2021.

By: Attorney Juliana M. Lemm
State Bar No. 1921833

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

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under 809.23(3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning reading those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of

the full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated June 16, 2021.

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