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**STATE OF WISCONSIN
IN SUPREME COURT**

Appeal No. 2019AP000221
(Marathon County Case No. 2018CF1025)

STATE OF WISCONSIN,

Plaintiffs-Respondent,

vs.

NHIA LEE,

Defendant-Appellant-Petitioner,

**NONPARTY BRIEF OF
WISCONSIN COUNTIES ASSOCIATION**

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INTRODUCTION

This case is of great interest to all counties in the state. In order to efficiently meet the constitutional obligation to provide counsel to those charged with a crime who cannot afford counsel, the legislature created the State Public Defender and the Wisconsin State Public Defender's Office ("SPD") and granted them the authority to appoint counsel according to specific indigency standards. Wis. Stat. §§ 977.05(1), (5)(a) & (5)(b). When those indigency standards are not met or the SPD is not permitted to appoint counsel for other reasons, circuit courts have the discretion, so long as certain conditions are met, to appoint counsel at county expense. *See State v. Dean*, 163 Wis. 2d 503, 511, 471 N.W.2d 310 (Ct. App. 1991). The relief requested in this case, however—the imposition of a legal requirement that courts must appoint county-funded counsel in all cases where SPD is delayed in finding counsel—would impose significant additional costs and administrative burdens on Wisconsin's counties, which should be borne by the state-funded SPD.

The WCA is further concerned with aspects of the Court of Appeals' opinion, which treats the availability of a court-appointed attorney at county expense as a factor to be considered when assessing whether good cause exists to adjourn a preliminary hearing. The WCA believes that, when an indigent defendant is eligible for SPD-appointed counsel and the SPD is searching for such counsel, the analysis of whether good cause exists should be conducted without regard to the availability of appointed counsel at county expense. Indeed, the WCA believes the Court of Appeals' approach will ultimately lead to more circuit courts appointing counsel at county expense when counsel would otherwise likely be obtained by SPD.

ARGUMENT

I. Defendant-Appellant-Petitioner's Requested Relief Would Devastate Wisconsin Counties

In this case, the Defendant-Appellant-Petitioner Nhia Lee (“Lee”) asks this Court to hold that circuit courts must appoint counsel for indigent defendants at county expense whenever there is a delay in securing SPD-appointed counsel for such defendants. *See, e.g.*, Defendant-Appellant-Petitioner’s Reply Br. at Page 6 of 19. Although Lee does not expressly say so, he is effectively asking this Court to declare that a circuit court must appoint counsel at county expense if an SPD-appointed counsel is not secured within the time limit for a preliminary hearing: 10 days after the initial appearance if the defendant is in custody. Wis. Stat. § 970.03(2).

The WCA agrees with the State that this issue is technically moot and need not be addressed in this proceeding. *See* Br. of Plaintiff-Respondent at 37, n.13. Further, the WCA agrees with the State that this is an issue that is better suited to be addressed through the Court’s rulemaking authority, rather than in this proceeding, so this Court can make such a policy decision based on sufficient factfinding involving all impacted parties. *Id.* at 40-43.

Nevertheless, to the extent this Court addresses this issue in this case, this Court should refuse to establish a mandatory deadline by which a circuit court must appoint counsel at county expense for an indigent defendant, especially in circumstances in which SPD is still searching for counsel for the defendant. Indeed, it is the WCA’s position that in a situation like this one—in which a defendant has been determined to be eligible for SPD counsel and the SPD is still working to obtain counsel—circuit courts should not be required to appoint counsel at county expense at any time.

A. This Court Has Never Held that Circuit Courts Must Appoint County-Funded Counsel to Defendants Who Qualify for SPD Representation

The WCA acknowledges this Court has, in the past, recognized the inherent authority of courts to appoint counsel at county expense for defendants who are unable to secure counsel. *See Carpenter v. Dane Cty.*, 9 Wis. 274 (1859); *Dane Cty. v. Smith*, 13 Wis. 585 (1861). As this Court has since acknowledged, however, these cases predated the advent of the State Public Defender system, which was “intended to structure a comprehensive state-wide program to deal with the appointment of counsel for indigent defendants.” *Douglas Cty. v. Edwards*, 137 Wis. 2d 65, 76-77, 403 N.W.2d 438 (1987). And, although this Court has observed that the existence of the SPD system does not negate the inherent power of courts to appoint counsel, *id.* at 77, to date appointment of counsel at county expense has only been mandated in situations where the SPD system is not available to a defendant. *Id.* (county required to pay fees of stand-by counsel appointed when SPD declined to appoint counsel); *see also State v. Dean*, 163 Wis. 2d 503, 471 N.W.2d 310 (court erred by failing to appoint counsel at county expense for defendant who was unable to afford counsel but did not meet SPD indigency criteria). Thus, as both the court of appeals recognized and the State argues, there is no case law requiring a court to appoint county-funded counsel when the SPD has not declined the case and is still searching for an attorney. *See State v. Lee*, 2021 WI App 12, ¶¶ 33-37, 396 Wis. 2d 136, 955 N.W.2d 424; Br. of Plaintiff-Respondent at 37-40. In short, what Lee requests is a significant extension of the current law, which currently supports imposing the cost of counsel on counties only when the SPD declines to act or is not involved. *Douglas Cty.*, 137 Wis. 2d at 85.

B. Requiring Courts to Appoint Counsel at County Expense When SPD Is Still Searching for Counsel Would Inevitably Shift the Financial Burden Associated with Defense of Indigent Defendants from SPD to the Counties

This Court should decline to impose any such requirement in this case. Granting Lee the request he seeks—effectively, a deadline by which SPD must find counsel or else circuit courts must appoint one at county expense—would inevitably lead to an increased number of indigent defendants being represented by court-appointed attorneys at county expense instead of SPD-appointed attorneys. It would do so by necessarily shortening the time that SPD has to find counsel and requiring appointment of a county-funded attorney if that deadline is not met. Further, because there may be significant overlap between attorneys who accept SPD appointments and those who accept court appointments,¹ it would incentivize attorneys to decline an SPD appointment at the lower rate of \$70 per hour in order to wait for appointment by the court at the higher rate of \$100 per hour. Such a development would be financially disastrous for Wisconsin counties and could affect the quality of representation that indigent defendants receive.

1. Requiring court-appointed counsel when SPD is still searching for counsel would cause further financial harm to Wisconsin's counties.

First, this Court is well-aware of the financial impact on counties that occurs when a court appoints counsel to represent a defendant at county expense. For example, when this Court raised the rate for court-appointed counsel from \$70 to \$100 per hour, it recognized the “profound impact” the raise would have on county budgets. As this Court explained:

[C]osts for indigent defense, which should be borne by the state as a whole, are being shifted to individual counties. The Bayfield County Administrator confirms that his county often cannot find attorneys who will accept representation at the current rate, so they are required to offer more money in order to find counsel.

¹ 2021 WI App 12 at ¶ 49.

Then, the county's ability to recoup some of this money through collections is compromised, because of the lower rate set in the rule. In an April 2018 report, the Sixth Amendment Center agrees that imposing the cost of counsel on counties is undesirable because "the local jurisdictions most in need of indigent defense services are often the ones least able to afford them." In many instances "the circumstances that limit a county's revenue – such as low property values, high unemployment, high poverty rates, limited household incomes, and limited educational attainment – are correlated with high crime rates."

In re the Petition to Amend SCR 81.02, S. Ct. Order 17-06, at 15-16, 2018 WI 83 (issued June 27, 2018, eff. Jan. 1, 2020). Setting a mandatory deadline for court appointments will only increase these costs.

Indeed, the WCA is immensely concerned that such a holding could devastate the ability of Wisconsin counties to provide other services to their residents. As things currently stand, there is already a large shortfall between what counties spend on circuit court operations (which would include the costs of court-appointed counsel) and the funds counties receive through court collected revenues. In the calendar year 2019, for example, counties spent \$202.1 million on circuit court operations and received only \$52.9 million in court collected revenues.² Counties fund this deficit primarily through the use of local tax revenue and unrestricted state aid payments. *Id.*

Even if a small fraction of cases were transferred from the SPD system to the county system, the gap between circuit court costs and court collected revenue would rise even further. A holding that courts must appoint county-funded counsel for indigent defendants, even when SPD is still searching for counsel, would thus result in the diversion of more funds to circuit court operations and away from other county responsibilities.

Nor could counties simply find new revenue sources to cover this gap. Counties are statutorily prohibited from exceeding their levy limit set forth

² Wisconsin Legislative Fiscal Bureau, Informational Paper #59: Wisconsin Court System, at p. 11 (January 2021), available at https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2021/0059_wisconsin_court_system_informational_paper_59.pdf (last visited Aug. 20, 2021).

in § 59.605, *Wis. Stats.* And, because the State delegates a multitude of functions to counties, for which they receive only partial reimbursement, counties are already straining to fund characteristically state operations. The choice for counties becomes not how much of which services to provide, but which services to eliminate. And to further complicate the decision, as creatures of the State, counties cannot simply choose to cut state-mandated services. Simply put, Wisconsin's counties cannot afford a holding that asks them to bear more of the burden of providing a service that is supposed to be funded and administered statewide by the SPD.

2. Requiring court-appointed counsel when SPD is still searching for counsel could affect the quality of representation received by indigent defendants.

Second, the relief requested by Lee—which, as discussed above, would inevitably result in more indigent defendants being represented by court-appointed attorneys at county expense instead of SPD-appointed attorneys—could affect the quality of representation these defendants receive.

The SPD has a well-established structure that hires staff attorneys and certifies private attorneys to provide assistance to indigent defendants. Wis. Admin Code Ch. PD 1; Wis. Stat. §§ 977.05(4)(i), (j), (jm); 977.05(5)(a); 977.07; 977.08. The SPD provides general resources and training through its Training Division and has a group Specialty Practice Coordinators that provide mentorship and education to private attorneys regarding complex areas of law.³ Not only does the SPD provide resources and training to private attorneys but provides reimbursement for the retention of experts and investigators. Wis. Admin. Code § PD 2.12(2). This structure provides

³ *Specialty Practice Groups*, Wis. State Pub. Def., <https://wispd.org/index.php/for-the-legal-practitioner/spd-assigned-counsel-division/specialty-practice-groups> (last visited Aug. 19, 2021)

valuable assistance to SPD assigned attorneys and clients and provides a level of support that counties are not capable of replicating.

Under the current system, SPD staff attorneys are the most prepared to represent indigent defendants as they are supervised, salaried, and their overhead is covered. Wis. Stat. § 997.08(5). Private Bar attorneys that accept appointments from the SPD assigned are the next best option, paid \$70 an hour, with some supervision and SPD provided resources as mentioned above. Wis. Stat. 977.08(4m)(c). Though court-appointed attorneys are paid \$100 per hour, they have no state oversight and no access to a broad system of resources and support. Wis. S. Ct. R 81.02.

Further, the counties that struggle the most with appointing attorneys are also the ones that suffer from the greatest budgetary constraints. Revenue is often limited by low property values, high unemployment and poverty rates, and low educational attainment in incomes, which all correlate with relatively high crime rates.⁴ The same factors that limit revenue, require relatively high costs towards social services.⁵ These budgetary struggles make it difficult to not only appoint attorneys but to ensure that the attorneys are qualified, supported, and trained to provide adequate representation.

Indeed, shifting more of the burden of providing representation to indigent defendants onto Wisconsin counties would run counter to nationwide trends. For decades, legal experts have encouraged states to live up to their constitutional duty to provide indigent defense services by creating state funded, statewide structures able to ensure uniform quality of representation.⁶ And, states throughout the country are responding to

⁴ 6th Amendment Center, *Justice shortchanged Part II – Assigned Counsel Compensation in Wisconsin*, (April 2018).

⁵ *Id.*

⁶ See, e.g., American Bar Association, *Ten principles of a public defense delivery system*. (2002), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defenda

litigation by reforming their models of indigent defense to state models in which the state runs the program or in which it provides more financial support to counties, to remedy unconstitutional levels of representation. For example, after plaintiffs in Michigan raised allegations of constitutional violations as a result of the indigent defense systems which relied on court-appointed attorneys were sufficient to state a claim for declaratory and prospective injunctive relief, *Duncan v. State*, 284 Mich. App. 246, 774 N.W.2d 89 (2009), *partially aff'd on other grounds*, 486 Mich. 906, 780 N.W.2d 843 (2010), Michigan created the Michigan Indigent Defense Commission, a State agency with the authority to enforce attorney standards and compensation across the state. Mi. Stat § 780.985. In New York, a recent high-profile settlement resulted in additional funding for counties to bring defense services up to certain standards.⁷ And Nevada recently settled a lawsuit regarding an unconstitutional public defense system due to county disparities and enacted legislation to improve the system.⁸ To require counties to take on more indigent defendants will put Wisconsin counter to the national trends and long held standards designed to improve indigent defense.

[nts/lisclaid_def_tenprinciplesbooklet.authcheckdam.pdf](#); National Advisory Commission on Criminal Justice Standards and Goals, *Task Force on Courts, Chapter 13, The Defense*, Standards 13.6, 13.8, 13.9 (1973); available at <https://www.nlada.org/defender-standards/national-advisory-commission>.

⁷ See, e.g., Lorelei Lard, ABA Journal, *For the first time, New York will provide some state funding for indigent defense* (April 14, 2017), available at https://www.abajournal.com/news/article/for_the_first_time_new_york_will_provide_some_state_funding_for_indigent_de

⁸ Stipulated Consent Judgment, *Davis v. Nevada*, Case. No 170C002271B, available at <https://dids.nv.gov/uploadedfiles/didsnv.gov/content/resources/davis%20v%20nevada%20file%20stamped%20settlement%20consent%20judgment.pdf>; Nev. Stat. § 180.400.

II. The WCA Is Concerned by the Court of Appeals' Test for "Cause" to Extend the Time Limit for a Preliminary Hearing

Finally, the WCA is concerned with the portion of the Court of Appeals' decision that directs circuit courts to consider the availability of court-appointed counsel as part of the analysis when determining whether good cause exists to extend the deadline for a preliminary hearing. 2021 WI App 12 at ¶ 54. Indeed, the Court of Appeals seems to endorse the idea that offering the higher rate applicable to court-appointed attorneys might entice attorneys who are declining SPD appointments to accept court appointment. Again, the inevitable result of this policy will be to increase the number of county-funded court appointments. Some circuit courts evaluating whether good cause exists to extend the preliminary hearing deadline will inevitably conclude if court-appointed counsel is available, but the SPD is still searching, that good cause for an extension does not exist and that the case should go forward with court-appointed counsel.

The WCA does not believe the availability of court-appointed counsel should be a factor circuit courts are required to consider when determining whether good cause exists to adjourn a preliminary hearing. Rather, the WCA believes the analysis in a situation like this one—when the SPD is searching for but has not yet been able to secure counsel—should involve consideration of other factors identified by the Court of Appeals: “the nature of the charges against the defendant, 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,” as well as “the special circumstances of the defendant and whether the purpose of the preliminary hearing will be thwarted by the delay.” 2021 WI App 12 at ¶¶ 53, 56. Circuit courts should also consider “[t]he overall length of the delay.” *Id.* at ¶ 57. And, these various factors must be balanced against the prejudice to the defendant of an extension of the preliminary hearing. *Id.* at ¶ 58. But, the

availability of court-appointed counsel should not be a factor in this analysis for the reasons already discussed.

Removing the availability of court-appointed counsel as a consideration is unlikely to significantly impact the rights of defendants. Presumably, this Court could make clear that, without regard to the availability of court-appointed counsel, significant delays in obtaining SPD-appointed counsel will not constitute good cause for extending a preliminary hearing. Indeed, were this Court to make clear that significant delays in obtaining SPD-appointed counsel (especially for financial reasons) may result in the dismissal of charges—rather than the court-appointment of counsel at county expense—may provide an impetus for the Legislature to enact necessary reforms to the SPD system. Under the Court of Appeals' decision, however, it is more likely indigent defendants who cannot quickly get attorneys via SPD-appointment will receive court-appointed attorneys. And, the problems with the underfunding of the SPD system will continue to go unaddressed because they will largely go unnoticed—the counties will have carried the load.

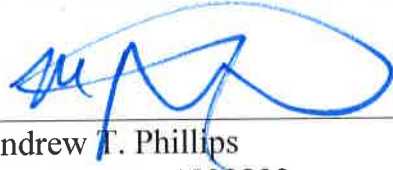
CONCLUSION

For the foregoing reasons, the WCA respectfully requests that this Court decline to impose any requirement on circuit courts to appoint counsel in situations when the SPD is experiencing delays in locating counsel for an indigent defendant. The WCA further requests that this Court clarify that the availability of court-appointed counsel should not be a factor that circuit courts consider when determining whether cause exists to adjourn a preliminary hearing to a later date.

Respectfully submitted this 20th day of August, 2021.

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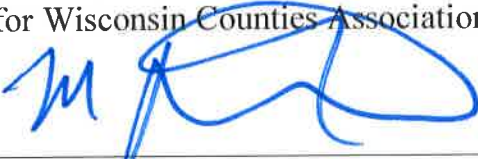
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), for a nonparty brief produced with a proportional serif font. The length of this brief is 2980 words. Word processing software (Microsoft Word) was used to determine the length of this brief. The word count above is inclusive of all words in this brief's introductory, Argument, and Conclusion sections, including the text of all such sections' headings and footnotes.

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CERTIFICATE OF COMPLIANCE WITH RULE 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). 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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CERTIFICATE OF SERVICE

I hereby certify that the Nonparty Brief of the Wisconsin Counties Association was sent via personal courier to the Clerk of the Supreme Court on August 20, 2021. I further hereby certify that on August 20, 2021, I personally caused copies of the brief to be mailed by first-class postage prepaid mail to:

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