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SUPREME COURT

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 NATIONAL 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**

Jerome F. Buting
State Bar No. 1002856

Buting, Williams & Stilling, S.C.
400 N. Executive Dr., Ste 205
Brookfield, WI 53005
262-821-0999
jbuting@bwslawfirm.com

Counsel for the National Association of
Criminal Defense Lawyers

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**NONPARTY BRIEF OF NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS**

The National Association of Criminal Defense Lawyers ("NACDL") submits this nonparty brief to address why the prompt appointment of counsel is critical to ensure a defendant is able to quickly seek pretrial release, provide his attorney with information for purposes of investigating and evidence gathering, and consult with his attorney on issues relating to the disposition of the case.

NACDL is uniquely situated to provide insight into the role and impact of defense counsel. Its tens of thousands of direct and affiliate members include public defenders, court appointed attorneys, and retained counsel in state, federal, and military courts throughout the country. NACDL has engaged in extensive policy, training, and amicus efforts relating to pretrial representation; worked alongside diverse partners to administer federal grant funds that help redress wrongful

convictions; and served as a leader in the study of systemic issues including the trial penalty, state and federal public defense systems, collateral consequences, and discovery reforms.

It is unclear how many people in Wisconsin are waiting for attorneys to be appointed, how long they have been waiting, or when they can reasonably expect to receive the representation to which they are constitutionally entitled.¹ Delays in providing attorneys have ripple effects that reverberate throughout the system. Those harmed await restitution, return of their property and closure to this chapter in their lives; witnesses find their memories fading as critical details become hazy, or lost; and communities lose faith in their legal system for justice delayed is justice denied.

ARGUMENT

The Sixth Amendment ensures an individual the right "to have the Assistance of Counsel for his defence." U.S. const. amend. vi. Our adversarial system requires more than having a lawyer at trial, for many events happen prior to trial that, "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). "[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).

Courts bear the ultimate responsibility for the quality of justice in their

¹See e.g., Dan Truttschel, Defendant in shooting incident still without counsel, court commissioner delays hearing. Kenosha News, August 3, 2021, https://www.kenoshanews.com/news/local/crime-and-courts/defendant-in-shooting-incident-still-without-counsel-court-commissioner-delays-hearing/article_ea12c7cf-cb8e-50f3-bb84-ba9a07db509d.html; Ben Krumholz, Public Defender shortage causing delays, driving up local costs. Fox 11 News, March 3, 2021, <https://fox11online.com/news/local/green-bay/court-officials-public-defender-shortage-causing-delays-driving-up-local-costs>; Karen Madden, Justice Delayed: shortage of attorneys leaves poorest defendants in jail as cases drag on. Wisconsin Rapids Daily Tribune, August 20, 2019, <https://www.wisconsinrapidstribune.com/in-depth/news/2019/08/20/wisconsin-public-defender-shortage-leaves-poor-jailed-cases-stalled/1139227001/>.

community which includes ensuring a defendant is provided counsel within a "reasonable time" after his right attaches and he has made clear his desire to be represented. *Rothgery v. Gillespie Co.*, Tex., 554 U.S. 191, 207 (2008). Every day that passes awaiting the recruitment of counsel, can reduce the value of that counsel as the defendant loses more of his ability to meaningfully meet the state's charges.

I. Lengthy delays in the appointment of counsel unconstitutionally prejudices the accused's ability to mount a defense.

There are "myriad responsibilities that counsel may be required to undertake that must be completed long before trial if the defendant is to benefit meaningfully from his right to counsel." *Lavallee v. Justices In Hampden Superior Ct.*, 812 N.E.2d 895, 903-04 (Mass. 2004). The ABA's Criminal Justice Standards includes a laundry list of actions defense counsel should undertake. Among the "Prompt and Thorough Actions to Protect the Client" are informing a defendant of their rights, taking steps to preserve evidence, developing an investigative strategy, and considering opportunities for cooperation which "will be lost if not pursued quickly." ABA Criminal Justice Standards for the Defense Counsel (4th ed. 2017) ("ABA Defense Standards")², Std. 4-3.7.

A. Failing to appoint counsel promptly hinders opportunities for pretrial release.

One of the core responsibilities of counsel is to pursue the client's release from custody. ABA Defense Standard Std. 4-3.2 ("In every case where the client is detained, defense counsel should discuss with the client, as promptly as possible, the client's custodial or release status and determine whether release, a change in release conditions, or less restrictive custodial conditions, should be sought.") This is because a person's pretrial status directly impacts the trajectory of his entire case.

²Online:
https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/

An example of this dynamic is illustrated in *Rothgery v. Gillespie County*. In that case, Walter Rothgery was arrested on a charge of possession of a firearm by a person convicted of a felony, with bail set at \$5,000. He faced up to 10 years in prison. *Rothgery*, 554 U.S. at 196. In the 6 months following his posting bond, *Rothgery* made numerous requests for counsel. The court, following local practice, deferred appointing counsel until indictment. Once the indictment was returned, the court raised Rothgery's bail to \$15,000, and he was re-arrested. After several weeks in jail, Rothgery was finally assigned an attorney. The lawyer quickly obtained a bail reduction, gathered documentation showing Rothgery had never been convicted of a felony, and secured dismissal of the charge. *Id.* at 196-97. Had counsel been appointed earlier in the process, Rothgery would have avoided spending 6 months on bond and 3 weeks in jail for a crime he did not commit.

Having counsel to advocate for the defendant improves their likelihood of pretrial release. "Without counsel present, judicial officers made less informed decisions and were more likely to set or maintain a pretrial release financial condition that was beyond the individual's ability to pay." Douglas L. Colbert, et al., *Do Attorneys Really Matter? The Empirical and Legal Case for Representation at Bail*, 23 *Cardozo L. Rev.* 1719, 1720 (2002). Those released prior to trial are more likely to have their charge dismissed, be acquitted at trial, or have their conviction deferred. They are less likely to be sentenced to jail or prison, and, if incarcerated, serve significantly shorter sentences than their incarcerated peers. Dottie Carmichael & Miner P. Marchbanks III, *Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes, and Costs*, Texas A&M University Public Policy Research Institute (Oct. 2012) ³; Will Dobbie, et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly*

³Online at: <https://ppri.tamu.edu/files/WichitaPDOSTudy.pdf>

Assigned Judges, 108 Am. Economic Rev. 201 (2018)⁴. Those released pretrial are also less likely to be rearrested for up to 2 years after their case ends. Christopher Lowenkamp, et al., *The Hidden Costs of Pretrial Detention*, LJAF (2013)⁵.

B. Delaying the appointment of counsel prevents early investigation and evidence gathering.

Among the most important pretrial responsibilities of counsel is to conduct a prompt investigation. "Even if the judge released the defendant from custody and stays all actions in the case—that is, even if the case procedure remains static while the defendant is on the waiting list [for counsel]—the condition of the evidence is not static. Each day's delay in the investigation for the defendant and preserving of evidence accrues to the defendant's detriment." *David v. Missouri*, Cole County Cir. Ct., Order of Feb. 18, 2021, at 1 (Class action lawsuit challenging Missouri's use of waiting lists because of a shortage of public defenders to take eligible cases.)

Early appointment of counsel can help a defendant gather the information needed to corroborate a legal or factual defense, undermine the credibility of a government witness or theory, lessen the degree of the offense or minimize his role, or mitigate his sentence. When a lawyer is promptly identified, assigned, and engaged with their client they can:

- Document bruises, abrasions, and other injuries before they heal to corroborate self-defense claims.
- Capture critical, but transient features of relevant locations, such as foliage on the trees, construction on a roadway, a dimmed streetlamp, or obscured signage on a fence.

⁴Online at: <https://www.aeaweb.org/articles?id=10.1257/aer.20161503>

⁵Online at: https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf

- Locate and interview witnesses before their memories fade or they change jobs or addresses.
- Recover video surveillance footage from stores, home security systems, red light cameras, and automated license plate readers before retention policies call for their erasure.⁶
- Capture social media posts, preserve text messages, and document other digital content before it is deleted.⁷
- Identify a lack of organized thinking, paranoid statements, delusional beliefs, and racing thoughts that can be the indicia of serious mental illness. Prompt identification and recognition of mental illness can both provide corroboration for a plea of not guilty by reason of mental disease or defect or other mental health-based defense and minimize risks of significant deterioration that cause lengthy restoration of competency efforts.

For example, on November 22, 2015, a flurry of bullets ripped through a crowd

⁶Because of volume, businesses regularly purge surveillance video content. This is especially true for cameras which record 24/7. See e.g. *How Much Video Surveillance Storage Does My Business Need?* Business News Daily, March. 10, 2021, (recommending most small and mid-size businesses retain video footage for 30 days) <https://www.businessnewsdaily.com/16024-video-surveillance-storage.html#:~:text=It%20depends%20on%20the%20amount,for%20three%20months%20or%20more>. Similarly, state laws or local police polices may require regular destruction of footage from red light cameras and automated license plate readers believed to be of no known evidentiary value. See e.g. National Conference of State Legislatures Automated License Plate Reader Statutes, State Statutes Related to Privacy and Data Retention, <https://www.ncsl.org/research/telecommunications-and-information-technology/state-statutes-regulating-the-use-of-automated-license-plate-readers-alpr-or-alpr-data.aspx>

⁷Whether intentionally deleted to prevent discovery or removed because of ignorance as to its evidentiary value, social media posts, text messages, and other digital content can quickly become beyond the reach of the defense, making it critical to photograph, download, or otherwise preserve this information. Major cell phone providers, for example, may retain call detail records (date, time, and number contacted) for several months, but retain the *content* of the communication for days. Joseph B. Evans, *Cell Phone Forensics: Powerful Tool Wielded By Federal Investigators*, Fordham J. Corp. and Fin. Law, blog post June 2, 2016.

at Bunny Friend Park in New Orleans. Seventeen people were injured, including a 10-year-old boy, in what investigation later determined to be a dispute between two rival gangs. An eyewitness identified Joseph Allen as one of the shooters, picking him out of a lineup. Allen had a long criminal record, including a prior arrest for a firearm charge, and was a known member of one of the gangs involved. Although his family insisted Allen was in Houston on a shopping trip with his girlfriend at the time of the shooting, within days the police had a warrant charging Allen with 17 counts of attempted murder. Allen turned himself in and appeared before a hearing officer the following day where bail was set at \$1.7 million.⁸

His family was able to hire a lawyer, who immediately spoke with Allen and his girlfriend, getting important details of the events, and hiring an investigator. Within days the investigator secured surveillance footage from three different Houston stores that showed Allen and his girlfriend shopping at the time the shooting occurred. Within 2 weeks of his arrest, the charges against Allen had been dropped.⁹

If these events had occurred in Marathon County or many other Wisconsin counties where people wait weeks and months to get counsel, the critical video footage would have long been deleted, leaving Allen to convince a jury to believe the bare alibi testimony of a convicted felon and his girlfriend.

The defense cannot rely upon the efforts of the police and prosecution, who are already actively marshalling their evidence against the accused. Rather, it is a core function of the defense lawyer to promptly interview the client and identify areas for investigation. ABA Defense Standard Std. 4-4.1(c) ("Defense counsel should conduct

⁸Ken Daley, *Bunny Friend Park shooting suspect arrested on word of single witness*, documents show, Nola.com, November 30, 2015
https://www.nola.com/news/crime_police/article_7bcaa5b4-fcec-56d4-b1dd-c6ff4bc8909b.html

⁹Jonathan Bullington, *Joseph Allen, once Bunny Friend Park shooting suspect, released from jail*, Nola.com, December 10, 2015.
https://www.nola.com/news/crime_police/article_9b1e211c-1d31-550f-9e94-8a1dc5ab0a6d.html

a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the matter" including conducting an "independent investigation.")

C. Failing to appoint counsel promptly delays critical counseling and negotiations.

Even in instances in which there is no bond to be set, no investigation to be undertaken, no witnesses to locate, and no evidence to marshal, the early engagement of counsel is still very much needed to serve as a defendant's advisor, counselor, and negotiator.

In multi-defendant cases, or those involving complex, insular organizations like gangs or drug trafficking rings, police and prosecutors may seek the assistance of confidential informants and cooperating witnesses. In such instances, cooperation can mean the reduction of sentence, the amendment of charges, or even outright dismissal of the case. But cooperation is often a "first come, first served" proposition, with only one defendant able to reap the benefits. *See e.g. United States v. Maddox*, 48 F.3d 791, 796-97 (4th Cir. 1995) (holding the government can offer a sentencing benefit to whichever defendant plead first and deny that benefit to the other in order to expedite the plea bargaining process) and ABA Defense Standard Std. 4-6.2(g) ("Defense counsel should be aware of the possible benefits from early cooperation with the government").

In such circumstances a defendant awaiting the appointment of counsel will be shut out of this critical opportunity to cooperate as he has no one to discuss with him the benefits and risks of such a decision, negotiate the offer on his behalf, or even indicate his interest in such an undertaking, and the prosecution cannot extend such an offer to a defendant who has requested counsel but is currently unrepresented.

Similarly, a defendant may have critical and time sensitive information about other criminal activity that is occurring or previously occurred in the community.

Without counsel he has no way to advise the prosecution of that information so they can decide if they wish to act on it. He has no one to negotiate terms that can best protect his legal interests and he has no means to be counseled on the risks and rewards of such an undertaking.

In other instances, a defendant may wish to try to resolve his case as promptly as possible.

[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation.

Blackledge v. Allison, 431 U.S. 63, 71 (1977). Counsel can quickly identify any legal or factual defenses he may have, advise the defendant of potential case outcomes, negotiate a plea, and work to mitigate the collateral consequences of any conviction.

"Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness." SCR 20:1.3 Comment (3).

For example, in 2018 in Wood County, Wisconsin 18-year-old Trequelle Vann-Marcouex was being detained in connection with a home invasion robbery. He requested and qualified for court appointed counsel, and for 12 days he called the SPD and each day was told they were unable to locate someone to represent him. With no one to explain the process, investigate the case, or even find out if he needed anything, Vann-Marcouex was left on his own to navigate the court system. The sense of despair that was enveloping the teenager is exemplified in an exchange with the court after the judge conducted the preliminary hearing having Vann-Marcouex proceed *pro se*.

After finding probable cause, the judge set the case for trial the following month and told Vann-Marcoux to "keep contacting the Public Defender's Office about getting an attorney" for the next court date. When the teen exclaimed, "I don't understand how this can be enough evidence. I wasn't even there," the judge told him, "[t]hat will be something you can discuss with your attorney." *State v. Vann-Marcoux*, 18-CF-450 (Wood County 2018), transcript of preliminary hearing, p.18.¹⁰ Van-Marcoux shared his lack of response from the SPD despite daily calls, and was told by the judge, "you have to deal with them on that" and remanded him to the jail. *Id.* at 19. Trequelle hung himself in his jail cell that evening.¹¹

While it is impossible to predict whether this same tragic turn of events would have unfolded even if Vann-Marcoux had counsel, prompt contact with a lawyer would have allowed this young man to better understand the process, would have let him know there was someone advocating for him, interviewing his witnesses, and presenting his side of the story to the court. Having counsel could have also meant someone recognizing the signs of despair and alerting jail staff to take additional suicide precautions.¹²

CONCLUSION

The failure to timely provide counsel to individuals entitled to court-appointed counsel violates the Sixth Amendment. Representation activities must be undertaken promptly as the harms done early cannot be remediated "regardless of the advocate's

¹⁰Online at: https://www.wjiinc.org/uploads/6/1/2/9/61290857/prelim_transcript_3.pdf.

¹¹Mario Koras, *Wisconsin's 'constitutional crisis' is forcing people to sit in jail without a lawyer*, *The Appeal*, May 20, 2019, <https://theappeal.org/wisconsin-public-defense-constitutional-crisis-is-forcing-people-to-sit-in-jail/>.

¹²A leading cause of in-custody deaths is suicide, with roughly half of those persons taking their own lives within the first 9 days of their detention. *Mortality in Local Jails, 2000-2018-Statistical Tables*, U.S. DOJ, Bureau of Justice Statistics, April 2021, <https://bjs.ojp.gov/library/publications/mortality-local-jails-2000-2018-statistical-tables>

zeal once finally appointed." *David*, at 11. Evidence once lost cannot be recreated, witness memories once faded cannot be recaptured, unchecked mental illness can lead to long efforts to restore competency, weeks and months in pretrial detention cannot be returned, and lost opportunities for cooperation cannot be regained. "The absence of counsel for pretrial preparation 'puts at risk both the defendant's right to an "ample opportunity to meet the case of the prosecution," and the reliability of the adversarial testing process.'" *Lavallee*, 812 NE2d at 905-06 (citations omitted).

NACDL therefore urges this Court to hold the Sixth Amendment right to counsel requires the prompt appointment of counsel for an eligible defendant.

Respectfully submitted,

NATIONAL ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS,
Amicus Curiae

BUTING, WILLIAMS & STILLING, S.C.

Electronically signed by Jerome F. Buting,
Attorney Jerome F. Buting
State Bar No. 1002856

P.O. Address:

Buting, Williams & Stilling, S.C.
400 N. Executive Dr., Ste 205
Brookfield, WI 53005
262-821-0999
jbuting@bwslawfirm.com

WIS. STAT. (RULE) 809.19(8g) 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 2984 words.

Electronically signed by Jerome F. Buting,
Attorney Jerome F. Buting

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 12th day of August, 2021, I caused 22 copies of the Nonparty Brief of National Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688

Electronically signed by Jerome F. Buting,
Attorney Jerome F. Buting

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. Sec. 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief which complies with the requirements of Sec. 809.19(12).

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

Dated: 8-16-21

By: 
Jerome F. Buting
State Bar No. 1002856