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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001999-W

STATE OF WISCONSIN EX REL.
ANTONIO S. DAVIS,

Petitioner-Petitioner,

v.

CIRCUIT COURT FOR DANE COUNTY AND
HONORABLE ELLEN K. BERZ,

Respondent.

PETITION FOR REVIEW

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On the day after his arrest, Antonio Davis requested and was deemed qualified for representation by the State Public Defender (SPD). Due to a shortage of lawyers, the SPD did not appoint counsel for him until 65 days after his initial appearance—long after the 20-day deadline for filing a request for substitution of judge had passed. Within 6 days of being appointed, Mr. Davis's counsel filed a substitution request.

ISSUE PRESENTED

> Whether the SPD's inability to appoint counsel before the deadline for requesting a substitution of judge expires is a "government created obstacle" that interferes with a defendant's intelligent exercise of his right of substitution? Alternatively, whether the doctrine of equitable tolling tolls the deadline for filing a request for substitution of judge until the defendant is appointed counsel?

The circuit court denied Mr. Davis's request for substitution of counsel as untimely. Mr. Davis petitioned the Court of Appeals for a supervisory writ directing the circuit court to grant his substitution request. That petition was denied by the Court of Appeals on the grounds that it cannot develop the law.

CRITERIA FOR REVIEW

This case satisfies at least two of the criteria for Supreme Court review. First, pursuant to §809.62(1r)(c), the question presented is a purely legal issue that is likely to recur unless the Supreme Court grants review and develops the law governing exceptions to the deadline for filing requests for substitution of judge. The SPD's inability to appoint counsel in a timely manner is well documented. Due to the problem, a class action lawsuit has been filed against Governor Evers and Wisconsin's Public Defender Board. According to an August 2022 *Wisconsin State Journal* article about the lawsuit, tens of thousands of Wisconsin defendants are waiting for lawyers, and the Public Defender said it could take years to clear the backlog because attorney staffing in down by 20%.[1]

Must defendants caught in the backlog make a request for substitution of judge *pro se*—without the advice of counsel—while awaiting appointment of counsel? If so, how are they supposed to know that they must act *pro se*? And how are they to be made aware of the deadline for substitution?

The Supreme Court has stated that the purpose of §971.20 is to afford a defendant an opportunity to exercise his right of substitution intelligently.

[1] *See* https://madison.com/news/local/govt-and-politics/wisconsin-hit-with-another-class-action-lawsuit-over-delays-in-getting-attorneys-for-the-poor/article_8e7c6c6e-d5d5-5f3a-9723-f876ab96a776.html (last visited 1/11/23).

Baldwin v. State, 62 Wis. 2d 521, 531, 215 N.W.2d 541 (1974). The Supreme Court has also acknowledged that there are exceptions to the deadline for filing a substitution request when "a government-created obstacle" interfered with a defendant's opportunity to timely file for substitution. *State v. Zimbal*, 2017 WI 59, ¶41, ¶46, 375 Wis. 2d 643, 896 N.W.2d 327 (citing *Baldwin*, 62 Wis. 2d at 530-532 (court calendaring problem); *State ex rel. Tessmer v. Cir. Ct. Branch III, In & For Racine Cty.*, 123 Wis. 2d 439, 443, 367 N.W.2d 235 (Ct. App. 1985)(procedures for misdemeanor traffic cases); *State ex rel. Tinti v. Cir. Ct. for Waukesha Cty.*, Branch 2, 159 Wis. 2d 783, 790, 464 N.W.2d 853 (Ct. App. 1990)(courts internal procedures). The Supreme Court should grant review to develop the law and clarify that the SPD's failure to appoint counsel in a timely manner is a government-created obstacle that interferes with a defendant's ability to file an intelligent and timely request for substitution of judge. A decision to this effect will affect defendants across Wisconsin.

Second, pursuant to §809.62(1r)(b), this case alternatively demonstrates a need for the Supreme Court to consider establishing policy within its authority. Chief Justice Roggensack's concurrence in *Zimbal* agreed that, based on the facts of his case, the defendant's request for substitution of judge should be deemed filed on time. However, she objected to the relaxing of the strict rule of compliance with §971.20(7). She argued that the same result could, and should have been reached, by applying the doctrine of equitable tolling to the deadline for filing a

substitution of judge. *Zimbal*, ¶¶54-55. Justices R.G. Bradley and Kelly joined in her concurrence. The Supreme Court should alternatively grant review and establish that the remedy of equitable tolling is available to defendants who are denied counsel until after the deadline for filing a request for substitution has passed.

STATEMENT OF THE CASE AND FACTS

Antonio Davis is charged in Dane County Circuit Court Case No. 22CM1737 with Disorderly Conduct and misdemeanor Battery. He was arrested on those charges on August 16, 2022. (Appendix, p. 14). On the day after his arrest, August 17, 2022, Mr. Davis applied for representation on the case through the State Public Defender's Office and was determined to qualify for such representation. (Appendix, p. 14).

Mr. Davis's initial appearance was subsequently held on August 30, 2022 in front of a court commissioner. Pursuant to local practice, this matter was on that day assigned to Branch 11, Judge Ellen Berz. (Appendix, p. 14). Counsel was finally appointed for Mr. Davis on November 3, 2022. The delay in appointment of counsel was due to backlogs at the public defender's office and not due to any negligence or lack of diligence of Mr. Davis. (Appendix, p. 14).

Newly appointed counsel met with Mr. Davis on November 9, 2022 and discussed the assigned trial branch. Mr. Davis advised of his wish to substitute

out of Branch 11. (Appendix, p. 14). Counsel promptly filed a Request for Substitution and accompanying Affidavit in support of that request to explain why the substitution was filed outside of the 20 days allowed by Dane County Local Rules for substitution of judge on misdemeanor cases. These documents were efiled on November 9, 2022. (Appendix, pp. 12-15). The request for substitution was denied on November 10, 2022, by Judge Berz, with a one-word response: "untimely." (Appendix, p. 9).

Mr. Davis petitioned the Court of Appeals for a supervisory writ directing Judge Berz to grant his substitution request. The respondent was ordered to file a response, and the Court of Appeals on December 13, 2022 issued a decision denying the supervisory writ. The Court of Appeals found that Mr. Davis had failed to show that the circuit court had a plain duty to grant his substitution request. (Appendix, p. 7). According to the Court of Appeals, Mr. Davis is arguing that the law should be developed to recognize a substitution request as timely based on the date a public defender is appointed to represent an indigent defendant, and they would not take a position on such a potential development of the law. (Appendix, p. 8).

ARGUMENT

I. The Supreme Court should develop the law regarding "government created obstacles" to the timely filing of substitution requests.

The leading cases addressing exceptions to the deadline for filing a timely request for substitution of judge are *Tessmer* and *Zimbal*. Both hold that the deadline should not be strictly enforced when the government creates an obstacle that prevents the defendant from complying with it.

In *Tessmer*, the defendant appeared *pro se* at his initial appearance and had not previously been given any notice of an assigned trial court judge. At that time, a court commissioner entered a not guilty plea for him and he was given written notice of a pretrial date containing information about the assigned trial court judge. *Tessmer*, 123 Wis. 2d at 441. The defendant subsequently retained counsel, who filed a request for substitution seven days after the initial appearance. *Id*. The circuit court denied the request as untimely.

The court of appeals reversed. Citing *Baldwin*, it observed that courts should not construe §971.20 strictly "when the constitutional right to a fair trial would be denied because the defendant is unable at the time of arraignment to know what judge is to try his case . . . A defendant cannot intelligently exercise the right of substitution prior to an initial court appearance." *Id*. at 443. Given these circumstances, adopting a literal construction of the statute would

defeat its purpose: "affording a defendant an opportunity to intelligently exercise the right of substitution." *Id.*

In *Zimbal*, 2017 WI 59, 375 Wis. 2d 643, 896 N.W.2d 327, the circuit court advised a defendant to wait until counsel was appointed to him in order to request substitution. *Id.,* at ¶ 10. Counsel was appointed after the statutory deadline passed and the request for substitution was denied. *Id.,* at ¶ 14. The *Zimbal* court held that the request should have been deemed timely because there should be exceptions allowed to the strict requirements of the statute when a government-created obstacle prevents a defendant from complying with the statutory deadline. *Id.,* at ¶ 40.

A defendant has a constitutional right to a fair trial. He cannot know whether he needs to take steps to protect that right by substituting on a judge until he has a chance to consult his lawyer. His lawyer could advise him whether a judge assigned to his case has a reputation for treating defendants more harshly under circumstances similar to those in his case.

Unfortunately, delays in the appointment of counsel for the indigent are becoming more and more common in the State of Wisconsin. *See, e.g. State v. Lee*, 2021 WI App 12, 396 Wis.2d 136, 955 N.W.2d 424. The Office of the State Public Defender is a government agency, so these delays are being caused by the government. The Supreme Court should grant review and hold that under that rationales of *Tessmer*

and *Zimbal*, indigent defendants may exercise their right to substitution within a reasonable time, such as 20 days, from when counsel is appointed to them. Otherwise, indigent defendants will be denied the right to substitution when the SPD is unable to appoint counsel in a timely manner.

II. Alternatively, the Supreme Court should establish a remedy for defendants who are appointed counsel after the deadline for filing a request for substitution has passed.

"Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed." *Zimbal*, ¶64 (Roggensack, C.J., concurring)(quoting 51 Am Jur. 2d, Limitations of Actions §152 (2017). "Wisconsin appellate courts have tolled statutory deadlines as an equitable solution for harsh results that would flow from a required action outside of the defendant's control." *Id*., ¶66 (citations omitted). Strict construction of the deadline in cases where the SPD fails to appoint counsel in a timely manner yields harsh results. Indigent defendants who are unschooled in the law will lose the right of substitution. They will not know that they have right. They will not know the deadline for exercising it. And they will not have the advice of counsel about whether they should exercise the right in their case.

The Supreme Court should grant review and establish that the circumstances of Mr. Davis's case qualify for this equitable remedy. For indigent

defendants, the deadline for filing a substitution of judge should be tolled until the SPD actually appoints counsel. Thus, Mr. Davis would have had 20 days from the date counsel was appointed to file his request for substitution.

III. This is a good case for resolving the issue presented.

In a misdemeanor case, there is a statutory requirement that substitution must be filed "before making any motions to the trial court and before arraignment." Wis. Stat. §971.20(4). As noted above, the statute must be construed to allow a defendant the opportunity to exercise that right intelligently. *Tessmer*, 123 Wis. 2d at 434; *Tinti,* 159 Wis. 2d at 789. Dane County Circuit Court Local Rules therefore permit 20 days from an initial appearance for substitution requests in misdemeanor cases.[2]

Mr. Davis is indigent, and did everything within his power to assure that he would have representation on this case. He applied for representation in this case at his first available opportunity, while he was in jail the day after his arrest. He was found to be indigent and thus to qualify for representation by the Office of the State Public Defender. Although he was informed that his case was assigned to Judge Berz at his initial appearance, he would not have been aware of how long it would take for counsel to be appointed to him, or

[2] *See* Dane County Local Court Rule 208, https://courts.countyofdane.com/Prepare/Rules.

been aware that the circuit court would allow important deadlines to expire while he patiently waited for a lawyer to be appointed to him. He never waived his right to be represented by counsel in this case, or ever indicated a desire or intent to represent himself.

Mr. Davis filed his substitution request 71 days after his initial appearance. No motions had been filed in the case. The court had not set a trial date. He did not use his request for substitution to disrupt the court's calendar.

If Mr. Davis had had the money to retain a private lawyer, he could have easily met the 20-day deadline for a request for substitution. However, due to circumstances beyond his control, counsel was not appointed for him until well after the deadline had passed. Once the circuit court denied his request for substitution, he promptly filed his petition for a supervisory writ, which is the preferred route for review of a trial court ruling on the timeliness of a request for substitution of judge. *Clark v. State,* 92 Wis. 2d 617, 631, 286, N.W.2d 344, 349 (1979).

The Court of Appeals denying the writ implied that its hands were tied. Based on the facts of his case, the circuit court did not have a clear and plain duty to grant his request for substitution. (Appendix, p. 8). It could not rule in his favor without developing the law.

The court of appeals' first mistake was reading the caselaw too narrowly. *Zimbal* recognized a line of cases where a "government created obstacle" prevents

the exercise of the right of substitution. *Zimbal*, ¶¶41-47. The SPD's backlog is literally a government created obstacle and it prevents and intelligent exercise of the right of substitution.

The court of appeals second mistake was overlooking *Tessmer*'s procedural history. It involved an issue of first impression. Section 971.20(4) requires substitution requests to be filed before arraignment. However, in traffic misdemeanor cases the defendant's first appearance is tantamount to an arraignment. Construed strictly, §971.20(4) would require a defendant to file a substitution request before his initial appearance. When the circuit court in that case denied the defendant's request for substitution, he filed a petition for supervisory writ. Relying heavily on *Baldwin*, the Court of Appeals granted the writ.

The important point is that *Baldwin* did not involve a traffic misdemeanor case. It involved a court-created calendaring system. In *Tessmer*, the Court of Appeals granted the writ by extrapolating from *Baldwin*'s rationale. That is exactly what Mr. Davis asked the Court of Appeals to do in this case. Grant the writ based on the rationales of *Zimbal* and *Tessmer*. The Court of Appeals ducked the issue. Given the SPD's backlog of cases, circuit courts, lawyers, and defendants need an answer to the issue presented.

CONCLUSION

For the foregoing reasons, Antonio Davis, by counsel, requests that this court grant his petition and review this appeal.

Dated this 12th day of January, 2023.

Respectfully submitted,

Electronically signed by:
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2,505 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 12th day of January, 2023.

Signed:

Electronically signed by:
Laura Breun
LAURA BREUN
Assistant State Public Defender