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**SUPREME COURT**

STATE OF WISCONSIN  
IN SUPREME COURT

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No. 2022AP1999-W

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STATE OF WISCONSIN EX REL.  
ANTONIO S. DAVIS,

Petitioner-Petitioner,

v.

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

Respondents.

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**RESPONSE TO PETITION FOR REVIEW**

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The Circuit Court for Dane County and the Honorable Ellen K. Berz oppose Antonio S. Davis's petition for review. Davis seeks review of the court of appeals' order denying his petition for supervisory writ. *State of Wisconsin ex rel, Antonio S. Davis v. Circuit Court for Dane County*, No. 2022AP1999-W, slip op. (Wis. Ct. App. Dec. 13, 2022) (unpublished); (Pet-App. 3–8.) He asks this Court to develop the law and provide an exception to the clear deadlines for filing a request for judicial substitution in circuit court. However, the standard for granting a supervisory writ involves whether a circuit court violated a plain legal duty. Here, it is indisputable that the circuit court did not violate a plain legal duty, because no authority required it to grant Davis's belated substitution request. Because the dispositive issue is whether the circuit court violated a plain duty, this case is not an appropriate vehicle for developing the law in the manner Davis seeks. *See* Wis. Stat. § (Rule) 809.62(3)(b). This Court should deny review.

## BACKGROUND

Davis was charged with one count of misdemeanor disorderly conduct, domestic abuse assessments, and one count of misdemeanor battery, domestic abuse assessments.<sup>1</sup> Davis filed a request for judicial substitution more than two months after his initial appearance, and more than two months after the case was assigned to Branch 11.<sup>2</sup> Davis has never disputed that he had notice of his judicial assignment. The circuit court denied his request for substitution as

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<sup>1</sup> <https://wcca.wicourts.gov/caseDetail.html?caseNo=2022CM001737&countyNo=13&mode=details#summary> This Court may take judicial notice of circuit court entries on the Wisconsin Circuit Court Access web page. Wis. Stat. § 902.01(2)(b).

<sup>2</sup> *Id.*

untimely, presumably in light of Dane County Local Criminal Rule 208.<sup>3</sup> (Pet-App. 9.)

In his petition to the court of appeals, Davis did not dispute that his request was untimely per local rule. Instead, Davis argued that an exception should be made because he was not represented by counsel during the window in which he had the opportunity to request substitution. (Pet-App. 8.) Davis essentially argued 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. (Pet-App. 8.) The Wisconsin court of appeals denied the petition for supervisory writ, because Davis did not establish that the circuit court violated a plain legal duty. (Pet-App. 8.)

**THIS COURT SHOULD DENY REVIEW BECAUSE  
THIS CASE IS NOT AN APPROPRIATE VEHICLE IN  
WHICH TO DEVELOP THE LAW**

**A. The court of appeals correctly concluded  
that the circuit court did not violate a plain  
duty.**

The court of appeals' decision was correct. "A supervisory writ is an extraordinary remedy to prevent a court from refusing to perform, or from violating, its plain duty." *State v. Buchanan*, 2013 WI 31, ¶ 14, 346 Wis. 2d 735, 828 N.W.2d 847 (quoting *Madison Metro. Sch. Dist. v. Cir. Ct. for Dane Cnty.*, 2011 WI 72, ¶ 33, 336 Wis. 2d 95, 800 N.W.2d 442).

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<sup>3</sup> That rule provides that "[i]n all CT and CM cases the defendant shall have 20 days after the initial appearance to file a request for substitution of the assigned judge." Dane Cnty. L.R. 208, *available at*: CompleteRuleList | Dane County Clerk of Courts (countyofdane.com).

Because Davis's substitution request was not timely under the relevant local rule, and because no authority required the circuit court to deem his request for substitution timely, the circuit court did not have a plain duty to grant Davis's substitution request. The Wisconsin court of appeals properly denied the petition for supervisory writ.

**B. Davis's case is not a proper vehicle for this Court to consider the issues he raises.**

Davis's petition to this Court presents two issues: (1) whether the State Public Defender'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; and (2) alternatively, whether the doctrine of equitable tolling should be applied in Davis's case and similar cases. (Pet. 3.)

The first issue is not appropriate for this Court's review. Davis is asking this Court to develop the law or a policy to provide an exception to the timeliness rules. (Pet. 5.) But developing the law or establishing a new policy is diametrically opposed to the plain legal duty aspect of the supervisory writ standard. A petition for supervisory writ cannot be granted unless the petitioner establishes the violation of a plain duty. *State ex rel. CityDeck Landing LLC v. Cir. Ct. for Brown Cnty.*, 2019 WI 15, ¶ 30, 385 Wis. 2d 516, 922 N.W.2d 832. No plain duty was violated here. Merits of his argument aside, this case is not an appropriate vehicle for development of the exception that Davis seeks.

The second issue, which Davis did not argue in the lower courts, is not appropriate for the same basic reason. Davis is asking this Court to establish that equitable tolling is a remedy for defendants who are appointed counsel after the deadline for filing a request for substitution has passed. (Pet. 10.) Again, the issue is whether the circuit court had a

plain duty to grant Davis's substitution request. It did not. This case is not an appropriate vehicle to decide whether equitable tolling should apply to Davis's circumstances.

Davis argues that the court of appeals should have read *Zimbal*<sup>4</sup> and the "government created obstacle" line of cases as applying to his case because "the SPD's backlog is literally a government created obstacle and it prevents [an] intelligent exercise of the right of substitution." (Pet. 12–13.) His argument is unpersuasive.

Strict compliance with substitution deadlines may be overlooked only under certain narrow exceptions, namely, when a government-created obstacle prevents the litigant from exercising the right to substitution. Government-created obstacles include when a litigant does not have notice of his or her appointed judge before the deadline runs. *State v. Zimbal*, 2017 WI 59, ¶ 41, 375 Wis. 2d 643, 896 N.W.2d 327 (citing *Baldwin v. State*, 62 Wis. 2d 521, 530–32, 215 N.W.2d 541 (1974); *State ex rel. Tessmer v. Cir. Ct. Branch III, In & For Racine Cnty.*, 123 Wis. 2d 439, 443, 367 N.W.2d 235 (Ct. App. 1985); *State ex rel. Tinti v. Cir. Ct. for Waukesha Cnty., Branch 2*, 159 Wis. 2d 783, 790, 464 N.W.2d 853 (Ct. App. 1990)).

Government-created obstacles also include when a circuit court judge affirmatively extends the substitution deadline. *Zimbal*, 375 Wis. 2d 643, ¶¶ 47–48, 52. In *Zimbal*, the circuit court concluded that the defendant's substitution request was untimely because it fell outside of the statutory 20-day time limit. *Id.* ¶ 1. *Zimbal* argued that the court erred for three reasons, including because "the circuit court [had previously] instructed him that the filing of a motion for

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<sup>4</sup> *State v. Zimbal*, 2017 WI 59, 375 Wis. 2d 643, 896 N.W.2d 327.

substitution should be deferred until after an attorney was appointed.” *Id.* ¶ 2.

The Wisconsin Supreme Court agreed with *Zimbal*. *Id.* ¶ 40. It held that it would “make an exception to the rule of strict adherence [to Wis. Stat. § 971.20] because the circuit court directed that the substitution issue would again be addressed after trial counsel was appointed and *Zimbal* followed that directive.” *Id.* This limited exception “comports with our prior case law allowing for an exception when a government-created obstacle prevents a defendant from complying with the statutory deadline.” *Id.*

Notably, *Zimbal* was a case that arose on appeal rather than a supervisory writ, so the circuit court’s “plain duty” was not at issue. *Id.* ¶ 1. No court has ever held that a defendant’s pro se status or a delay in appointment of counsel amounts to a government-created obstacle that prevents the defendant from exercising the right to substitution. The *Zimbal* line of cases do not create a plain legal duty that the circuit court was required to follow.

Davis also argues that the court of appeals overlooked *Tessmer*,<sup>5</sup> which involved “an issue of first impression” on a petition for supervisory writ. (Pet. 13.) Davis argues that the *Tessmer* court “extrapolat[ed]” from other cases, which he claims is on all fours with what he is requesting here. *Tessmer* does not support Davis’s position.

The *Tessmer* court held that under the particular facts of the case, the request for substitution took place within a reasonable time period. *Tessmer*, 123 Wis. 2d at 444. The court’s holding was driven by the fact that, as of the date the defendant’s substitution deadline ran, he did not know which judge would be assigned to try his case. *Id.* at 443. The

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<sup>5</sup> *State ex rel. Tessmer v. Cir. Ct. Branch III, In & For Racine Cnty.*, 123 Wis. 2d 439, 367 N.W.2d 235 (Ct. App. 1985).

defendant was unable to exercise his right to substitution “intelligently,” and the court therefore construed the statute liberally in his favor. *Id.* Notably, the court’s analysis *did not* turn on the fact that the defendant was pro se at his initial appearance; rather, it turned on the fact that he had not received notice of who his judge was. *Id.* at 442–43. Davis received this notice before his deadline ran.

*Tessmer* involves the application of unique facts to an established legal standard, not the development of a new exception to a legal standard. *Tessmer* does not support granting review in this case.

### CONCLUSION

Respondents respectfully request that this Court deny Davis’s petition for review.

Dated this 26th day of January 2023.

Respectfully submitted,

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**FORM AND LENGTH CERTIFICATION**

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 1,576 words.

Dated this 26th day of January 2023.



JENNIFER L. VANDERMEUSE  
Assistant Attorney General

**CERTIFICATE OF COMPLIANCE WITH  
WIS. STAT. §§ (RULES) 809.19(12) and  
809.62(4)(b) (2019-20)**

I hereby certify that:

I have submitted an electronic copy of this petition or response, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.19(12) and 809.62(4)(b) (2019-20).

I further certify that:

This electronic petition or response 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 petition or response filed with the court and served on all opposing parties.

Dated this 26th day of January 2023.



JENNIFER L. VANDERMEUSE  
Assistant Attorney General



