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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP221-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NHIA LEE,

Defendant-Appellant-Petitioner.

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

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

The State arrested Nhia Lee for possession with intent to distribute methamphetamines. Lee had a *Riverside*[1] probable-cause hearing within 48 hours. Lee then had two initial appearances (with counsel) because he originally provided a false name to police. Lee was placed on a supervision hold related to a prior offense for failing to register as a sex offender. His supervision in that case was ultimately revoked. Due to the State Public Defender's (SPD's) delay in locating permanent counsel for Lee,[2] the circuit court repeatedly extended the 10-day statutory deadline for holding a preliminary hearing, such that Lee did not have his preliminary hearing until 113 days after his initial appearance. Lee claims this delay extinguished the State's ability to prosecute him.

The court of appeals held that the circuit court erroneously exercised its discretion by repeatedly extending the 10-day statutory deadline in Wis. Stat. § 970.03(2) for holding the preliminary hearing so that the SPD could appoint permanent counsel for Lee. As a result, the circuit court lost personal jurisdiction over Lee, and the remedy was a dismissal without prejudice.

Lee asks this Court to make three fundamental changes to Wisconsin law. First, Lee asks this Court to change the remedy for when a circuit court fails to timely hold a preliminary hearing. As the court of appeals correctly ruled, Wisconsin law is well-established that the remedy in such cases is a dismissal without prejudice. Lee provides no reason for ruling differently other than that the current law "is totally unjust." This Court should not change existing law.

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[1] *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

[2] It is undisputed that at all times Lee qualified for SPD representation and that SPD was actively seeking counsel for Lee.

Second, Lee continues to press arguments that his constitutional rights were violated despite the court of appeals' explicit finding that these claims were insufficiently developed and without merit. All of Lee's constitutional claims fail on the merits for several reasons, including that counsel for Lee expressly declined the opportunity to establish an evidentiary record showing prejudice from any of the alleged violations.

Finally, Lee asks this Court to set a mandate for circuit courts to appoint counsel for indigent defendants at county expense when SPD is having difficulty appointing counsel. However, Lee provides no workable standards for determining *when* circuit courts should do so and seems to have abandoned his request before the court of appeals to arbitrarily establish a 10-day deadline. This Court certainly has the power to establish such a mandate going forward, but any such mandate is better done through this Court's rulemaking authority.

For these reasons, this Court should affirm the court of appeals' decision.

ISSUES PRESENTED

The State re-orders and reframes the issues presented by Lee from the narrowest to the broadest necessary to resolve the case.

1. Should this Court adhere to decades of precedent and re-affirm that the remedy for the failure to timely hold a preliminary hearing is a dismissal *without* prejudice?

Answered by the circuit court: Not addressed because the circuit court concluded that it properly extended the deadline for the preliminary hearing for cause.

Answered by the court of appeals: "Wisconsin law for decades has held that the failure to hold a preliminary hearing within the prescribed time results in a loss of

personal jurisdiction, which requires only a dismissal without prejudice."[3]

This Court should affirm.

2. Did Lee establish that his constitutional rights to counsel, due process, or a speedy trial were violated by the repeated extensions of the preliminary hearing deadline so SPD could appoint permanent counsel, such that he was entitled to a dismissal with prejudice?

Answered by the circuit court: No. Lee did not establish that his constitutional rights were violated.

Answered by the court of appeals: The court of appeals rejected Lee's constitutional claims under the doctrine of constitutional avoidance and because the claims were not adequately developed and failed on the merits.

This court should affirm.

3. Was the circuit court required to appoint counsel for Lee at county expense at any point before his permanent SPD appointment, and if not, should this Court establish such a requirement?

Answered by the circuit court: No. The fact that the circuit court could have appointed counsel under *State v. Dean*[4] did not mean it was required to.

Answered by the court of appeals: Current law does not require circuit courts to appoint counsel at county expense within 10 days of the initial appearance if SPD is unable to secure permanent counsel by that time. In appropriate circumstances the preliminary hearing may be extended to allow SPD to locate counsel.

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[3] *State v. Lee*, 2021 WI App 12, ¶ 61, 396 Wis. 2d 136, 955 N.W.2d 424.

[4] *State v. Dean,* 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991).

This court should affirm that no requirement existed under present law and should not use this case to establish any such requirement prospectively.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court having accepted review, both oral argument and publication are proper.

STATEMENT OF THE CASE

Circuit court proceedings

Lee was arrested on September 1, 2018, and subsequently charged with possession with intent to distribute methamphetamines, unauthorized use of an individual's personal identifying information or documents, and possession of drug paraphernalia. (R. 1:1–2.)

The circuit court conducted a *Riverside* hearing and found probable cause for Lee's arrest on September 2, 2018. (R. 57:14.) Lee then had an initial appearance on September 4, 2018. (R. 57:14.) However, Lee initially provided a false name to police (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; 57:14–15.)

Lee appeared by counsel at the September 11 hearing; counsel explained that Lee was "on extended supervision hold" 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 review 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 permanent 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.) 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 objected to these review hearings and demanded a preliminary hearing. (R. 9:1–2; 18.) But he also said he wanted an attorney. (R. 42:2.)

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

At the same hearing, the circuit court denied a motion to dismiss that Lee filed pro se a few weeks earlier. (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" before extended pretrial detention. (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.)

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; 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 court found probable cause and ordered Lee bound over for trial. (R. 56:16.)

Thereafter, the court denied Lee's motion to dismiss at his 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.) Defense counsel further argued that the delay prejudiced Lee because counsel did not know where Lee's cell phone was located and did not have any records of which officers Lee spoke to. (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 and did not know how to prove what Lee claimed. (R. 57:9.)

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 Marathon County had established the review hearing process to ensure qualifying indigent defendants had counsel at preliminary hearings. When an attorney is not appointed in time, the branches hold review hearings. (R. 57:13–14.) The court further explained that Lee had a *Riverside* probable-cause hearing within 48 hours of his arrest. (R. 57:14.)

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 hearing. (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 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.)

Thereafter, the court of appeals granted Lee's petition for leave to appeal the non-final order.

Court of appeals' decision

The court of appeals reversed, concluding that the circuit court erroneously exercised its discretion by repeatedly extending the 10-day statutory deadline for a preliminary hearing based solely on SPD's inability to appoint permanent counsel and without considering other factors. *State v. Lee*, 2021 WI App 12, ¶ 3, 396 Wis. 2d 136, 955 N.W.2d 424.[5] In so holding, the court of appeals rejected Lee's argument that the circuit court was required to appoint counsel for him at county expense after SPD was unable to secure permanent counsel within 10 days of the initial appearance: "Lee considerably overreads the authorities he cites in support of his argument that the circuit court was required to make such an appointment." *Id.* ¶ 33.

The court of appeals also held that while there was nothing inherently wrong with the circuit court sua sponte extending the 10-day preliminary hearing deadline for cause, a circuit court needs to consider more than just the fact that SPD has not yet appointed counsel. *Id.* ¶ 39. Courts must consider "the extent of the SPD's efforts to locate counsel, the reasons for the delay in obtaining counsel, and how long that delay is likely to continue given the other circumstances." *Id.* ¶ 53. Likewise, actual prejudice to the defendant is also an important factor in the analysis. *Id.* ¶ 58.

While concluding that the circuit court erroneously exercised its discretion and lost personal jurisdiction over Lee, the court of appeals rejected Lee's argument that he was entitled to a dismissal with prejudice. *Id.* ¶ 61. "Wisconsin law for decades has held that the failure to hold a preliminary hearing within the prescribed time results in a loss of

[5] The State did not file a petition for cross-review of this portion of the court of appeals' decision.

personal jurisdiction, which requires only a dismissal without prejudice." *Id.*

Finally, the court of appeals rejected Lee's constitutional claims under the doctrine of constitutional avoidance and because the claims were not adequately developed and meritless. *Id.* ¶ 62. The State will discuss this portion of the court of appeals' decision in further detail below.

This Court accepted Lee's petition for review.

STANDARDS 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). 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).

ARGUMENT

The court of appeals decided this case on narrow grounds, holding that the circuit court erroneously exercised its discretion by repeatedly extending the 10-day statutory deadline for holding the preliminary hearing, and that the proper remedy was a dismissal without prejudice. *Lee*, 396 Wis. 2d 136, ¶ 61. This Court should affirm that the appropriate remedy is dismissal without prejudice. It should also hold that Lee failed to establish that any of his

constitutional rights were violated by the repeated extensions. Finally, it should reject Lee's request to prospectively establish an arbitrary date by which circuit courts must appoint counsel at county expense while SPD is actively searching for counsel.

I. The circuit court's failure to timely hold a preliminary hearing does not prevent the State from re-filing charges against Lee.

The ultimate issue in this case is whether the delays in holding Lee's preliminary hearing preclude the State from further prosecuting Lee. Under established law, the circuit court's erroneous exercise of discretion in repeatedly extending the deadline for the preliminary hearing resulted in a loss of personal jurisdiction, and the court of appeals correctly held that the proper remedy was dismissal without prejudice. Lee's request for a dismissal *with prejudice* is devoid of any legal support.

A. Wisconsin law firmly holds that failure to timely hold a preliminary hearing results in a loss of personal jurisdiction and the remedy is a dismissal without prejudice.

The court of appeals held that "Wisconsin law for decades has held that the failure to hold a preliminary hearing within the prescribed time limits results in a loss of personal jurisdiction, which requires only a dismissal without prejudice." *Lee*, 396 Wis. 2d 136, ¶ 61. The court of appeals was correct.

Wisconsin law is clearly established that the failure to hold a preliminary hearing within the 10 days specified by section 970.03 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.[6]

As this Court explained in *State ex rel. Klinkiewicz v. Duffy*, 35 Wis. 2d 369, 373, 151 N.W.2d 63 (1967), the right to a preliminary hearing "stems purely from statute and is not considered a constitutional right." Accordingly, if a case is dismissed for failure to timely hold the preliminary hearing, "[t]his of course does not preclude the state from initiating a new prosecution for the same offense absent the running of the statute of limitations." *Id.* at 375.

Likewise, in *State v. Stoeckle*, 41 Wis. 2d 378, 164 N.W.2d 203 (1969), this Court reaffirmed that the statutory deadline for holding a preliminary hearing "is not necessarily to protect a defendant's right to a speedy trial, but rather to limit the period of time a person accused of crime must be detained or incarcerated on the basis of an arrest warrant alone." *Id.* at 386. Accordingly, "[i]f the state delays the preliminary hearing beyond the statutory time limit without the defendant's consent . . .the charge must be dismissed and the defendant released, although he may be recharged if the statute of limitations have not run." *Id.* Therefore, this Court held that "the remedy of dismissal without prejudice is proper." *Id.*

B. Lee's request for a dismissal with prejudice has no legal basis.

Lee argues that "[t]he 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

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[6] *See also Armstrong v. State*, 55 Wis. 2d 282, 285, 198 N.W.2d 357 (1972) (noting that the defendant was "correct when he states that the failure to hold the preliminary examination within the time provided by statute results in the loss of personal jurisdiction"); *Crummel v. State*, 46 Wis. 2d 348, 356, 174 N.W.2d 517 (1970) (same).

adjudicate Lee's case." (Lee's Br 34.) He asks this Court to rule that the appropriate remedy is "dismissal of Lee's case with prejudice." (Lee's Br. 34.)[7]

The only authority Lee cites for this proposition is *Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190. (Lee's Br. 34.) But *Mikrut* merely held that challenges to competency can be forfeited if not timely asserted. *Mikrut*, 273 Wis. 2d 76, ¶ 31. And *Mikrut* affirmed that defects in competency are not jurisdictional. *Id.* ¶ 9. Therefore, *Mikrut* does not help Lee.

Lee fails to explain how noncompliance with a statutory time limit which is not constitutionally required deprives a court of jurisdiction. Indeed, even failure to abide by a constitutional time limit does not necessarily deprive a court of jurisdiction or competency. For instance, "a *Riverside* violation, however, is not a jurisdictional defect causing a trial court to lose competency over the case." *State v. Golden*, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994).

Other than *Mikrut,* Lee cites no legal authority to support his requested relief. Instead, he argues that he is entitled to a dismissal with prejudice because "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." (Lee's Br. 34.) But the issue of whether Lee would be entitled to sentence credit *if* the State refiles charges and *if* he is convicted is entirely separate from whether the circuit court has the ability to adjudicate the charges against him in the first place.[8]

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[7] The citations to Lee's brief refer to the page numbers in the bottom center, not the record pagination in the upper right.

[8] It is unclear whether Lee would be entitled to sentence credit under section 973.155(1)(a).

Lee also claims that a dismissal with prejudice is required because allowing the State to refile charges against him "is totally unjust." (Lee's Br. 34.) This is not argument that is grounded in any legal authority. Lee's fairness argument also ignores the fact that at the time he was taken into custody he was placed on a supervision hold in a previous case, and that supervision was later revoked. But regardless, Lee's time in custody has no legal bearing on the circuit court's ability to exercise its jurisdiction over him if charges are refiled and a preliminary hearing is timely held.

Moreover, Lee ignores the consequences of his argument and that it would cause unjust results in many cases. Under Lee's argument, someone charged with first-degree intentional homicide—a charge that carries a mandatory life sentence—would avoid serving *any* sentence just because he might not be entitled to credit for the time he sat in jail awaiting a preliminary hearing.

Finally, it is noteworthy that Lee does not argue that this Court should abandon *stare decisis* and overrule the decisions discussed above. That is, Lee does not ask this Court to establish a new rule that the failure to timely hold a preliminary hearing in all cases results in the State's inability to subsequently prosecute the defendant if charges are refiled. (Lee's Br. 32–34.) Instead, he simply argues that it is not fair to allow the State to refile charges *against him* given the circumstances of his case. But as discussed, this request has absolutely no legal basis.

In short, the circuit court's failure to hold Lee's preliminary hearing within 10 days of his initial appearance resulted in the loss of the circuit court's personal jurisdiction over Lee. The circuit court's erroneous exercise of discretion in extending the time for the preliminary hearing did not result in the State's inability to refile charges against him.

II. Lee's constitutional arguments fail because they were insufficiently developed below, he failed to establish a record proving prejudice, and they otherwise lack merit.

Lee also argues that the circuit court violated his right to counsel, due process, and a speedy trial, entitling him to a dismissal with prejudice. (Lee's Br. 14–32.) These arguments fail for numerous, independent reasons. The court of appeals held that "[t]o the extent Lee would be entitled to any greater relief on his constitutional claims than on his statutory claim, we conclude his constitutional arguments are either obviously deficient or underdeveloped." *Lee*, 396 Wis. 2d 136, ¶ 62. This Court should affirm.

A. Lee forfeited his constitutional arguments by insufficiently developing them below.

The general rule is that an appellate court will not address undeveloped arguments and that failure to adequately brief an issue constitutes forfeiture. *See, e.g., State v. Curtis*, 218 Wis. 2d 550, 557, 582 N.W.2d 409 (Ct. App. 1998); *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Likewise, a party's "failure to address the grounds on which the [lower] court ruled constitutes concession of the ruling's validity." *Sands v. Menard*, 2016 WI App 76, ¶ 52, 372 Wis. 2d 126, 887 N.W.2d 94, *aff'd*, 2017 WI 110, 379 Wis. 2d 1, 904 N.W.2d 789; *accord W. Capitol, Inc. v. Vill. of Sister Bay*, 2014 WI App 52, ¶ 49, 354 Wis. 2d 130, 848 N.W.2d 875.

The court of appeals found that Lee's right to counsel and speedy trial claims were "vague" and that he "fail[ed] to develop key aspects of these claims." *Lee*, 396 Wis. 2d 136, ¶ 62 & n.24. And it noted that his due process argument relied on a single foreign case involving a civil claim stemming from prolonged pretrial detention without an arraignment or other court appearance. *Id.* The court of appeals noted that Lee

failed to address the fact that counsel was appointed in his case, that he was not without counsel at any critical stage of the proceeding, and that he, in fact, had a *Riverside* probable-cause hearing and an initial appearance before a magistrate where he was represented by counsel. *Id.*

Indeed, before the court of appeals, Lee simply summarily asserted that "[t]he court's failure to appoint counsel . . . in a timely fashion violated due process, the Sixth Amendment right to counsel and the Wisconsin Constitution." (Lee's Ct. App. Br. 43.) Lee's speedy trial claim was only a couple of paragraphs long and was made in the context of discussing the circuit court's exercise of discretion—not as a standalone claim. (Lee's Ct. App. Br. 23–24.) Lee also failed to discuss the appropriate standard of review for his constitutional claims or identify the requisite elements of the legal analysis for each.

Here, Lee fails to mention the fact that the court of appeals found that his arguments on appeal were inadequately developed. He also does nothing to contest that determination. According, this Court should conclude that Lee forfeited these issues before the court of appeals and should not address them. *See Hackett v. City of S. Bend*, 956 F.3d 504, 510 (7th Cir. 2020) ("An appellant who does not address the rulings and reasoning of the [lower] court forfeits any arguments he might have that those rulings were wrong.")

B. Lee cannot establish prejudice from any alleged constitutional violation because he refused to make a record of prejudice.

Even if this Court overlooks Lee's forfeiture of his constitutional claims before the court of appeals, it need not separately analyze them here. That is because alleged constitutional violations are subject to a harmless error

analysis and Lee expressly refused the opportunity to make an evidentiary record supporting his claims of prejudice.

1. Constitutional claims are subject to a harmless-error analysis.

Alleged constitutional violations in the trial process are subject to the harmless error doctrine. *State v. Nelson*, 2014 WI 70, ¶ 18, 355 Wis. 2d 722, 849 N.W.2d 317; *see also State v. Kramer*, 2006 WI App 133, ¶¶ 25–26, 294 Wis. 2d 780, 720 N.W.2d 459 (right to present a defense subject to harmless error).[9]

Specifically, alleged violations of the right to counsel are subject to the harmless error analysis. *Coleman v. Alabama*, 399 U.S. 1, 11 (1970) (deprivation of counsel at preliminary hearing subject to harmless error analysis); *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). Likewise, alleged violations of a defendant's right to due process are subject to the harmless error doctrine. *State v. Harve*y, 2002 WI 93, ¶ 36, 254 Wis. 2d 442, 647 N.W.2d 189.

The test for harmless error is whether the defendant was prejudiced by the alleged constitutional violation; in the trial context, that means whether the error contributed to the conviction. *Id.* ¶¶ 40–41. Claims of alleged constitutional speedy trial violations contain a similar prejudice element. *See State v. Urdahl*, 2005 WI App 191, ¶ 11, 286 Wis. 2d 476, 704 N.W.2d 324.

A defendant must make an evidentiary record to support a claim of prejudice from an alleged constitutional violation. *See Rothgery v. Gillespie Cty., Tex.*,

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[9] Lee does not allege that any of his constitutional claims are subject to a structural error analysis.

554 U.S. 191, 213 (2008) (remanding 42 U.S.C. § 1983 action for determination of whether six-month delay in appointment of counsel actually prejudiced defendant); *Urdahl*, 286 Wis. 2d 476, ¶ 34 (recognizing that showing actual prejudice is "an important factor" in determining if a defendant's Sixth Amendment right to a speedy trial was violated).

2. Lee cannot show prejudice because he refused to establish an evidentiary record supporting his claims of prejudice.

Here, Lee cannot prove prejudice on any of his constitutional claims. Lee made a strategic decision to *not* develop an evidentiary record of prejudice at the hearing on his motion to dismiss because he did not want to testify. This strategic decision dooms each of his constitutional claims.

In the circuit court, defense counsel asserted that Lee was prejudiced by the delay in holding his preliminary hearing because he had been interviewed by law enforcement and did not have "anyone to negotiate a cooperation agreement." (R. 57:5–6.) Defense counsel further argued that the delay prejudiced Lee because counsel did not know where Lee's cell phone was located and did not have any records of which officers Lee spoke to. (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 expressly declined the opportunity for an evidentiary hearing, stating she did not want her client to testify and did not know how to prove what Lee claimed. (R. 57:9.)

In his brief before this Court, Lee makes only vague references to these items of alleged prejudice. (Lee's Br. 30, 33.) For instance, Lee claims that the circuit court "prejudiced [his] right to counsel" (Lee's Br. 23–24), but he does not point

to any evidence of this. Likewise, while Lee discusses the concept of prejudice generally in his speedy trial argument (Lee's Br. 28–29), he fails to point to any evidence of actual prejudice—i.e., lost evidence, inability to present a defense, inability to call witnesses, etc. *See Barker v. Wingo*, 407 U.S. 514, 532 (1972) (discussing instances of actual prejudice due to speedy trial violations). Instead, Lee makes the conclusory assertion that the delay in appointing counsel "skewed the fairness of the system." (Lee's Br. 30.)

And Lee makes no attempt to prove actual prejudice in his due process claim. (Lee's Br. 24–28.) While Lee discusses the general evils of prolonged pretrial detention, he completely ignores that when he was taken into custody, he was on an extended supervision hold in another case and that 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 Circuit Court Case Number 2015-CF-1190 for failing to register as a sex offender. Lee's supervision ultimately was revoked on or about May 30, 2019. Thus, Lee cannot show that he was suffered any pretrial incarceration that he otherwise would not have been subject to.

Because Lee cannot establish that he was prejudiced by the alleged constitutional violations, all of his constitutional claims fail.

C. Lee was not deprived of his right to counsel, his right to a speedy trial, or due process.

If this Court chooses to ignore Lee's forfeiture of his constitutional arguments at the court of appeals and the fact that he cannot show he was prejudiced by any of the alleged constitutional violations, then the claims nevertheless fail on the merits.

1. Lee was not deprived of his right to counsel at any critical stage of the proceeding.

Lee asserts that he was denied his Sixth Amendment right to counsel. (Lee's Br. 21–24) But as he did in the court of appeals, Lee ignores one glaring deficiency in his claim.

"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) (emphasis added). 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*, 554 U.S. at 212. That said, it is undisputed that an indigent defendant has a constitutional right to representation at the preliminary hearing. *See Jones v. State*, 37 Wis. 2d 56, 69, 154 N.W.2d 278 (1967).

As the court of appeals indicated, "Lee was provided counsel during the initial appearance and the preliminary hearing." *Lee*, 396 Wis. 2d 136, ¶ 62 n.24. Further, Lee "fails to demonstrate that the period between [the review] hearings was a 'critical stage' of the proceedings to which the right of counsel would attach." *Id.*

The court of appeals' analysis is correct. 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. 28–29), 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 also 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 anything that occurred during the review hearings that would make them a "critical stage."

Because Lee has not identified any "critical stage of the proceedings" where he was denied counsel, *Hornung*, 229 Wis. 2d at 476, Lee's Sixth Amendment right to counsel was not violated.

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

a. The statutory deadline for holding a preliminary hearing does not define the scope of Lee's right to a speedy trial

Lee claims that his Sixth Amendment right to a speedy trial was violated because his preliminary hearing did not occur within the specified time frame. (Lee's Br. 28–32.) In doing so, he argues that the statutory deadline under section 970.03 is of constitutional significance. (Lee's Br. 31.)

But Wisconsin law has repeatedly rejected this notion. As discussed above, this Court has recognized that the right to a preliminary hearing "stems purely from statute and is not considered a constitutional right." *Klinkiewicz*, 35 Wis. 2d at 373. Its function "is not necessarily to protect a defendant's right to a speedy trial." *Stoeckle*, 41 Wis. 2d at 386.

As this Court recognized in *State v. O'Brien*, 2014 WI 54, ¶ 25, 354 Wis. 2d 753, 850 N.W.2d 8, "[t]he fact that Wisconsin has preliminary examinations at all exceeds the requirements" of the federal and state constitutions. Thus, "[t]here is no constitutional right to a preliminary examination." *State v. Schaefer*, 2008 WI 25, ¶ 32, 308 Wis. 2d 279, 746 N.W.2d 457. Accordingly, the "contention that this

statute is an implementation of the constitutional right to a speedy trial must fail." *Stoeckle*, 41 Wis. 2d at 387.

b. Lee's speedy trial claim fails under the *Barker* analysis.

Lee correctly notes that his speedy trial claim is analyzed under the framework set forth in *Barker*, 407 U.S. 514. (Lee's Br. 29.) In *Barker,* 407 U.S. at 521, 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 uses 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.[10] Courts determine whether a constitutional violation occurred under the totality of the circumstances. *Urdahl*, 286 Wis. 2d 476, ¶ 11.

The Seventh Circuit has explained that under the *Barker* analysis, "there is no per se rule of constitutional law

[10] The State does not contest that Lee timely invoked his right to a speedy trial.

that requires the states to bring their criminal defendants to trial within a fixed time failing which charges must be dropped." *United States 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.

(1) Lee's delay was not presumptively prejudicial.

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, 212–13, 455 N.W.2d 233 (1990).

Lee completely ignores this important first step in the *Barker* analysis. Lee's argument is based on the 113-day delay between his initial appearance and preliminary hearing. But under *Barker*, delays of less than a year are not presumptively prejudicial. Therefore, the analysis ends there.

Furthermore, Lee ignores that *Barker* is concerned with the delay from when a complaint is filed to when a trial occurred. As no trial occurred here, it is entirely premature to undertake the *Barker* analysis.

This was the precise holding of this Court in *Lemay*, 155 Wis. 2d at 214–15. There, the defendant appealed from the denial of a pretrial motion to dismiss based on a delay between the issuance of the complaint and warrant and service of the warrant. *Id.* at 203–04. On appeal, the defendant asked this Court to perform the *Barker* analysis and find prejudice despite the fact that no trial had yet

occurred. This Court succinctly stated: "This cannot be done." *Id.* at 214.

Lee's speedy trial claim fails on this basis alone.

(2) Delays to secure counsel are not attributed to the State.

Citing only a law review article, Lee argues that delays caused by the need to secure counsel should be attributed to the State. (Lee's Br. 29.) Lee is incorrect.

Under the *Barker* analysis courts are primarily concerned with intentional delays caused by the State "in order to hamper the defense," which are "weighted 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) (citation omitted). 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).

Here, the prosecution had no involvement in any of the postponements of Lee's preliminary hearing. Indeed, as the court of appeals noted, the State did not even appear at the review hearings. *Lee*, 396 Wis. 2d 136, ¶ 40.

And there is no evidence that the delays were an intentional effort to "hamper the defense." *Urdahl*, 286 Wis. 2d 476, ¶ 26. To the contrary, the delays Lee complains of were for his own benefit—to ensure he had the legal representation he was constitutionally entitled to. *See United States v. Low*, 452 F. Supp. 2d 1036, 1049 n.18 (D. Haw. 2006) (No Sixth Amendment violation due to delays "for the Defendant's benefit").

The cases mentioned in the law review article Lee cites do not help him. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981), was a civil rights action addressing whether a public defender acts "under color of state law." The court said nothing about delays caused by the need to secure counsel for a defendant under the *Barker* analysis.

Likewise, *Vermont v. Brillon*, 556 U.S. 81, 91–92 (2009), held that delays caused by assigned defense counsel were *not* attributable to the state. The court stated in *dicta* that this rule is not absolute and hypothesized that delays caused by the "systematic breakdown" of the public defender system *could* be attributed to the state. But the Court gave no indication of how to determine when a "systematic breakdown" occurs. And no case in Wisconsin has applied this exception to impute delays to the state.[11]

Therefore, the delays that occurred in this case either are "valid" delays that do not count or, at most, "neutral"

[11] Although the "systematic breakdown" exception was discussed in *State v. Provost*, 2020 WI App 21, ¶¶ 2, 4, 392 Wis. 2d 262, 944 N.W.2d 23, it was found not to apply.

institutional delays that do not weigh heavily against the State.

(3) Lee has not shown prejudice under *Barker*.

As discussed *supra*, Lee chose not to make a record of his claimed prejudice during the 113-day delay in holding his preliminary hearing. And *Barker* looks to a specific type of prejudice—whether the defendant can show an "inability . . . [to] adequately [ ] prepare his case." *Barker*, 407 U.S. at 532. Accordingly, courts look to 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 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.) Thus, Lee cannot show any of the types of prejudice identified in *Barker* or *Grimmond*.

And as this Court explained in *Lemay*, 155 Wis. 2d at 214, "evidence of prejudice is speculative until after trial." *Id.* at 214. Relying on *United States v. McDonald*, 435 U.S. 850, 858–59 (1978), this Court held that "a pretrial determination of prejudice to the defendant under a speedy trial analysis was speculative and premature." *Lemay*, 155 Wis. 2d at 215 ("Whether the state's witnesses' memories or lack thereof are prejudicial to the defendant's ability to present his defense can only be seen with finality at trial."). The only exception to this rule is where a defendant can demonstrate "extraordinary circumstances clearly showing substantial prejudice" to him. *Id.* Lee has not done so.

Accordingly, Lee's speedy trial claim is without merit.

3. Lee's right to procedural due process was not violated because he had a *Riverside* hearing and was in custody on other charges at all times.

Lee also claims that the delay in holding his preliminary examination violated his right to due process.[12] (Lee's Br. 24–28.) But Lee admits that "the probable cause finding in [his] case . . . met the basic requirements" of the constitution. (Lee's Br. 24.)

Indeed, the scope of Lee's right to procedural due process before extended pretrial confinement is established in *County of Riverside v. McLaughin*, 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 this 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

[12] Lee does not separately analyze his procedural and substantive due process arguments. But the substantive due process clause does not provide greater protections than textual constitutional rights. *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998). Thus, "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. v. City of Platteville*, 225 Wis. 2d 759, 775, 593 N.W.2d 84 (Ct. App. 1999) (citation omitted). Because Lee's substantive due process argument centers around his right to a speedy trial and right to counsel, he has no viable separate substantive due process claim that need be addressed. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 51, 235 Wis. 2d 610, 612 N.W.2d 59.

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. Such a proceeding need not be adversarial and the "sole issue is whether there is probable cause for detaining the arrested person pending further proceedings." *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975).

Here, the circuit court conducted a *Riverside* review and found probable cause for Lee's arrest on September 2, 2018. (R. 57:14.) Lee then 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 for the charges 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.

In arguing that the review hearing procedure employed by the circuit court violated his right to due process, Lee completely ignores that the purpose of these hearings was to ensure he had counsel for the preliminary hearing—a critical stage in the proceeding. Further, no probable cause determination was made at the review hearings.

Lee also relies on *Jauch v. Choctaw County*, 874 F.3d 425, 428 (5th Cir. 2017), (Lee's Br. 26), but that case has absolutely no relevance here. In *Jauch*, the plaintiff was taken into custody on several traffic tickets on 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.* 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 preliminary hearing on January 2, 2019, at which time he was bound over for trial. (R. 56:16–17.) 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, Lee's right to procedural due process was not violated in this case.

III. This Court should not use this case to establish an arbitrary date by which circuit courts must appoint counsel at county expense; any such requirement is a policy decision that is more appropriate for a rule petition.

A. No existing authority required the circuit court to appoint counsel for Lee at any point.[13]

At the court of appeals, Lee argued that the circuit court was required to appoint counsel at county expense after the preliminary hearing could not be held within 10 days of the initial appearance. *Lee*, 396 Wis. 2d 136, ¶ 33.[14] Lee relied primarily on, *State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (Ct. App. 1991), and this Court's order in *In re the Petition to Amend SCR 81.02*, S. Ct. Order 17-06, 2018 WI 83 (issued June 27, 2018, eff. Jan. 1, 2020) [hereinafter *Petition to Amend SCR 81.02*]. *Lee*, 396 Wis. 2d 136, ¶¶ 30–37. The court of appeals properly concluded that neither authority mandated any such appointment. *Lee*, 396 Wis. 2d 136, ¶ 33 ("Lee considerably overreads the authorities he cites.").

The State does not dispute that circuit courts have inherent authority to appoint counsel. *Douglas Cnty. v.*

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[13] Given that Lee has had permanent counsel since his preliminary hearing and that the court of appeals reversed the circuit court's order denying Lee's motion to dismiss, the issue of appointment of counsel in this case technically is moot, and this Court need not address it to adjudicate the present dispute. *See PRN Assocs. LLC v. State, Dep't of Admin.*, 2009 WI 53, ¶ 25, 317 Wis. 2d 656, 766 N.W.2d 559 ("An issue is moot when its resolution will have no practical effect on the underlying controversy."). The State nonetheless addresses this issue in the event that this Court concludes that one of the exceptions to the mootness doctrine applies. *Id.* ¶ 29 & n.11.

[14] It is unclear from Lee's brief to this Court whether he is renewing his argument that existing law required the circuit court to appoint counsel for him or whether he is merely seeking a prospective declaration from this Court. (Lee's Br. 14–21.) Accordingly, the State addresses both contentions.

Edwards, 137 Wis. 2d 65, 76–77, 403 N.W.2d 438 (1987). But neither *Dean* not any other authority mandates such an appointment at any particular time *while SPD is searching for counsel*.

Dean, 163 Wis. 2d at 513–15, merely held that circuit courts are not bound by SPD indigency criteria and have inherent authority to appoint counsel at county expense. 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 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.*

But unlike *Dean*, there is no dispute in this case that Lee qualified for SPD representation. Therefore, the holding of *Dean* does not govern here. Moreover, *Dean* simply does not answer the issue presented here—the precise time a court is legally required to appoint counsel at county expense *when SPD is still seeking representation*. Whereas SPD in *Dean* refused to represent the defendant under its indigency criteria, here, it is undisputed that SPD was actively searching for counsel to represent Lee; Attorney O'Neill said so in open court at Lee's bail review hearing. (R. 50:4.) And counsel was appointed.

Likewise, this Court's mandate in *Petition to Amend SCR 81.02* did not establish a requirement that circuit courts must appoint counsel at county expense anytime SPD cannot make an appointment within 10 days of the initial appearance. In *Petition to Amend SCR 81.02*, this Court amended SCR 81.02 to change the rate of compensation for

court-appointed attorneys to $100 per hour. *Petition to Amend SCR 81.02* at 18. The petition asked this 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. This Court granted the first item of requested relief, amending SCR 81.02(1), but refused to grant the other two items of relief. *Id.*

In so ruling, this 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. This Court recognized that increasing the rate of compensation for court-appointed attorneys would "have a profound impact on existing county budgets." *Id.* at 15. This 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.*

But, as the court of appeals recognized, this language was not part of this Court's mandate in *Petition to Amend SCR 81.02*. *Lee*, 396 Wis. 2d 136, ¶ 36. Indeed, nothing in this Court's mandate in *Petition to Amend SCR 81.02* says that circuit courts must appoint counsel at county expense anytime SPD cannot make an appointment within 10 days of the initial appearance.

This Court's mandate merely amended SCR 81.02 to reflect a rate increase for court appointed attorneys. *Petition to Amend SCR 81.02* at 18–19. It said nothing about when such appointments are required to be made. Indeed, Lee even admits that "[t]he constitutional underpinnings behind the mandate in the fee petition need to be developed by this Court." (Lee's Br. 20.)

And even if this Court construes its mandate in *Petition to Amend SCR 81.02* as requiring appointment of counsel at county expense in some cases, this Court's mandate does not answer the question of *when* the duty to appoint is triggered; nor does it specify that county appointments must occur if SPD counsel cannot be found for nonfinancial reasons. That is, *Petition to Amend SCR 81.02* does not specify when or how circuit courts are supposed to determine "[i]f lawyers are unavailable or unwilling to represent indigent clients at the SPD rate." *Id.* at 15. And there is no evidentiary record in this case establishing that SPD's delay in appointing permanent counsel for Lee was the result of its rate of pay as opposed to other considerations, such as the lack of conflict-free counsel.

For these reasons, no existing legal authority requires circuit courts to appoint counsel for indigent defendants at county expense while SPD is actively searching for permanent counsel. Certainly, no authority requires such an appointment if SPD cannot locate permanent counsel within 10 days of the initial appearance.

B. Any prospective mandate requiring appointment of counsel at county expense should be made through this Court's ruling making authority.

To the extent Lee is asking this Court to establish a prospective requirement that circuit courts appoint counsel at county expense at any given point in time,[15] this case is not the proper vehicle for it to do so. Rather, any such mandate requires a careful balancing of the duties of SPD and the numerous challenges it faces in appointing counsel alongside

[15] Lee no longer appears to argue for a ten-day requirement, instead arguing that such an appointment should be made "when it becomes obvious that the SPD cannot appoint within the proper time frames." (Lee's Br. 19–20.) He does not explain when this proposed threshold would be satisfied.

the practical constraints on circuit courts. In other words, the type of mandate Lee seeks requires factfinding and policy decisions that are much better suited to a rule petition. Indeed, the fact that this Court addressed a similar issue in *Petition to Amend SCR 81.02* strongly suggests that rulemaking (not this appeal) is the proper avenue for considering Lee's proposal.

In order to frame this discussion, the State notes that under 2019 Wis. Act 9, §§ 2244, 2245 the Legislature increased the rate paid to private attorneys for SPD appointments from $40 to $70 an hour, effective January 1, 2020. However, it is too soon to determine what practical effect this has had on private attorneys willing to take SPD appointments, particularly given the institutional restrictions of the past year due to the COVID-19 pandemic. *Lee*, 396 Wis. 2d 136, ¶ 29 n.14.

And, as the court of appeals recognized, there are numerous reasons why SPD may have difficulty appointing counsel in any particular case. These include: (a) "a general or geographic lack of attorneys qualified to accept an appointment for a particular type of case"; (b) "attorneys may have conflicts of interest that preclude them from representing a particular defendant"; (c) "[a]n attorney's existing caseload may also prevent him or her from taking on another client;" or (d) "attorneys may not be willing to represent clients at the statutory SPD rate." *Id.* ¶ 53. Again, the record is this case does not establish *why* SPD was not able to appoint counsel for Lee at an earlier date. *Id.* ¶ 52.

Additionally, any rule requiring circuit courts to appoint counsel at county expense while SPD is searching for counsel "would have major budgetary ramifications for Wisconsin's counties." *Lee*, 396 Wis. 2d 136, ¶ 37. This Court recognized as much in *Petition to Amend SCR 81.02* at 15.

All of these considerations combined mean that any prospective rule from this Court requiring circuit courts to appoint counsel at county expense while SPD is actively searching for counsel has to carefully balance several considerations and take into account numerous variables.

For instance, SPD has an entire regulatory scheme for qualifying attorneys willing to represent indigent defendants and the circumstances under when such appointments are made. Wis. Admin. Code § PD. What happens if the reason SPD cannot locate counsel is not due to funding disparities—i.e., if there is a lack of conflict-free qualified attorneys with time to take on representation of indigent defendants in rural counties? How are circuit courts to make such appointments? Are they limited to selecting attorneys who are appropriately certified under Wis. Admin. Code § PD 1? And what happens when a court locates counsel independently, but counsel is not able to comply with a defendant's speedy trial demand due to counsel's schedule? Assuming the issue *is* funding, what happens when a rural county simply lacks the budget to make such appointments?

These are significant policy considerations that need to be taken into account before this Court imposes a mandatory duty on circuit courts to appoint counsel at county expense. Therefore, even if this Court were to conclude that the county-appointment mandate Lee seeks is sound policy, this case is not the appropriate vehicle to implement such a policy. Instead, any such rule should be the result of this Court's rule-making authority, where the Court can hear testimony as to the significant budget implications of a mandatory county appointment rule, the practicalities of when and how appoints should be made, and the effect of any such rule on the operations and mission of SPD.

Accordingly, this Court should not use this case as a vehicle to establish any prospective rule concerning when

circuit courts are required to appoint counsel at county expense while SPD is actively searching for counsel.

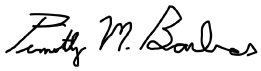
CONCLUSION

This Court should affirm the court of appeals' decision.

Dated this 8th day of July 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin



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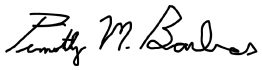
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (c) (2019-20) for a brief produced with a proportional serif font. The length of this brief is 9,812 words.

Dated this 8th day of July 2021.



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

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12) (2019-20).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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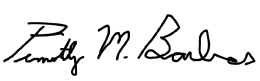

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