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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2019AP000221-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

NHIA LEE,

Defendant-Appellant-Petitioner.

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

AMICUS CURIAE BRIEF OF
WISCONSIN STATE PUBLIC DEFENDER

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ARGUMENT

I. Background and Structure of the Office of the State Public Defender.

The State Public Defender (SPD) is submitting this non-party brief to explain the SPD structure, the appointment process, the evolving challenges with finding counsel for SPD cases, and how the SPD will keep circuit courts informed about its efforts to find counsel in individual cases.

A. Appointment authority.

In all criminal prosecutions, the person accused has the right to counsel. U.S. Const. amend. VI. Nearly 60 years ago, the United States Supreme Court made clear that this right includes people that cannot afford an attorney. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

Wisconsin has an even longer tradition of ensuring indigent defendants are represented by counsel. *Carpenter v. Cnty. of Dane*, 9 Wis. 249, 274, 278 (1859) (determining circuit courts have the power and duty to appoint an attorney for a defendant who cannot afford one). In 1977, consistent with this tradition, the Legislature created our statewide public defender system in Chapter 977. Ch. 29, § 1600, Laws of 1977. In doing so, the Legislature created specific indigency standards for appointment of counsel through the SPD. Wis. Stat. § 977.07. The

authority to appoint counsel was entrusted to the State Public Defender, currently Kelli S. Thompson, who is appointed by the State Public Defender Board. Wis. Stat. §§ 977.05(1)&(5)(a), 977.08(1). Pursuant to s. 977.05(5)(b), the State Public Defender has delegated indigency determinations and appointment authority to SPD staff.

The SPD appoints cases to SPD staff attorneys and certified private bar attorneys. Wis. Stat. §§ 977.05(4)(i)&(5)(a), 977.08(3)(d). It makes roughly 130,000 to 135,000¹ appointments a year. The SPD is authorized to appoint counsel for criminal cases, involuntary commitment cases (Ch. 51 and Ch. 980), juvenile cases (delinquency and CHIPS/JIPS²), protective placement cases (Ch. 55), paternity cases, and termination of parental rights cases.³ See Wis. Stat. § 977.05(4)(i). It also has limited discretionary authority to appoint counsel in cases where there is no right to appointed counsel. See Wis. Stat. §§ 977.05(4)(j)&(jm). And, there are

¹ The SPD appointed 137,771 cases in fiscal year 2017, 140,546 in fiscal year 2018, 132,666 in fiscal year 2019, 121,956 in fiscal year 2020, and 121,712 in fiscal year 2021. The latter two years decreased due to the COVID-19 pandemic.

² Children in need of protection and services (Wis. Stat. § 48.13) and juveniles in need of protection and services (Wis. Stat. § 938.13).

³ Specific parameters apply to several of these cases types. For example, clients must be financially eligible except financial eligibility is not required for commitment or protective placement cases or when appointing counsel to represent a juvenile.

circumstances where the SPD is explicitly prohibited from appointing counsel. *See* Wis. Stat. § 977.05(6).

The SPD has 37 trial offices and two appellate offices covering all 72 counties, as well as one administrative office. The local offices appoint cases to staff and private attorneys.

The SPD is funded by the state, and therefore, pay for staff and private attorneys is primarily allocated through the state budget process. Because of this, between July 29, 1995 and January 1, 2020, the SPD was only permitted to pay private attorneys \$40 an hour for their work. Wis. Stat. § 977.08(4m)(c). The \$40 an hour rate had not changed significantly from the SPD's creation in 1977.⁴ That was the rate in place when the SPD was searching for counsel to represent Mr. Lee. As will be discussed below, the rate the SPD is authorized to pay private attorneys increased to \$70 an hour on January 1, 2020. Wis. Stat. § 977.08(4m)(d).

The SPD, alone, was given the authority to appoint cases for SPD-eligible clients. Wis. Stat. §§ 977.05(1)&(5)(a), 977.08(1). However, there are circumstances where the SPD is not authorized to appoint counsel but the client is still indigent,

⁴ For cases appointed before December 1, 1992, the SPD paid private attorneys \$45 an hour for in-court time and \$35 an hour for out-of-court time. Wis. Stat. § 977.08(4m)(a). From December 1, 1992 until July 29, 1995, the SPD paid private attorneys \$50 an hour for in-court time and \$40 an hour for out-of-court time. Wis. Stat. § 977.08(4m)(b).

therefore the court is permitted to appoint counsel at county expense. *See State v. Dean*, 163 Wis. 2d 503, 511, 471 N.W.2d 310 (Ct. App. 1991). The most common example is where a criminal defendant does not meet the SPD's statutorily mandated eligibility standards, but is still considered indigent. *Id.*

In that circumstance, the court should and does appoint. In *Dean*, the court explained:

[T]he public defender's office is not the exclusive means of providing counsel to indigent defendants. *State ex rel. Chiarkas v. Skow*, 160 Wis.2d 123, 138, 465 N.W.2d 625, 630 (1991) (quoting *Douglas County v. Edwards*, 137 Wis.2d 65, 77, 403 N.W.2d 438, 444 (1987)). There are situations, as here, where a defendant does not meet certain indigency criteria, but nevertheless is unable to afford counsel. *See* 2 W. LaFave & J. Israel, *Criminal Procedure* sec. 11.2, at 28 (1984).

Id. at 511-12. The court concluded, “although the legislature's indigency criteria are not met, the court can still declare the defendant indigent for purposes of appointing counsel to protect the defendant's constitutional right to counsel.” *Id.* at 513.

Another example of when courts appoint counsel where the SPD is not authorized to do so are CHIPS cases under s. 48.13. The SPD is not authorized to appoint counsel for parents in CHIPS cases, unless “an Indian child is the subject of the proceeding” (s. 48.23(2m)) or it is a part of the five-county pilot program for SPD representation

(s. 48.233). In some counties, judges will appoint counsel for indigent parents in CHIPS cases where the SPD is not authorized to appoint counsel.

In addition, some judges have appointed counsel at county expense when the SPD has had a difficult time finding counsel. In those circumstances, the county has paid the appointed attorney at a rate greater than the SPD rate (\$40 an hour before January 1, 2020 and \$70 an hour after). *See In re the Petition to Amend SCR 81.02*, S.Ct. Order 17-06, 2018 WI 83, 7. The process has varied both in when such appointments occur and in the rate the county paid.⁵ The SPD is not reimbursing the county in those situations because there is no authority in Ch. 977 allowing the SPD to reimburse for county-appointed cases. Also, once it becomes a county appointment there is no ability to review the hours an attorney bills or for the SPD to ensure only appropriately certified attorneys are appointed.

B. Certification and resources.

The SPD has an entire structure established to certify and assist private attorneys in representing their SPD clients. Wis. Admin. Code Ch. PD 1. Certification requirements vary by case type, as different case types require different expertise. Wis. Admin. Code § PD 1.04. For example, certification for a class A felony case requires,

⁵ Some counties paid up to \$125 an hour.

1. The attorney maintained a significant portion of his or her practice in criminal law within the five years immediately preceding the application for certification.
2. The attorney has been sole or lead trial counsel in at least two class A to D felony cases tried to a jury to final resolution within the five years immediately preceding the application for certification.
3. The attorney submitted to peer review, including reference checks with other criminal defense attorneys, prosecutors, judges and public defender staff.
4. The attorney has submitted a writing sample, consisting of a court memorandum or brief concerning criminal law issues that was written within the two years immediately preceding the application for certification, which was reviewed and approved by the state public defender.
5. The attorney has submitted any requested information relevant to a determination of the attorney's qualifications.

Wis. Admin. Code § PD 1.04(3)(d).

The SPD also provides funding when investigators or experts are retained to assist in representing SPD clients. Wis. Admin. Code § PD 2.12. In addition, SPD-appointed private attorneys often utilize resources from the SPD training division and from the SPD's specialty practice coordinators. The practice coordinators were established to assist with issues related to immigration, juvenile cases,

forensic sciences, racial disparities, family defense, and mental health. Thus, the SPD has the necessary structure in place to assist, and provide resources for, SPD-appointed attorneys.

II. The Appointment Process and Evolving Challenges in Finding Counsel.

A. Appointment process.

For criminal cases,⁶ SPD staff attorneys provide limited scope representation at bail hearings and initial appearances prior to the appointment of counsel. The procedure for this representation varies by county but generally an SPD staff attorney is assigned to evaluate whether individuals scheduled for initial appearances or bail hearings qualify for SPD representation and to provide limited scope representation. *See* SCR 20:1.2(c)(1)d. The assigned attorney is provided with some information about the case (e.g. complaint or probable cause statement) often right before or at the hearing. The attorney also likely has had limited contact with the defendant prior to the hearing. Therefore, the SPD staff attorney is representing the defendant for purposes of bail and potentially initial problems with the complaint (e.g. obvious omissions in the complaint). This limited representation is all that is possible prior to a conflict check and given time constraints and the limited information available.

⁶ Intake procedures are also in place for juvenile and mental health cases.

When a person is found eligible for SPD representation, a conflict check is completed. SPD staff attorneys are appointed to represent clients in as many non-conflict⁷ cases as they can competently handle. The overflow and conflict cases are then appointed to private attorneys.

To find private attorneys to take SPD cases, staff call, email, and have in-person conversations about available cases. Historically, staff sought private attorneys practicing in the county, or nearby counties, from which the case originated. As it has become more difficult to find counsel in certain parts of the state, especially rural areas, staff have broadened their searches. It is not unheard of for staff to contact every appropriately certified private attorney in the state to find counsel in a particular case. They may go through that list multiple times before finding an attorney to take the case. Throughout the state, legal secretaries devote a significant percentage of their time to finding counsel, leaving little room for assisting staff attorneys and their high workloads.

B. Challenges in finding counsel.

There are both systemic hurdles in finding counsel and dynamic local factors that impact an attorney's desire to accept cases in certain areas. In 2018, when the SPD was seeking counsel for Mr. Lee, it was the height of the SPD's private bar crisis. At

⁷ When ethically permitted, some conflicts are screened in order to appoint a staff attorney.

that time, the SPD had a difficult time finding attorneys to accept SPD appointments at \$40 an hour because the rate was often insufficient to cover the cost of an attorney's operations. S.Ct. Order 17-06 at 3. As this Court explained, the fact the \$40 an hour rate was "abysmally low [was] not in dispute." *Id.* at 2. The problem was exacerbated in more rural areas because the number of attorneys practicing in those locations has generally decreased. *Id.* at 6.⁸

However, the pay rate for private counsel appointed by the SPD increased to \$70 an hour as of January 1, 2020. Wis. Stat. § 977.08(4m)(d). The increased rate will undoubtedly help SPD staff find attorneys willing to take cases, but the breadth of the improvement is unknown as the rate is still relatively new and the increase began just before the COVID-19 pandemic hit, which has significantly impacted all operations within the criminal justice system. Therefore, the challenges in finding counsel have evolved since Mr. Lee's case began.

The pandemic has created new challenges in finding counsel for SPD clients in certain parts of the state. Although the number of cases charged in many counties decreased during the pandemic, in some counties the number of cases charged increased. Some private attorneys chose to retire or not take

⁸ See also Kaeding, Danielle, *Rural Wisconsin Lacking Lawyers, Especially Up North*, WPR (Aug. 23, 2016) at <https://www.wpr.org/rural-wisconsin-lacking-lawyers-especially-north>.

SPD cases due to the risks and challenges associated with practicing criminal law and other SPD case types during a pandemic. And, with the slowdown in the court system, attorney workloads are already saturated because many cases that would have been resolved pre-pandemic are still pending. This means attorneys willing to take SPD cases are unable to ethically take on as many new SPD clients, as they are still working on older, stalled cases.

Like many other professions, the pandemic led to more resignations with SPD staff. As a result, the staff appointing cases have less experienced help and they have more cases to appoint due to staff attorney turnover. When a staff attorney leaves the impact on appointment of counsel is twofold: (1) there is one less attorney to take new cases until a new attorney is hired and (2) the departing attorney's cases need to be reassigned. Then, of course, there are the resources expended in hiring and training new staff as well as the fact that newer attorneys are unable to handle more serious cases.

And, it has been consistently challenging to appoint cases in rural parts of the state because of a general shortage of attorneys. The attorney shortage in rural Wisconsin extends to all areas of law.⁹

⁹ In 2019, the State Bar established the Greater Wisconsin Initiative to address the shortage of lawyers in "Greater Wisconsin." The task force noted "that fewer than 40 percent of active lawyers in Wisconsin practice outside urban areas. On average, most of them are over the age of 60 and 'current trends indicate that these attorneys are not being

However, the challenges in appointing counsel are not universal statewide. This is true because of the quantity of attorneys in certain locations but also due to the number of cases charged or other local practices making out-of-county representation more difficult.

Therefore, some of the challenges in finding counsel have evolved since Mr. Lee's case began. There are some large-scale challenges (e.g. number of attorneys, impact of the pandemic, pay) and some smaller challenges where changes could have a real impact (e.g. flexible scheduling and increased access to clients at the jails¹⁰). Regardless of the challenges,

replaced' as they retire." *State Bar Board Discusses Shortage of Rural Attorneys, Acts on Diversity CLE*, Wisbar News (June 10, 2021) available at <https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=28467>.

¹⁰ Access to clients when practicing out-of-county can be an issue. Some jails will not set up confidential phone calls between the client and attorney, instead the attorney must come in person or have the client call collect. Collect calls are recorded and expensive. See Chris Mueller, *Many Wisconsin counties earn thousands from jail phone calls. Inmates and their families pay the costs*, Appleton Post-Crescent (Aug. 9, 2021), available at <https://www.fdlreporter.com/story/news/crime/2021/08/09/jail-phone-calls-many-wisconsin-counties-profit-but-at-inmates-cost/7966577002/>. Not having access to the client is a significant impediment to representation when practicing out-of-county, which can snowball into more motions to withdraw.

the SPD will always continue the search for counsel until counsel is found for all SPD clients.

The SPD will also continue to think outside the box in an effort to recruit more attorneys to take SPD cases. For example, while the SPD has long worked with the law schools in Wisconsin to encourage new attorneys to practice indigent defense in Wisconsin, it is now increasing its work with out-of-state law schools to do the same. In addition, it received a grant through the United States Department of Justice¹¹ for the Juvenile Rural Access to Training and Expertise Project (J-RATE). This project focuses on finding and training attorneys to represent juveniles in rural Wisconsin. The work on this project will also benefit recruitment for all SPD case types.

C. Keeping circuit courts informed about appointment efforts.

The court of appeals decision in this case made clear that circuit courts need to have more information about the SPD's efforts to find counsel in order to properly exercise discretion about whether to adjourn a preliminary hearing. In an effort to keep courts informed in a uniform way, the SPD developed a letter it provides to the circuit court when there is a delay in appointing counsel.

When an attorney is permitted to withdraw it becomes exponentially more difficult to find counsel.

¹¹ Office of Juvenile Justice and Delinquency Prevention.

Now, if the SPD has not found counsel for a client prior to the scheduled preliminary hearing, SPD staff will file a letter with the court indicating they have not found counsel. The letter also states the number of contacts staff had with private attorneys made in an effort to find counsel. Contacts include emails, phone calls, and in-person conversations. This letter is meant to assist the court by providing information it may need when exercising its discretion. Judges are also encouraged to reach out to SPD managers if they have concerns or questions about the SPD's efforts to find counsel.

The SPD takes seriously its duty to find counsel for all SPD-eligible clients. Support staff are diligently trying to find counsel day-in and day-out. It is not an easy task. They have worked throughout the pandemic to ensure offices remained open to the public and to ensure the SPD could still appoint counsel and provide representation for its clients. Likewise, SPD staff attorneys and private attorneys taking SPD appointments have continued to work throughout the pandemic, advocating on behalf of their clients. All of these efforts will continue.

CONCLUSION

The SPD sought to provide this Court with information about the SPD's structure, appointment process, and evolving challenges in finding counsel.

Dated this 20th day of August, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,950 words.

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 § 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.

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.

Dated this 20th day of August, 2021.

Signed:

KATIE R. YORK
Appellate Division Director