STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

NO. 2021AP000177 - CR

STATE OF WISCONSIN,

***Plaintiff-Respondent*,**

vs.

CHRISTOPHER S. BUTLER

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

Permissive Appeal from Order Denying Motion to Dismiss
Brown County Circuit Court,
Hon. Beau G. Liegeois, presiding
Case No. 19CF1630

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STATEMENT OF THE ISSUES PRESENTED

1. Are there any due process or other limitations on whether, under what circumstances, or how long an initial appearance can be adjourned? The circuit court did not decide this issue, but the Court of Appeals has directed the parties to address this issue in their briefs.
2. Does the 10-day deadline in Wis. Stat. § 970.03(2) for holding a preliminary hearing begin to run when a defendant first appears before the court or when the initial appearance is concluded? The circuit court did not decide this issue, but the Court of Appeals has directed the parties to address this issue in their briefs.
3. How does *Lee* apply in the context of an initial appearance that has been adjourned multiple times? The circuit court did not decide this issue, but the Court of Appeals has directed the parties to address this issue in their briefs.
4. Did the circuit court lose personal jurisdiction over Butler as a result of the continued extensions of time for the convening of his preliminary

hearing as he awaited the appointment of assigned counsel? The circuit court decided that it did not lose personal jurisdiction over Butler.

STATEMENT ON WHETHER ORAL ARGUMENT IS NECESSARY

There should be oral arguments pursuant to Wis. Stats.§ 809.22, insofar as the issues presented are issues of first impression that implicate a variety of fundamental Constitutional issues, including due process, the right to a prompt judicial determination as to probable cause, and the right to a speedy trial.

STATEMENT ON WHETHER THE OPINION SHOULD BE PUBLISHED

The opinion should be published because it decides an issue of substantial and continuing public interest pursuant to Wis. Stat. § 809.23(1)(a)5 by determining whether due process rights are violated by the extraordinary delay between the initial appearance and the preliminary hearing, particularly Brown County's practice of adjourning initial appearances.

The opinion should be published because it decides an issue of substantial and continuing public interest pursuant to Wis. Stat. §

809.23(1)(a)5 by determining whether repeatedly adjourning initial appearances violates constitutional and statutory rights to due process, the right to a prompt judicial determination as to probable cause, and the right to a speedy trial.

The opinion should be published because it decides an issue of substantial and continuing public interest pursuant to § 809.23(1)(a)5 Wis. Stats. by determining when the statutory preliminary hearing deadline begins to run.

STATEMENT OF THE CASE

A. Procedural Status of Case Leading up to this Appeal

A criminal complaint was filed against Butler on October 23, 2019 charging him with one count of repeated sexual assault of same child (a class B felony) as a "persistent repeater," one count of repeated sexual assault of same child (a class C felony) as a "persistent repeater," and one count of exposing genitals to a child (a class I felony) as a "repeater." (1:1-2). As a result of having been previously convicted of a serious child sex offense, Butler faced a mandatory sentence of life imprisonment without the possibility of parole or extended supervision under section 939.62(2m)(b)2, Wis. Stats.

Butler waited for several months while in custody for an attorney to be appointed to represent him. In April, 2020 an attorney was finally appointed but she withdrew from representation before anything meaningful could be accomplished, insofar as she was not aware that Butler had previously requested a speedy trial and she did not believe that her schedule could accommodate such a request. A second attorney was not appointed to represent Butler until August 13, 2020. On September 8, 2020, Butler made his first appearance in court with his newly assigned counsel and completed

the initial appearance. On September 29, 2020 a preliminary hearing was conducted.

On January 22, 2021 defense counsel filed a motion to dismiss, arguing that the continued delay of his right to a timely preliminary hearing had caused the circuit court to lose personal jurisdiction over him. (54:1-4). On January 29, that motion was denied. (62:1). On February 2, 2021 Butler filed a timely petition for leave to appeal the denial of his motion to dismiss. (64:1). On February 26, 2021 this Court granted Butler's petition and ordered the parties to brief the issues raised in the petition, along with three other issues listed by the Court. (69:2).

B. Statement of Facts

On the same day he was charged by criminal complaint, Butler appeared before a court commissioner along with an assistant state public defender. (77:2). At that hearing, defense counsel acknowledged receipt of the criminal complaint and waived its formal reading. (77:2). The State then set forth its reasons for requesting that the circuit court set cash bond at $75,000. (77:2-3). Once the State was finished with its argument, defense counsel reserved Butler's right to argue bond until such time as an attorney could be appointed to represent him. (77:3). The court set cash bond at $75,000 and adjourned the case for the "balance of initial appearance." (77:4).

On November 20, 2019 Butler appeared with a different assistant state public defender who advised the court that counsel had not yet been appointed for him. (78:2). The court then adjourned the case "for a balance of initial appearance." (78:2).

On December 4, 2019 Butler appeared with a different assistant state public defender who advised the court that the Office of the State Public Defender had not yet found an attorney for Mr. Butler. (79:2). The court then scheduled the matter for "an adjourned initial appearance." (79:2).

On December 18, 2019 Butler appeared with a fourth different assistant state public defender who advised the court that his office was continuing to search for representation for Butler. (80:2). The court then scheduled the next court date. (80:2).

On February 5, 2020 Butler appeared with a fifth different assistant state public defender who advised the Court that her office was still looking for an attorney for Butler. (81:2). The court scheduled the matter for "a balance of initial appearance and appointment of counsel." (81:2).

On February 26, 2020 Butler appeared with an assistant state public defender who advised the court that no attorney had yet been appointed to represent Butler and that Butler wanted to address bond at the next hearing. (82:2). The court then adjourned the matter. (82:2).

On March 18, 2020 Butler appeared with an assistant state public defender who advised the court that "it appears we are still looking for an attorney for Mr. Butler." (83:2). The assistant state public defender then argued to lower the $75,000 cash bond to $10,000 – $15,000, which the State opposed. (83:2-5). The Court ultimately denied the request to lower bond. (83:5).

On March 24, 2020 (after more than five months of being incarcerated without an attorney), Butler filed a pro se "Demand for Speedy Trial." (13). In that demand, Butler cited the Sixth and Fourteenth Amendments to the United States Constitution, Article I, Section 7 of the Wisconsin Constitution, and section 971.10, Wis. Stats. (13:1). Butler pointed out that he had been in custody since October 2019 and had not been appointed counsel. (13:1). He further noted that he had a right to a timely preliminary hearing within 10 days of his initial appearance. (13:1). He alleged in his demand that personal jurisdiction over him had been lost due to the untimely preliminary hearing issue and that he had suffered "anxiety and concern due to the case being unresolved." (13:2).

Additionally, on March 24, 2020, Butler filed a pro se "Bond Modification." (14:1). In that document, Butler moved the court to convert his cash bond to a signature bond. (14:1). In support of his request, Butler noted

that he had been in custody since October 2019. (14:1). He further noted that he had "suffered mental anguish due to his pretrial detention which has put a strain on his family relationships – most importantly his 3-year-old daughter. Because the defendant is confined, he is not able to financially support his daughter nor be present in her life." (14:2). Buter further argued that "[d]ue to the systemic breakdown in the public defender system the defendant has not been publicly-assigned counsel. His indigency, ultimately caused by his prolonged incarceration has forced him to rely on this system." (14:2-3).

On March 26, 2020 Butler appeared in court with an assistant state public defender who advised the court that his agency was still looking for an attorney for Butler. (84:2). The court then advised the parties that a pro se bond motion had been filed. (84:2). The Assistant State Public Defender asked the court to set cash bond at $10,000 with any additional conditions deemed appropriate by the court. (84:5-6). The State opposed the request for lower bond. (84:7). The court ultimately denied the request to lower bond and scheduled the matter for an "adjourned initial appearance." (84:9).

On April 22, 2020 (almost six months after first appearing in court), Butler appeared with Attorney Aileen Henry who advised the court that she had been appointed to represent Butler. (86:2). However, Attorney Henry advised the court that "at the time I accepted the case from the public

defender's office, I did not realize that [Butler] had put in a speedy trial demand. I understand that speedy trials rights now are suspended [because of the COVID-19 pandemic], but at some point they will be reinstated and I'm not sure that I will be able to meet Mr. Butler's speedy trial demand once it's reinstated . . . ." (86:2). Attorney Henry advised the court that she "explained that to [Butler], and I believe he wants an attorney who will be able to meet his speedy trial demands once trials start again." (86:3). The court then sought clarification of the situation from Butler and explained that the appointment of counsel other than Attorney Henry could take a long period of time. (86:3). Butler indicated to the court that he was not sure what he wanted to do. (86:3). The court then suggested adjourning the matter for one week so that Butler could discuss his situation further with Attorney Henry. (86:3-4).

On April 28, 2020 Butler appeared again with Attorney Henry. (85:2). Attorney Henry reiterated that at the time she was appointed she "did not realize that Mr. Butler had put in for a speedy trial demand." (85:2). She further indicated that, "I do not believe that I would be able to meet his speedy trial demand, because he will want one once the Information is filed." (85:3). She concluded that, "We've agreed that I should withdraw and have the Public Defender's office try to find him counsel that will be able to get

him a trial within the timeframe that he wants." (85:3). The Court then conducted a colloquy with Mr. Butler, who agreed that because Attorney Henry was not willing to represent him if his plan were to ultimately request a speedy trial, that was not opposed to Attorney Henry's request to withdraw from representing him. (85:3-5). The Court, without objection from the State, granted the motion to withdraw. (85:5).

After the Court allowed Attorney Henry to withdraw, the State indicated that it had a request with regard to Butler's bond. (85:7). Specifically, the State asked the Court that as a condition of bond that Butler not be allowed to have contact with L.P., who the State indicated was a witness in the case and who the State alleged was writing letters to the alleged victims. (85:7). The Court then inquired with Butler as to his position regarding the State's request, to which Butler replied that he was objecting to the proposed condition. (85:8). According to Butler, the District Attorney's Office contacted L.P. "a couple of weeks ago and told her some personal stuff about another female that I was talking to. She also came to court . . . . She spoke on my behalf and wanted my bond to be lowered. And then the DA said there's somebody else I'm talking to. Then these [new] charges against her." (85:8-9). The Court ultimately granted the State's request for the additional

bond condition, but reserved Butler's opportunity to address the issue once he was assigned counsel. (85:9).

Butler next appeared in court on May 5, 2020 along with Assistant State Public Defender John Herman (the 9th different Assistant Public Defender to appear with Butler at this point). (87:2). Attorney Herman advised the Court that his office was still seeking representation for Butler, but that he was willing to argue for a lower bond for Butler. (87:2). During his argument, Attorney Herman advised the court that Butler was seeking a reduction of the $75,000 cash bond to a lower amount of $40,000-$50,000. (87:3). The State opposed the request for bond reduction, pointing out that Butler was facing a potential term of life imprisonment. (87:4). The court ultimately granted the request and agreed to lower the bond amount to $50,000, along with additional conditions of a GPS device and a 1,000 feet geographical restriction from the alleged victims' residence. (87:6). The court then scheduled the matter for an "adjourned initial appearance." (87:7).

On May 27, 2020 Butler filed a letter with the court, requesting a reduction in bail. (21). In his letter, Butler asserted that his request for a bail reduction was "so I can get a better chance of getting out to get a job and get myself a lawyer and fairly fight my case. I have been incarcerated since October without a lawyer." (21:2). He further indicated that, "I have had my

rights violated. My amendments 6 and 14 have been violated. There is prosecutorial misconduct. The DA went and talked to my witness after she tried to bail me out. Told her I was talking to another female and what we were saying on the phone. Which has nothing to do with the case. Shortly after that my witness was charged with intimidating a witness. Now there is no contact between us." (21:2-4).

On June 2, 2020 Butler appeared in court with Assistant State Public Defender Jeffrey Cano, who advised the court that "we're looking for an attorney for Mr. Butler. We had Ms. Henry, but now we have to find another one." (88:2). Attorney Cano further indicated that, "There is a speedy trial demand, but Ms. Henry couldn't accommodate that. It would probably have been faster, but we're in this situation now that we have to find an attorney which probably will take longer now because all of the attorneys in the State are rejecting the case." (88:2). On that record, the court then proposed another adjourned initial appearance in three weeks. (88:3). Butler then asked to speak. (88:3). Once recognized by the court, Butler stated that, "I put in for another bond reduction hearing. I don't know if I can get another hearing for that or not." (88:3). Attorney Cano advised the Court that he did not "have any information on Mr. Butler" and that "I've never spoken to Mr. Butler." (88:4). (Notwithstanding the fact that on March 26th Attorney Cano

appeared with Mr. Butler and argued that bail should be lowered to $10,000 with any other conditions the Court wished). The court ultimately continued the bond as set but preserved Butler's right to address bond at the next court appearance. (88:4).

On June 23, 2020 Butler appeared in court with Assistant State Public Defender Jonathan Virant who advised the court that, "From the looks of the paperwork, the Public Defender's Office is still looking for an attorney." (89:2). The court then noted that the District Attorney's Office had filed a letter with Judge Liegeois, the Circuit Court Judge, raising concerns about Butler not having counsel yet and the case not moving forward. (89:2-3). The Court Commissioner then commented that he was "not sure whether or not Judge Liegeois is simply going to go ahead and appoint counsel for Mr. Butler." (89:3). Upon the Court indicating that it would reschedule the matter for another three weeks, Butler inquired about a potential bail reduction. (89:3). The court then allowed Butler to speak privately with Attorney Virant. (89:4).

After speaking with Butler, Attorney Virant was allowed to address the issue of bond. (89:4). In his argument, Attorney Virant noted that, "this is his 16th Adjourned Initial Appearance" and that he was seeking a reduction of Butler's bond to $20,000 – $30,000. (89:4). In response, the State asked the

Court to increase the bond back to its original amount of $75,000. (89:5). In considering the arguments of counsel, the court noted that, "[o]bviously, Mr. Butler has been before me quite frequently, given how long his case has been pending. And I did modify the bond back in May, added some additional conditions. I think that bond amount remains reasonable under the circumstances. The defendant has been in custody for a long time without counsel. We kind of talked about that before with Mr. Butler. So I'm kind of just repeating myself. But he had counsel at one point and that didn't work out. The Public Defender's Office is still looking for counsel for him. It sounds like Judge Liegeois may be considering appointing counsel for him." (89:7-8). The Court ultimately kept bond fixed at $50,000 and set the matter for an "adjourned initial appearance." (89:8).

On July 1, 2020 the case was called on the record before Circuit Court Judge Beau Liegeois. (90:2). The proceedings began with Butler appearing without counsel. (90:2). The Court indicated that it had the matter called on the record as a result of the letter that it had received from the State. (90:2). In explaining why the case had been called on the record, the Circuit Court indicated that, "I thought that I should intervene to see how I can troubleshoot getting an attorney appointed faster. My understanding is that there was one attorney appointed already with the Public Defender's Office

and that was Attorney Aileen Henry, who I have substantial familiarity with, that she's practiced in Brown County for a long time and she is an experienced attorney who has always had excellent courtroom demeanor. But I reviewed the transcript of the April 28th, 2020, hearing where Mr. Butler wanted to not have Attorney Henry as his attorney, and it looked like because he had a different expectation of the timeline of the case than Attorney Henry did so that Attorney Henry withdrew." (90:3). The Court went on to state that, "You do have an absolute right to an attorney. * * * However, that . . . doesn't mean you get an unlimited number of attorneys assigned to you. At some point rejecting or firing attorneys is a rejection of the right to be represented by an attorney. Now, having one prior attorney and not wanting to be represented by the attorney anymore is certainly reasonable, so we are waiting for the subsequent appointment of counsel. I think we're at the point where the Court, myself, is going to start calling defense attorneys that are qualified to take this case and see if they will accept the Public Defender's Office representation." (90:3-4).

Shortly thereafter, Attorney Shannon Viel from the State Public Defender's Office made an appearance on the record and was asked if he had any additional information regarding the appointment of counsel for Butler. (90:7). Attorney Viel responded that, "we had assigned a private attorney for

his case, and then that attorney was let go and that at this point we essentially cannot appoint. We believe we would be able to appoint – I should say it's our belief that we would be successful in continuing to appoint for Mr. Butler . . . without the 90-day speedy trial restriction. That appears to be limiting our options to find an attorney. A staff attorney cannot take that within that time limit given all of our caseloads." (90:7-8). The proceedings ultimately concluded with the Circuit Court pronouncing that it was "going to contact the Public Defender's Office to get a list of attorneys, private bar attorneys that are certified to take these cases and start calling them personally to see if they'll take the public defender appointment." (90:10-11).

On July 9, 2020 Butler appeared in court with Assistant State Public Defender Virant who advised the court commissioner that his office was "continuing to look for an attorney" for Butler. Upon hearing that no attorney had yet been appointed, Butler directly asked the Court, "How long is this going to take? I've been in here for nine months without an attorney. It's an ongoing issue. I feel like my rights are being violated, all types of things." (91:2-3). In response, the court commissioner indicted on the record that he was going to have his clerk send Judge Liegeois an email "to see if he would be willing to appoint counsel." (91:3). The prosecutor appearing on the record then advised the court that the matter had been before Judge Liegeois last

week and that "they're aware of the issue." (91:3). Upon hearing that, the court commissioner then indicated that, "They are; okay. Thank you. Okay. Well, they are aware of the issue, sir. So the only thing we can do is just see what will happen, if anyone is willing to appoint you an attorney." (91:3).

On July 16, 2020 Butler appeared in court with Assistant State Public Defender Jeffrey Cano. (92:2). At the onset of the hearing, the court commissioner indicated that the Circuit Court Judge "wanted me to place on the record today, the status. Now, Mr. Butler has been in custody for a long period of time without counsel. There was previously counsel appointed, and he asked for different counsel. So, it has continued to take the Public Defender's Office some time since that point. [The Circuit Court Judge] indicated he had contacted four attorneys to see if they would take the case at the State Public Defender rate. Thus far, two had refused and two he had not heard back from, at least as of yesterday. If there was no success, he would start looking outside of Brown County . . . ." (92:2-3). Butler then asked to have the court consider a bond reduction. (92:3). After denying his request to lower bond to $20,000-$30,000, the matter was ultimately adjourned. (92:6-7).

On July 23, 2020 Butler appeared in court with an assistant state public defender. (93:2). At the proceeding, the Court Commissioner indicated

that he had received an email from the Circuit Court Judge who advised him that the judge had potentially found an attorney "who's willing to consider taking Mr. Butler's case" and that the Public Defender's Office "will be contacting the attorney to see if he qualifies for the appointment." (93:2-3). The matter was then adjourned for another week. (93:5).

On July 30, 2020 Butler appeared in court with Assistant State Public Defender Brianna Zawada who advised the court that her agency was "talking to an attorney based out of Milwaukee", that "paperwork has been sent to him to get him SPD certified", and they were "waiting for a response on that certification." (94:2). Butler then asked the court if the issue of bail could be addressed. (94:3). During arguments regarding bail, the court pontificated, "what consideration can I give the fact that the State, which is obligated to provide him with counsel, has failed to do so? And he's been in custody now for nine months without an attorney and he's, frankly, requesting a speedy disposition in the case. What effect does that have on what bond I set? I think it has to have some if the State fails in its obligation." (94:6). The court then asked defense counsel "why nobody in your office has taken the case," to which counsel replied, "I don't have any information on that, your Honor." (94:7). The court then ordered Attorney Cano from the State Public Defender's Office to appear at the next court date

"to explain why staff is not taking this case. Now it's been nine months since the filing of the Complaint. So I'm not going to take any action on the bond request today." (94:8).

On August 6, 2020 Butler appeared in court with Assistant State Public Defender Viel. (95:2). The court noted that Attorney Cano had been ordered to appear to address the lack of an attorney being appointed. (95:2-3). Attorney Viel began by stating, "to be honest with you, I'm at a bit of a loss as well. . . . we did actually appoint an attorney originally, Aileen Henry. Mr. Butler – and I'm not blaming Mr. Butler at all. But Mr. Butler did ask that Ms. Henry no longer be his attorney. So we are continuing to search for an attorney. This case did get called in front of Judge Liegeois, asking about the status of the case. I did attend that call. At that time, there was some thought or at least consideration on Mr. Butler's part, if he would be willing to remove the speedy trial demand, which we consider to be a significant block in terms of trying to find Mr. Butler an attorney. * * * Essentially, we have gone through this office, person by person. And much of this office, unfortunately, just given the turnover that we've experienced, are what I would consider, younger attorneys. * * * Some of the more experienced attorneys - - we all have significant cases and we've all pretty much maxed

out our case load at this point, and would not be able to give Mr. Butler the attention he deserves, especially under a speedy trial demand." (95:3-4).

The court commissioner indicated that he did not have any authority or ability to appoint Butler an attorney, "so we'll keep waiting and seeing what happens in regards to the Public Defender." (95:6). After asking to have bond heard, and upon hearing that his request for lower bond was being denied, Butler stated that, "I need to get out to work a couple of jobs to hire an attorney, since I been sitting in here this long. This is not my fault. You guys act like I'm guilty of this and not even proven innocent." (95:12). He later went on to state that, "how long does this have to continue for? For another year or what? I've been in here for nine months, almost ten months." (95:13).

On August 13, 2020 counsel was finally appointed for Butler. (32). On September 8, 2020, Butler made his first appearance in court with his newly assigned counsel and "completed the initial appearance" 322 days after he first appeared in court. (35). On September 29, 2020 a preliminary hearing was conducted 343 days after Butler first appeared in court. (38)

ARGUMENT

I. Initial appearances can only be adjourned for a reasonable period of time, subject to Wis. Stat. § 970.03(2) and *Riverside*, before constitutional and statutory violations ensue.

The continued adjourning of Butler's initial appearance deprived him of several fundamental rights, including the right to a prompt judicial determination as to whether there was probable cause to hold him in custody, his constitutional and statutory rights to a speedy trial, and his constitutional rights to procedural due process.

A. Riverside/Due Process Violation

The United States Supreme Court has held that generally, any custodial initial appearance and probable cause hearing must be held within 48 hours, barring extraordinary circumstances. See, *County of Riverside v. McLaughlin*, 500 U.S. 44, 58 (1991). *Riverside* was granted certiorari to resolve the conflicting determinations among Circuits as to what constitutes a "prompt" probable cause determination. *Id.* at 50. The Court balanced competing concerns of prolonged detentions and the protection of the public by requiring states to provide "a fair and reliable determination of probable cause… made by a judicial officer either before or *promptly after* arrest," leaving it up to each state to integrate prompt probable cause into their

differing systems. *Id.* at 52-53. In affirming that a State has no legitimate interest in detaining individuals who have been arrested without probable cause for an extended period of time, the Supreme Court held that determinations of probable cause that happen within 48 hours will in general comply with the promptness requirement of *Gerstein. Id* at 56.

Wis. Stat. Section 970.01(1) provides in part: "any person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed," for an initial appearance. *State v. Evans,* 187 Wis.2d 66, 90 (Ct. App. Wis. 1994). In cases where arrestees are taken into custody on a warrant with pre-initial appearance probable cause determinations, the court looks at the individual circumstances of the case to determine whether the initial appearance was held within a reasonable time frame. *Evans,* 187 Wis.2d 66 at 91. The *Riverside* post-arrest probable cause determination is "required to fulfill the same function for suspects arrested without warrants as the pre-arrest probable cause determination fulfills for suspects arrested with warrants." *State v. Koch*, 175 Wis.2d 684, 698 (1993). In *Koch,* the Wisconsin Supreme Court held that the *Riverside* rule requiring that probable cause determinations be held within 48 hours of the arrest, is applicable in Wisconsin. *State v. Golden*, 185 Wis.2d 763, 768, (Ct. App. Wis. 1994); *Koch*,

175 Wis.2d 684. The *Riverside* rule allows for states to combine their probable cause determination hearings with other pre-trial proceedings, so long as the determination is made promptly within 48 hours of the arrest. *Golden*, 185 Wis.2d 763 at 768-69.

In the present case, the criminal complaint was filed on October 23, 2019. On that same day Butler first appeared before the court. At that appearance, defense counsel acknowledged receipt of the criminal complaint and waived its formal reading. The State then set forth its reasons for requesting that the circuit court set cash bond at $75,000. Once the State was finished with its argument, defense counsel reserved Butler's right to argue bond until such time as an attorney could be appointed to represent him. The court set cash bond at $75,000 and adjourned the case for the "balance of initial appearance." Thereafter, the initial appearance was adjourned at least 20 times and for a period of 322 days before Butler appeared with his assigned counsel on September 8, 2020.

The circuit court, at Butler's initial appearance on October 23, 2019, admitted him to bail, but did not make a probable cause finding. (3:1). The subsequent proceedings that took place before Butler's eventual preliminary hearing are also devoid of any mention of a probable cause determination. Butler was arrested without a warrant on a violation of extended supervision.

Butler was brought before a judge in a reasonable time, as required by statute for his initial appearance. (1:1-8), (3:1); Wis. Stat. 970.01(1). The United States Supreme Court held in *Riverside* that a warrantless arrest probable cause determination must be made, generally, within 48 hours. *Riverside*, 500 U.S. 44, 56. However, no judicial determination of probable cause was made at the October 23, 2019 court appearance nor any of the subsequent court appearances that Butler made without assigned counsel – a period of at least 322 days. Under the *Riverside* rule, as adopted by Wisconsin, requiring that a probable cause determination be made within 48 hours, Butler's 322 days that he was incarcerated on a warrantless violation of extended supervision is a clear violation of the 48-hour rule. See, 500 U.S. 44; *Koch*, 175 Wis.2d 684.

Butler, arrested without a warrant, did not receive a probable cause determination as required by the law. The Court in *Golden*, held that for a *Riverside* violation, "…dismissal with prejudice or the voiding of a subsequent conviction is not required as the remedy for a Riverside violation unless the delay resulted from a deliberate Riverside violation producing prejudice to the defendant's ability to prepare a defense." *Golden*, 185 Wis.2d 763 at 769. The sheer flagrancy with which the State acted, subjecting Butler to hearing

after hearing after hearing without ever addressing the basis for his detention demands that the charges be dismissed with prejudice.

B. Speedy Trial Violation

The statutory right to a speedy trial under Wis. Stat. 970.01(2)(a) guarantees defendants the right to a speedy trial within 90 days of a demand. The Constitutional speedy trial right attaches when the defendant "is indicted, arrested, or otherwise officially accused." State v. Borheygi, 222 Wis.2d 506, 510, 588 N.W.2d 89, 92 (Ct. App. Wis. 1998); see also United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982); Doggett v. United States, 505 U.S. 647, 655, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992).

A failure to abide by the statutory right to a speedy trial results in a discharge from custody, but a failure to abide by the Constitutional right to a speedy trial results in a dismissal of charges. State v. Lock, 348 Wis.2d 334, 337, 833 N.W.2d 189, 195-96 (Ct. App. Wis. 2013). It is Butler's position that both his statutory and his Constitutional right to a speedy trial was violated in this case.

To determine whether a denial of the constitutional right to a speedy trial has occurred, courts must analyze four factors. "(1) the length of delay;

(2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." Id.

The Wisconsin Supreme Court has held that a delay of nearly twelve months is presumptively prejudicial. Id.; see also Green v. State, 75 Wis.2d 631, 636, 250 N.W.2d 305 (1977). Reasons for the delay can range from deliberate government hampering of the defense, which is weighed heavily against the State, to overcrowding of courts, which is weighed less heavily. State v. Urdahl, 286 Wis.2d 476, 494-97, 704 N.W.2d 324, 333-35 (Ct. App. Wis. 2005). While a defendant has no duty to bring himself to trial, if he fails to assert the right, it is difficult to show he was denied a speedy trial. Id. Finally, prejudice is considered with eye to three sub-elements: "prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense." Id.

Butler was denied both his statutory and Constitutional speedy trial rights. While the denial of statutory speedy trial rights should have resulted in his release from custody, which did not happen, his constitutional speedy trial denial is far more serious.

Length of Delay

The delay in bringing him to trial by nearly a year satisfies the first element. The Wisconsin Supreme Court held in Green that a delay of nearly twelve

months is presumptively prejudicial. Green, 75 Wis.2d 631. That period time is almost the same period of time Butler sat in custody prior to appointment of counsel and his preliminary hearing.

Reasons for Delay

This Court in Borheygi wrote that "[t]he constitutional right of a speedy trial cannot be...cavalierly disregarded by the State in scheduling criminal trials." Borheygi, 222 Wis.2d at 520. The State in this case cavalierly disregarded Butler's right to a speedy trial by continuing to detain him for nearly a year before a lawyer was provided for him. The blame for the delay lays entirely at the feet of the State. Its inability to find Butler a lawyer, a responsibility that the State solely bears, was the cause for the delay. While the State and the Brown County Public Defender noted the paucity of lawyers available and competent to represent Butler at multiple points throughout the progression of the case, that assertion does not trump Butler's speedy trial right. State and lower court officials have the power to address this issue, and the fact that they did not, resulted in a flagrant denial of Butler's right to a speedy trial.

Assertion of Right to Speedy Trial

At a very minimum, Butler asserted his speedy trial right on March 24, 2020. (13:1-2). However, the constitutional right to a speedy trial attaches at

the initial formal accusation, which would be no later than October 23, 2019. His assertion of the right preserves his ability to assert a speedy trial denial and satisfies the third element.

Prejudice

Finally, Butler satisfies all three categories of this fourth element. His detention for nearly a year, including throughout the height of the pandemic, which disproportionately impacted inmates, certainly renders his incarceration oppressive. Arvind Dilawar, More Than Half of All Inmates in Wisconsin Prisons Have Tested Positive for Covid, The Nation, (February 18, 2021), https://www.thenation.com/article/society/prisons-incarceration-covid-wisconsin/. Along with the oppressive incarceration, Butler suffered anxiety about his case. He filed pro se motions with the circuit court during his incarceration and expressed frustration with the State's inability to find him a lawyer. (17:1), (18:1), (21:1-4), (23:1-2). Likewise, there can be no denying the delay impaired Butler's ability to arrange for his defense. His inability to contact lawyers or arrange for investigation of the evidence against him damaged his defense. Preventing that damage is at the very heart of the right to a speedy trial.

The denial of Butler's speedy trial right alone constitutes grounds to dismiss the case against him. While dismissal of the charges with prejudice is

recognized as a drastic remedy, it is the one appropriate and commanded for such violations. U.S. v. Velazquez, 749 F.3d 161, 186 (3d Cir. 2014) (holding that dismissal with prejudice is the correct remedy for a constitutional speedy trial violation); see also Hadley v. State, 66 Wis.2d 350, 367, 225 N.W.2d 461, 469 (1975) (holding that the remedy for a constitutional speedy trial is a complete dismissal of the indictment).

C. Procedural Due Process Violation

Finally, the State's conduct with regard to Butler's incarceration violated his rights to procedural due process. The Supreme Courts of the United States and Wisconsin have both recognized a right to protection from arbitrary government detention. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 118 S.Ct. 1708, 1716 (1998); *Thorp v. Town of Lebanon*, 235 Wis.2d 610, 642, 612 N.W.2d 59, 77 (2000). To prevail on a procedural due process claim, Butler must show "a deprivation by state action of a constitutionally protected interest in life, liberty, or property without due process of law." *Thorp*, 235 Wis.2d, 612 N.W.2d at 59 (internal quotations omitted).

As detailed above, the State's lengthy arbitrary incarceration of Butler deprived him of his constitutional right to a prompt judicial determination as to probable cause, his statutory right to a timely preliminary hearing, and his

constitutional and statutory rights to a speedy trial. The combined deprivation those rights constitutes a flagrant violation of his constitutional rights to procedural due process, which entitles him to dismissal of the charges with prejudice.

II. The ten-day deadline in Wis. Stat. § 970.03(2) begins to run after the defendant first appears in court and bail is fixed, regardless of whether the initial appearance has been formally completed.

Wis. Stat. 970.02(1) details the necessary components of the initial appearance. The presiding judge or court commissioner must inform the accused of the charges, their right to counsel, and their right to a preliminary hearing. Wis. Stat. 970.02(1). The judge must also admit the defendant to bail. *Id*.

The circuit court completed only one of the steps in Butler's initial appearance at his first initial appearance on October 23, 2019. (3:1). The court set a high cash bail, which required Butler to remain in custody awaiting a lawyer. Butler appeared before the circuit court a total of 19 more times before counsel was appointed. (3:1), (6:1), (7:1), (8:1), (9:1), (10:1), (12:1), (15:1), (17:1), (18:1), (22:1), (24:1), (25:1), (26:1), (27:1), (28:1), (29:1), (30:1), (31:1). Each and every one of those subsequent appearances served no

purpose other than for the court to inform Butler that there was no lawyer for him, and on a few occasions to hear Butler's request for lower bail.

Brown County Circuit Court's use of adjourned initial appearances in this case allowed it to delay the completion of Butler's initial appearance, potentially forever. The procedure allowed court officials to circumvent the ten-day requirement found in the statutes. If this Court does not put some sort of limit on this procedure, lower courts around the state will be able to circumvent the preliminary hearing timeliness requirement at will simply by "not completing" the initial appearance.

The question of when the ten-day clock in Wis. Stat. § 970.03(2) begins to run, and what the appropriate limit on the 'adjourned initial appearance' procedure is, presents two potential answers: (1) at the initiation of the initial appearance or (2) upon its formal conclusion. Only one of those options yields a conscionable result.

Under the second option, circuit court officials would have to formally pronounce the end of the initial appearance before the preliminary hearing clock begins to run. By allowing such a process, this Court would affix its imprimatur on circuit court officials holding open the initial appearance, potentially forever, by conducting weekly or biweekly pro forma hearings without ever violating statutory commands. Such a scheme would be an

unconscionable result. Illustrating such an example, however, is not meant to suggest that such a practice would become the default if Butler were not successful here. Rather, should Butler fail before this Court, the fact that its decision *could* be read to endorse such a regime should give this Court pause.

Under the first option, the ten-day deadline would be triggered upon the initiation of the first initial appearance. This scheme would allow courts to function normally and with breathing room, but without the undesirable side effects of prolonged and meaningless detention hearings.

At bottom, how this Court answers the question of when the ten-day requirement is triggered will depend entirely on its comfort level with the type of meaningless hearings faced by Butler. By beginning the initial appearance, and admitting Butler to bail, the circuit court triggered the ten-day deadline as this court found in *Lee*. *State v. Lee*, 396 Wis.2d 136, 140, 955 N.W.2d 424, 426 (Ct. App. Wis. 2021). "Wisconsin law requires that a preliminary hearing be held within ten days of a defendant's initial appearance if the defendant is in custody on a felony charge and bail is set in excess of $500." *Id*. Butler's admission to bail at the October 23, 2019 hearing triggered both the statutory rule and this Court's interpretation of the rule in *Lee*.

Brown County court officials flouted both rules, to Butler's detriment. They ought not be able to evade statutory commands in such an obvious manner. Holding open initial appearances as long as lower court officials deign results in nothing but gross injustice.

III. There is no substantive difference between the situation faced by Lee and that faced by Butler.

Lee was subjected to a procedure of weekly or biweekly status hearings which delayed the holding of his preliminary hearing. *Lee*, 396 Wis.2d at 142-50. Similarly, Butler was subjected to a procedure of weekly or biweekly adjourned initial appearances which delayed the holding of his preliminary hearing. The substance of the hearings both men faced are exactly the same. Butler and Lee were brought into court, the judge or commissioner advised them no lawyer had been appointed for them, and they were shuttled back to jail where they remained incarcerated until the next meaningless hearing. The fact that Butler had not yet "completed" his initial appearance is a semantic difference at best insofar as he had appeared before a commissioner and bail was set.

However, the similarities described above in the way that these two defendants were detained, and their preliminary hearings delayed, the sheer timeline of Butler's situation is considerably more egregious than Lee.

Counsel for Lee asserted in the briefs that Lee's ten-day preliminary hearing deadline had been exceeded by 103 days. *Id*. (Brief of Defendant-Appellant at 7). Butler's deadline was exceeded by 332 days. His first initial appearance was conducted on October 23, 2019. (3:1) His preliminary hearing finally occurred on September 29, 2020. (38:1). The two men, Butler and Lee, faced a nearly identical situation: an endless parade of meaningless hearings. This Court found the 103-day wait of Lee too egregious. The 332-day wait of Butler demands the same reaction.

The State contended in its response to Butler's Permissive Appeal that *Lee* was distinguishable for several reasons. First, the State argued that this case is different than *Lee* because while Lee's preliminary examination was repeatedly extended, Butler's initial appearance was repeatedly adjourned. (Response to Permissive Appeal Petition, 11). The State also quoted the circuit court, who told Mr. Butler, "the practice of our county is that the initial appearance has not been completed until a lawyer is found for the accused." By putting forth a semantic distinction between "extended preliminary examination" and "adjourned initial appearance," the State essentially argues that by not "completing" the initial appearance, Brown County officials can incarcerate anyone without counsel for any length of time, during and after

which the imprisoned would be powerless to seek judicial review. The State's argument emphasizes form over substance.

Second, the State asserted that the delays in finding Butler counsel resulted from the level of the offense, which narrowed the range of qualified attorneys. (Response, 12). The State seems to suggest that the absence of a clear reason for the delay in *Lee* compared with a clear reason here makes *Lee* inapplicable. *Lee*, however, makes no such distinction. *See generally Lee*, 396 Wis.2d 136, 955 N.W.2d 424. The clarity in reason for the delay is not material to the determination of applicability of *Lee*. Over the course of the entire delay in Mr. Butler's case, there is little indication any official ever seriously contemplated appointed a private attorney at county expense. That option would have readily dispelled any reason for delay in appointing counsel.

Third, the State argued that Butler terminated assigned counsel when one was found on April 2020, because she could not accommodate his speedy trial demand. (Response, 12). The State's assertion is not supported by the record. (17:1). It is clear from the transcript that the appointed counsel *withdrew* from representing Mr. Butler in light of his speedy trial demand. *Id*. at 3, 4. The State's position on this issue would force Butler to choose between his constitutional right to counsel and his right to a speedy trial. Guaranteed rights are not an either-or proposition. The State offers no legal support for its

implied assertion that Butler must pick between his right to a speedy trial and his right to counsel.

Fourth, the State incorrectly asserts that Mr. Butler has made no claims of prejudice. In fact, Mr. Butler did complain on at least one occasion of the State's handling of his witnesses. At the same hearing where the State erroneously claimed Mr. Butler fired appointed counsel over her inability to accommodate his speedy trial demand, Mr. Butler told the court commissioner that the State was harassing one of his witnesses. (85:5-7). Though it is unclear from the record what activities the State was engaging in with regard to the harassment, what is clear is a concerted effort by the State to harangue an ally of Mr. Butler into dropping her activities in support of his defense. *Id*. Mr. Butler's ability to legally stop or at least investigate this harassment was hampered by his incarceration without counsel. The State's assertion that Mr. Butler never complained of actual prejudice is simply incorrect.

Fifth, the State argues that because a prosecutor and representative of the SPD's office was present, Butler's case is distinguishable from *Lee*. While it is true that, unlike *Lee*, Mr. Butler did not appear alone in front of a magistrate on a regular basis, the relevance of that fact is unclear. That the SPD produced some warm body to sit next to Mr. Butler does not dispense with the intolerability of his continued and ongoing incarceration without assigned legal counsel. The State's position begs the question, how does the fact that

various random and uninformed assistant state public defenders sat next to Mr. Butler while his case was repeatedly adjourned make his case any less egregious than *Lee*?

Sixth, the State points out that unlike *Lee*, the circuit court personally called private attorneys on the SPD appointment list to attempt to find counsel for Mr. Butler. As with the fifth issue, this too begs the question of how does that make this case less egregious than *Lee*? As mentioned above, there is no indication that anyone ever considered appointing private counsel at county expense. This readily available option could have eliminated the need for the judge to cold call attorneys on the SPD appointment list to find counsel for the incarcerated defendant.

IV. The circuit court lost personal jurisdiction over Butler because the preliminary hearing was not held with the statutorily prescribed period.

This Court noted in *Lee* that the failure to hold a preliminary hearing within the statutory period resulted in a loss of personal jurisdiction. *Lee*, 396 Wis.2d at 173-74. Trial counsel asserted the loss of personal jurisdiction before the circuit court by way of a motion to dismiss. (54:1-5). The circuit court, despite being aware of this Court's decision in *Lee*, rejected those arguments. (61:1-2).

The unlawful delay in holding Butler's preliminary hearing, or indeed a meaningful initial appearance, detailed above, resulted in a loss of personal jurisdiction by the circuit court. *See, e.g., State ex rel. Klinkiewicz v. Duffy,* 35 Wis. 2d 369, 375, 151 N.W.2d 63 (1967); *State v. Stoeckle*, 41 Wis.2d 378, 164 N.W.2d 303 (1969); *Logan v. State*, 43 Wis.2d 128, 138-39, 168 N.W.2d 171 (1969); *Armstrong v. State*, 55 Wis.2d 282, 285, 198 N.W.2d 357 (1972*);* This Court's language on this point in *Lee* could not be more clear: "the failure to hold a preliminary hearing within the prescribed time results in a loss of personal jurisdiction." *Lee*, 396 Wis.2d at 173. In total, Lee's preliminary hearing deadline was exceeded by 103 days, while Butler's was exceeded by 332 days. This Court found 103 days to be a gross abuse of Lee's statutory right to a preliminary hearing. *See generally id*. That delay caused a loss of personal jurisdiction. Butler suffered a delay more than triple that time, and this Court likewise should find a loss of personal jurisdiction. While it is true that there is a semantic difference between the procedural postures of Lee and Butler, both men faced absurd extensions well beyond the statutorily permitted period. Lee was granted reprieve by this Court, as should Butler.

CONCLUSION

The procession of injustices suffered by Butler in this case is truly frightening. The State jailed Butler without a lawyer over an extremely

prolonged period of time, denied him his right to a prompt probable cause determination, denied him his right to a timely preliminary hearing, denied him his statutory and constitutional rights to a speedy trial, and generally denied him his constitutional rights to due process. The pure flagrancy of these actions, and the cavalier attitude of the State while it was happening, merit a strong response from this Court. For those reasons, Butler asks this Court to direct the circuit court to dismiss the Information with prejudice.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in sections 809.19(8)(b), (bm), and (c), Wis. Stats. for a brief. The length of this brief is 8,125 words with a proportional serif font.

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning reading those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of the full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions

of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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