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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2019AP221 - CR
(Marathon County Case No. 2018CF1025)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NHIA LEE,

Defendant-Respondent-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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

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The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief seeking to have this Court clarify that systemic difficulties appointing counsel within a reasonable time for indigent defendants are not cause for granting an adjournment of the preliminary hearing under Wisconsin Statutes §970.03(2). Such clarification will avoid violating a defendant's state and federal rights to counsel or violating a defendant's right to a speedy trial. *See* U.S. const. amend. iv, xiv; Wis. const. art. I, §7.

What time is reasonable may vary depending upon the circumstances of the case. In assessing whether a particular delay should overcome the statutory presumption that any delay longer than 10 days (or, at most, 20 days) is unreasonable, courts should focus on the needs of the defense

as well as institutional needs and concerns, especially when the defendant lacks an attorney to present that focus to the court. Courts should focus on the nature of the crime (including the evidence that may be presented at trial in that type of crime and how likely time is to affect its availability[1]), whether this case is the sole case holding the defendant in custody, whether law enforcement seeks to interrogate the defendant, whether the case involves multiple defendants racing to cooperate with the state, the strength of the case against the defendant as best can be determined from the complaint, as well as the length of the delay and how long it realistically will continue, the extent of the efforts the Office of the State Public Defender made to obtain counsel, and the possibility that the court itself could locate and appoint counsel.[2] The monetary costs of appointing counsel at county expense is *not* an appropriate consideration because they should not be allowed to trump a defendant's constitutional rights.

When a circuit court fails to take all of the relevant facts into account, a misuse of discretion occurs, *see* ***State v. Daniels***, 160 Wis.2d 85, 100, 465 N.W.2d 633 (1991), cause

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[1] Courts will consider this issue independently and without the assistance of defense counsel. Courts should remember that encouraging defendants to volunteer this information creates the possibility of defendants incriminating themselves, which is contrary to at least the spirit of the Fifth Amendment and Wisconsin Constitution Article I, §8. As a result, courts should hesitate before assuming that no problem with evidence exists.

[2] Wisconsin courts have the authority to appoint counsel and need not wait for the Office of the State Public Defender. ***County of Dane v. Smith*****,** 13 Wis. 585, 586 (1861); *see also* S. Ct. Order 17-06, 2018 WI 83 at 12.

ceases to exist, and the defendant must be discharged, Wis. Stats. §970.03(9). The right to counsel and the preliminary hearing requirement mean the case can no longer proceed, at least not as a felony. WACDL takes no position on whether the dismissal here should be with or without prejudice, but WACDL notes that the harm carries over to any renewed prosecution when the failure to appoint counsel causes favorable evidence to be lost or permanently harms the defendant's case.

Moreover, the length of the delay itself eventually outweighs these other factors, as occurred here. Adjournments of nearly a third of a year and adjournments lasting more than ten times the length of the statutory deadline clearly are not reasonable.

ARGUMENT

Systemic difficulties in appointing counsel for an indigent defendant within a reasonable time are not "cause" under §970.03(2) for adjournment of a preliminary hearing

Wis. Stats. §970.03(2) requires that a preliminary examination be commenced "within 10 days [after the initial appearance] if the defendant is in custody and bail has been fixed in excess of $500." This time is half of the 20-day time period allowed if the defendant has been released from custody, *id.*, and reflects concern for liberty. The statute allows a court to extend the time either by stipulation or "on motion and for cause."

Generally, adjourning a preliminary examination for cause is within the circuit court's discretion. ***State v. Selders***, 163 Wis. 2d 607, 472 N.W.2d 526 (Ct. App. 1991) (allowing, on the state's adjournment one day outside the deadline for a

line-up). But discretion is not "unfettered decision making." ***Daniels***, 160 Wis.2d at 100. Discretion must reflect the "reasoned application of the appropriate legal standard to the relevant facts in the case." ***Id.*** This case therefore requires this Court to interpret what "for cause" means in this statute and determine whether the circuit court applied the law correctly.

Wisconsin statutes do not define "for cause," *see* Wis. Stats. §§939.22, 990.01, and ordinary dictionaries are of little help as they define "cause" as "sufficient reason," *see, e.g.*, https://www.merriam-webster.com/dictionary/cause, def. 1d. These sources do not explain what is "sufficient" or whether the State Public Defender's inability to appoint counsel within a reasonable time is "sufficient" to constitute "cause" under the statute.

One of the key rules of statutory interpretation is that the legislature intended to adopt a constitutional statute. ***Am. Fam. Mut. Ins. Co. v. Wisconsin Dep't of Revenue***, 222 Wis. 2d 650, 667, 586 N.W.2d 872 (1998). As a corollary, "[a] court should avoid interpreting a statute in such a way that would render it unconstitutional when a reasonable interpretation exists that would render the legislation constitutional. ***Id***. at 667.

A. Interpreting "for cause" to allow more than minimal delay for appointment of counsel violates the state and federal rights to counsel.

Both the federal and state constitutions grant defendants the right to the effective assistance of counsel. U.S. const. amend. vi, xiv; Wis. const. art. I, §7. Defendants are entitled to "the guiding hand of counsel at every step in the proceedings," ***Gideon v. Wainwright***, 372 U.S. 335, 345 (1963) and the right to counsel attaches "when the accusation

prompts arraignment and restrictions on the accused's liberty to facilitate the prosecution," ***Rothgery v. Gillespie Co., Tex.***, 554 U.S. 191, 207 (2008). It attaches then because the defendant is "'faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law' that define his capacity and control his actual ability to defend himself against a formal accusation that he is a criminal." ***Id***. (quoting ***Kirby v. Illinois***, 406 U.S. 682, 689 (1972)).

Defendants have a right to counsel for the entire period between initial appearance and trial, including the preliminary hearing, ***State v. O'Brien***, 2014 WI 54, ¶40, 354 Wis.2d 753, 850 N.W.2d 8 (citing ***Coleman v. Alabama***, 399 U.S. 1, 10 (1970)). "[T]o deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself," ***Maine v. Moulton***, 474 U.S. 159, 170 (1985). Pretrial time may be the "most critical period of the proceedings," ***Powell v. Alabama***, 287 U.S. 45, 57 (1932).

This period "encompasses counsel's constitutionally imposed duty to investigate the case." ***Mitchell v. Mason***, 325 F.3d 732, 743 (6th Cir. 2003). What happens before trial "might well settle the accused's fate and reduce the trial itself to a mere formality." ***United States v. Wade***, 388 U.S. 218, 224 (1967).

Depriving defendants of counsel in this critical pre-trial stage based solely upon the inability to appoint counsel violates the right to counsel. When counsel is not provided at critical stages in the proceedings, the right to counsel is violated, regardless whether criminal law provides a remedy. *See, e.g.,* ***Hurrell-Harring v. State***, 930 N.E.2d 217 (N.Y. 2010) (holding civil remedy available); ***Wilbur v. City of***

Mount Vernon, 989 F.Supp.2d 1122 (2013) (same).

"***Gideon's*** clear command to state courts would be a dead letter if states...need only go through the motions." ***Kuren v. Luzerne Co.***, 146 A.3d 715, 737 (Pa. 2016). "As the United States Supreme Court recognized in ***United States v. Cronic***, 466 U.S. 648, 654-55 (1984), "[i]f no actual 'Assistance' "for' the accused's 'defence' is provided, then the constitutional guarantee has been violated."

Establishing a deprivation of the right to counsel is not the same as establishing a deprivation of the *effective* assistance of counsel. Violation of the right to effective assistance of counsel by a specific attorney requires defendants to show their counsel's deficient performance and prejudice. ***Strickland v. Washington***, 466 U.S. 668 (1984). It therefore can only be established after the case has concluded.

But even in criminal law, the ***Stickland*** test is inappropriate when cases involve an absence of counsel as opposed to an error by counsel. *See* ***Cronic***, 466 U.S. at 659. ***Strickland*** does not apply when it becomes "unlikely that the defendant could have received the effective assistance of counsel," regardless of the lawyer's skill. *See* ***id.*** at 661. "The presumption that counsel's assistance is essential" compels the conclusion "that a trial is unfair if the accused is denied counsel at a critical stage of his trial." ***Id***. at 659. Moreover, circumstances may be so bad that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." ***Id.*** at 59-60.

Similarly, defendants can fail to meet the ***Strickland*** test and still have a claim of violation of the right to counsel

under civil law because "deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment." ***Luckey v. Harris***, 860 F.2d 1012, 1017 (11th Cir. 1988). For civil prospective relief, the considerations of finality, post-trial burdens, and concern for the independence of counsel do not apply and therefore, unlike in criminal cases, no showing of prejudice is required. ***Luckey***, 860 F.2d at 1017.

Delaying the appointment of counsel for months near the beginning of a case can severely harm defendants. Without an attorney, "[c]ritical stage opportunities may pass without a defendant's knowledge, and even if they can be revisited, the opportunity to develop them as fully had counsel been available may be impaired." ***Lavallee v. Justices In Hampden Superior Ct.***, 812 N.E.2d 895, 903–04 (Mass. 2004).

As time passes, favorable physical evidence such as store videos and cell phone information can be lost. Locating favorable witnesses can become harder. Failing to interview the defendant and witness while events are fresh in memory may not be fixable later. ***Id***. at 1414. "The effects of the passage of time on memory or the preservation of physical evidence are so familiar that the importance of prompt pretrial preparation cannot be overstated." ***Id***.

Without an attorney, no one will "evaluate the impact that each decision or action may have at later stages," *See* ABA Criminal Justice Standards for the Defense Counsel, Standard 4-1.3(f) (4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/, and some decisions will not wait. In multi-defendant cases, for example, deciding to cooperate usually has more benefit earlier.

Defendants without an attorney to make motions to lower bail–who therefore remain in custody when they might not otherwise–are "more likely to be sentenced and receive longer sentences compared to defendants who were out of jail confinement during pretrial, regardless of similarity in offense type and other relevant legal and case factors." Natalie R. Ortiz, County Jails at a Crossroads: An Examination of the Jail Population and Pretrial Release, National Association of Counties (2015), https://www.naco.org/sites/default/files/documents/Final%20paper_County%20Jails%20at%20a%20Crossroads_8.10.15.pdf. The longer to resolution, the more likely defendants will lose jobs and housing before returning to the community.

This Court therefore should interpret "for cause" in Section 970.03(2) to avoid denial of the right to counsel.

B. Interpreting "for cause" to allow more than minimal delay for appointment of counsel significantly raises the likelihood of violations of constitutional rights to a speedy trial.

The legislature passed Section 970.03 in "an attempt to speed up the criminal justice procedures." Prefactory Note, Laws of 1969, ch. 255. The statute therefore established, for the first time, a period within which the preliminary examination must commence. ***Id***. Thus, although the function of the predecessor statute, Wis. Stats. § 954.05(1) (1965-66), was "not necessarily to protect a defendant's right to a speedy trial," *see* ***State v. Stoeckle***, 41 Wis.2d 378, 386, 164 N.W.2d 303 (1969), the legislature saw the time limits in Section 970.03 as serving that function.

Both the state and federal constitutions guarantee a defendant the right to a speedy trial, U.S. const. amend. vi, xiv; Wis. const. art. I, §7, which attaches when the first official accusation occurs, ***State v. Borheghi***, 222 Wis. 2d 506, 511,

588 N.W.2d 89 (Ct. App. 1998). In assessing whether a speedy trial violation has occurred, the "triggering mechanism" is the length of the delay under either the state or federal constitution. ***Barker v. Wingo***, 407 U.S. 514, 530 (1972)***; State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis.2d 426, 704 N.W.2d 324. Courts measure the length of the delay from the accusation to the trial, rather than to the preliminary hearing, but delay becomes "presumptively prejudicial" when it approaches a year. ***State v. Provost***, 2020 WI App 21, ¶27, 392 Wis.2d 262,944 N.W.2d 23.

Delays in preliminary hearings impact the time between the accusation and trial. Circuit courts must wait to allow a defendant to enter a plea or hold a trial until the defendant has been bound over following either the preliminary hearing or a waiver of it. Wis. Stats. §970.03(3) & (7). When lack of appointed counsel delays the preliminary hearing, the case may approach that triggering year even before any motions are made or discovery occurs. In this case, for example, the complaint was filed on September 10, 2018, and the preliminary hearing was held on January 2, 2019, approximately one-third of a year later.

Once there is presumptive prejudice, courts consider the reasons for the delay. ***Urdahl***, 286 Wis.2d 486, ¶11. When the SPD's recurring, systemic inability to appoint counsel causes delay, that situation fits an exception to the general rule that delays caused by counsel are attributed to the defendant. ***Vermont v. Brillon,*** 556 U.S. 81, 93 (2009). Such a delay is attributed to the state for speedy trial purposes. ***Id***.; *see also* ***Coleman v. Thompson***, 501 U.S. 722, 754 (1991) (When the right to counsel attaches, the state bears the "responsibility to ensure that petitioner was represented by...counsel. The consequences of any failure to do so are "imputed to the State.")

A delay is systemic if it is "'both institutional in origin and debilitating in scope.'" ***Provost***, 2020 WI App 21, ¶40 (quoting ***State v. Ochoa***, 406 P.3d 505, 514 (N.M.2017)). Here, the delay was "'both institutional in origin and debilitating in scope.'" *See* ***id.***

Two months before this case began, this Court recognized the systemic issues. S. Ct. Order 17-06. As this Court noted, "[c]hronic underfunding of the Office of the State Public Defender (SPD) has reached a crisis point." ***Id.*** at 1. The SPD admitted to the Court that the inadequate reimbursement rate "severely disrupt[ed] both the quantity and quality of representation" and this Court acknowledged that the decrease in available private bar lawyers had reached "a state of crisis in Northern Wisconsin." *See* ***id.*** at 6. Moreover, this Court noted its deep concern about the "impact of prolonged underfunding of the SPD" and agreed that "significant delays in the appointment of counsel" compromised the integrity of the court system. ***Id.*** at 17.

Thus, unlike in ***Provost***, 2020 WI App 21, ¶42. "there is a problem whose origin lies with the SPD system itself" and a systemic breakdown occurred. Nor do the State's cases from other jurisdictions suggest otherwise. ***York v. United States***, 389 F.2d 761 (6th Cir. 1968), ***Cowart v. Hargett***, 16 F.3d 642, 647 (5th Cir. 1994), and ***United States v. Varca***, 896 F.2d 900 (5th Cir. 1990) are pre-***Brillon*** cases. In any event, York waived his issue by failing to raise it in the lower court while Hargett failed to demonstrate sufficient delay for presumptive prejudice and Varca was seeking retained, not appointed, counsel.

To some extent, the third factor in the speedy trial analysis implicates the constitutional right to counsel. The third factor in the speedy trial analysis involves whether and

when the defendant asserts his or her right to a speedy trial. ***Urdahl***, 286 Wis.2d 476, ¶11. Defendants may be uneducated or not speak English. In those situations, a real possibility exists that they will fail to timely assert their speedy trial rights or will do so incorrectly. Thus, the delay in appointing counsel itself may contribute to depriving defendants of speedy trial protections.

The final factor in the speedy trial analysis is whether the delay prejudices the defendant. ***Id***. "Courts consider the element of prejudice with reference to the three interests that the right to a speedy trial protects: prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense," with the last being considered most significant. ***Id***., ¶34. Pretrial incarceration is particularly likely to be oppressive without an attorney who can make reasonable requests of the court. For example, some counties allow funeral release under some circumstances, but unrepresented defendants may not know how to obtain it.

Anxiety and concern among the unrepresented accused will be higher than normal. Unrepresented defendants lack someone to explain procedures and therefore feel more isolated. Without an attorney, no one will "communicate and keep [defendants] informed and advised of significant developments and potential options and outcomes." *See* ABA Criminal Justice Standards for the Defense Counsel, Standard 4-1.3(d).

This Court therefore should interpret "for cause" in Section 970.03(2) to avoid making a speedy trial violation more likely.

CONCLUSION

WACDL therefore asks that this Court hold that

systemic difficulties in appointing counsel within a reasonable time for indigent defendants are not cause under Wisconsin Statutes §970.03(2) for granting an adjournment of the preliminary hearing.

Dated at Milwaukee, Wisconsin, August 5, 2021.

Respectfully submitted,

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WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,974 words.

Electronically signed by Ellen Henak
Ellen Henak

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WIS. STAT. (RULE) 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this petition is identical to the text of the paper copy of the brief.

Signed electronically by Ellen Henak
Ellen Henak