FILED
08-08-2023
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP1999-W

STATE OF WISCONSIN EX
REL. ANTONIO S. DAVIS,

Petitioner,

v.

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

Respondents.

ON APPEAL FROM AN ORDER OF THE WISCONSIN COURT OF APPEALS, DIST. IV, DENYING A PETITION FOR SUPERVISORY WRIT

BRIEF OF RESPONDENTS

JOSHUA L. KAUL
Attorney General of Wisconsin

JENNIFER L. VANDERMEUSE
Assistant Attorney General
State Bar #1070979

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 294-2907 (Fax)
vandermeusejl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Davis, through counsel, filed a delinquent request for judicial substitution more than two months after the deadline expired. Davis asked the circuit court to overlook his late request, because he was not appointed counsel until after the deadline ran. But Davis knew who his judge was when the clock began ticking, and a lawyer appeared on his behalf during that time. The circuit court denied the request as untimely.

Davis then filed a petition for supervisory writ in the Wisconsin Court of Appeals. He argued that the circuit court had a plain duty to grant his late request, because a delay in the appointment of counsel was a government-created obstacle that prevented him from intelligently exercising his right to substitute. The court of appeals denied the petition, because Davis had not established that the circuit court violated a plain duty. Davis had cited no authority to show that a delay in the appointment of counsel was grounds to extend the substitution deadline.

Davis petitioned for this Court's review, arguing that the substitution deadline should not be strictly enforced, because the delay in his appointment of counsel was a government-created obstacle. This Court granted review.

In his opening brief, Davis has shifted his argument and departed from the theory he presented in his petition and the lower courts. He now argues that the government-created obstacle occurred when the circuit court entered a plea on his behalf at his initial hearing, which triggered a different substitution deadline and purportedly prevented him from exercising his right to substitute in an intelligent manner.

This Court should dismiss this case without deciding the issue. Davis abandoned the argument he presented to this Court in his petition for review. He did not raise his new

argument in circuit court or the court of appeals, and there is no compelling reason for this Court to overlook his forfeiture.

Even if outright dismissal was not appropriate, Davis's arguments lack merit. This action arises from a petition for supervisory writ. A petition for supervisory writ cannot be granted unless the petitioner establishes, among other things, the violation of a plain duty. Davis's arguments, both in the court of appeals and in this Court, fall far short of meeting that standard. The circuit court did not violate a plain duty, because no clear authority required the court to overlook the substitution deadline under the circumstances presented here. Nor did Davis establish irreparable harm.

This Court should dismiss the case, or, alternatively, affirm the court of appeals' denial of Davis's petition for supervisory writ.

STATEMENT OF THE ISSUES

1. Should this Court dismiss the case because Davis abandoned the argument he presented in his petition to this Court, and his new argument was not presented in the lower courts and either fails as a matter of law or lacks sufficient record development to warrant an opinion?

This Court should answer yes and dismiss this case.

2. Alternatively, did the Wisconsin Court of Appeals properly deny Davis's petition for supervisory writ because the circuit court did not violate a plain duty when it denied Davis's untimely substitution request, and Davis did not establish irreparable harm?

The Wisconsin Court of Appeals implicitly answered yes. It denied the petition because Davis did not establish the violation of a plain duty.

This Court should answer yes and affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This Court should dismiss this case without rendering an opinion because it is not a good vehicle for law development. If this Court declines to dismiss this case, oral argument and publication are customary, and Respondents[1] request both.

STATEMENT OF THE CASE

A. Davis is charged with several misdemeanor offenses, an attorney represents him at his initial appearance, and he receives notice of his assignment of judge.

On August 30, 2022, the State filed a criminal complaint against Davis; he is charged with one count of misdemeanor disorderly conduct and one count of misdemeanor battery, each with domestic abuse assessments.[2] (Pet-App. 4–5.) An initial appearance was held before Dane County Circuit Court Commissioner Jason Hanson on August 30, 2022. (Pet-App. 27.) State Public Defender (SPD) Attorney Laura Breun appeared on behalf of Davis. (Pet-App. 27.) At that hearing, Davis was advised of his right to an attorney and the SPD application process if not already represented. (Pet-App. 27.) Davis received a copy of the complaint and waived reading. (Pet-App. 27.) The court

---

[1] In this brief, "Respondents" refers to named respondents in this action, namely, the Circuit Court for Dane County and the Honorable Ellen K. Berz.

[2] *See* 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 webpage. Wis. Stat. § 902.01(2)(b); *see Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (judicial notice of electronically available court from the court's webpage).

entered Not Guilty pleas to his charges. (Pet-App. 27.) Nothing in the record suggests that Davis or the SPD attorney objected to the entry of pleas at that hearing.

At that same August 30 hearing, a signature bond was set, in which Davis was ordered not to have any contact with the victim referenced in the complaint. (Pet-App. 27–28.) Davis was provided a copy of the bail/bond form, which specified the conditions of his release, and also specified "Trial Judge – Br 11." (Pet-App. 10.) Branch 11 is the branch assigned to the Honorable Ellen K. Berz.[3] Judge Berz was assigned as the responsible court official. (Pet-App. 27.) A notice of hearing issued to Davis on August 30, 2022, listed Judge Berz as the presiding judge. (Pet-App. 11, 27.)

In Dane County, a local rule governs the process for requesting judicial substitution in misdemeanor cases. In all criminal misdemeanor cases, "the defendant shall have 20 days after the initial appearance to file a request for substitution of the assigned judge."[4] (Pet-App. 33.) Davis's 20-day clock began ticking on August 30, 2022, the day of his initial appearance and the same day he received notice of his judge.

B. More than two months after the substitution deadline expires, Davis files a request for judicial substitution, and the circuit court denies it as untimely.

According to an affidavit, Davis retained SPD counsel on November 3, 2022. (Pet-App. 15.) Davis's appointed counsel, SPD attorney Laura Breun, was the same attorney who had appeared on Davis's behalf on August 30, 2022. On

---

[3] *See* Judges | Dane County Clerk of Courts, available at: https://courts.countyofdane.com/judges (last visited July 10, 2023).

[4] Dane Cnty. Local R. 208, *available at*: https://courts.countyofdane.com/prepare/rules.

November 9, 2022, Davis, by Attorney Breun, filed a request for judicial substitution. (Pet-App. 13–16.) This request was filed over two months after Davis's initial appearance, when he had received notice of his assigned judge. (Pet-App. 27–28.)

Davis explained that his request was late under the local rule because the SPD's office is experiencing "significant delays" in its ability to appoint counsel for defendants, and Attorney Breun was not appointed until November 3, 2022. (Pet-App. 13–15.) Davis argued that his request for substitution, though late under the local rule, "should still be granted as it was made within a reasonable amount of time from when the defendant was appointed counsel in this matter and only after he had an opportunity to exercise his right to substitute intelligently." (Pet-App. 13.)

On November 10, 2022, the circuit court entered an order denying the request as untimely. (Pet-App. 17–19.)

C. The Wisconsin Court of Appeals denies Davis's petition for supervisory writ.

Davis petitioned the Wisconsin Court of Appeals for a supervisory writ. (R-App. 3–12.)[5] Davis argued that the circuit court had a plain duty to grant his substitution request. (R-App. 6–9.) Although his substitution request was outside the 20-day limit per Dane County Local Rule, he noted that it was not his fault that he was not appointed counsel until November 3, 2022. (R-App. 9.) He argued that the delay in appointment of counsel "was a government-created obstacle that prevented his ability to comply with the statute." (R-App. 9.)

---

[5] Respondents have provided a copy of Davis's supervisory writ petition and the Respondents' response in a supplemental appendix. For the Court's convenience, Respondents include a copy of the court of appeals' decision as well, though this brief cites to Davis's appendix when it references that decision.

The court of appeals denied the petition, concluding that Davis failed to establish that the circuit court had a plain duty to grant his substitution request. (Pet-App. 20–25.) Davis had not cited any authority that imposed a duty on the circuit court to recognize the substitution request as timely, based on the delay in the appointment of counsel. (Pet-App. 24–25.) "Instead, Davis essentially argues 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. 25.) Given that "no authority required the circuit court to deem the request for substitution timely, the court did not have a plain duty to grant the substitution request." (Pet-App. 25.)

D. Davis petitions this Court for review.

Davis petitioned for review. The issue, as presented to this Court in the petition, was as follows:

> 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?

(Pet. 3.)

This Court granted review on March 31, 2023.

STANDARD OF REVIEW

Whether this Court should dismiss this case without rendering an opinion is within this Court's discretion and is decided by this Court independently. *See generally* Wis. Stat. § (Rule) 809.62(1r).

Should this Court reach the merits, the standard of review is governed by precedent pertaining to supervisory writ actions. The court of original jurisdiction exercises its

discretion when deciding whether to issue a supervisory writ. *State ex rel. Kenneth S. v. Cir. Ct. for Dane Cnty.*, 2008 WI App 120, ¶ 9, 313 Wis. 2d 508, 756 N.W.2d 573. "A petition for a supervisory writ will not be granted unless: (1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result; (3) the duty of the trial court is plain and it must have acted or intends to act in violation of that duty; and (4) the request for relief is made promptly and speedily." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 17, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted).

The court's exercise of discretion in writ actions often involves "resolving questions of law in order to determine whether the circuit court's duty is plain." *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶ 105, 363 Wis. 2d 1, 866 N.W.2d 165 (citation omitted), *decision clarified on denial of reconsideration sub nom. State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49. "A plain duty 'must be clear and unequivocal and, under the facts, the responsibility to act must be imperative.'" *Id.* (citation omitted).

Davis's substitution deadline was governed by statute, but more specifically, by local circuit court rule. The interpretation and application of statutes and local rules are questions of law that this Court reviews de novo. *Hefty v. Strickhouser*, 2008 WI 96, ¶ 27, 312 Wis. 2d 530, 752 N.W.2d 820.

ARGUMENT

I. This Court should dismiss the case because Davis has abandoned the issue he presented in his petition to this Court, and his new argument is forfeited and should not be decided.

In his petition, Davis argued that this 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." (Pet. 5.) Davis argued that this 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." (Pet. 6.) This Court granted Davis's petition, and its order specified that the petitioner "may not raise or argue issues not set forth in the petition for review unless otherwise ordered by the court." (Order, March 31, 2023); *see also* Wis. Stat. § (Rule) 809.62(6).

But that is essentially what Davis did. In his brief to this Court, he abandoned the argument he petitioned upon and advanced a different theory for finding a government-created obstacle. His new presented issue is as follows:

> When the court sua sponte entered a plea on behalf of an unrepresented defendant awaiting appointment of counsel before giving notice of assignment of judge, did that procedure result in a government-created obstacle that deems Mr. Davis' request for substitution timely?

(Davis's Br. 5.) Davis now asks this Court to "find that the intake court's sua sponte arraignment, which allegedly happened before the appointment of counsel or notice of assigned judge, was a 'government created obstacle' that impeded Mr. Davis' ability to exercise the right of substitution." (Davis's Br. 8–9.)

A petitioner cannot raise alternative legal theories to support claims for relief that were not raised in the petition for review to this Court. *Emer's Camper Corral, LLC v. Alderman*, 2020 WI 46, ¶ 44, 391 Wis. 2d 674, 943 N.W.2d 513. As the petitioner, Davis was required to properly preserve his claims for review, and is limited to the claims he both preserved below and raised in his petition for review. *State v. Caban*, 210 Wis. 2d 597, ¶¶ 13–21, 563 N.W.2d 501

(1997); *Emer's Camper Corral*, LLC, 391 Wis. 2d 674, ¶ 44. Arguing one theory of a "government-created obstacle" in the court of appeals does not preserve for review a similar but distinct theory to find a government-created obstacle. *See Emer's Camper Corral, LLC*, 391 Wis. 2d 674, ¶ 44. Davis cannot now argue a new theory of a government-created obstacle that he did not preserve or petition upon. Further, as discussed below, Davis's new argument either fails as a matter of law, or the record lacks sufficient development to properly consider it.

The issue Davis raised in his petition to this Court is abandoned because it was not argued in his opening brief. *See A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised on appeal, but not briefed or argued, is deemed abandoned."). Thus, this Court should not address it. *Weborg v. Jenny*, 2012 WI 67, ¶ 39 n.8, 341 Wis. 2d 668, 816 N.W.2d 191.

For these reasons, Respondents respectfully request that this Court dismiss the case without issuing an opinion.

II. The circuit court did not have a plain duty to grant Davis's late request for judicial substitution, and Davis did not establish irreparable harm.

Neither the argument Davis raised in the court of appeals nor the new argument he presented in his brief to this Court has merit. In the court of appeals, Davis argued that the circuit court had a plain duty to grant his late substitution request because the delay in his appointment of counsel was a government-created obstacle that prevented him from intelligently exercising his right to substitution before the Dane County Local Rule's deadline ran. In this Court, Davis argues that the government-created obstacle "resulted when the court, sua sponte, at initial appearance, entered a plea on Mr. Davis's behalf," which caused the substitution deadline

under Wis. Stat. § 971.20 to expire "before he had appointed counsel and before he had notice of the assigned judge." (Davis's Br. 10.) Both arguments miss the mark. The court of appeals properly denied Davis's petition for supervisory writ, and this Court should affirm.

A. A supervisory writ is a drastic remedy that will only be issued if stringent prerequisites are met.

A supervisory writ "is considered an extraordinary and drastic remedy that is to be issued only upon some grievous exigency." *Kalal*, 271 Wis. 2d 633, ¶ 17 (citation omitted). The supervisory writ "serves a narrow function: to provide for the direct control of lower courts, judges, and other judicial officers who fail to fulfill non-discretionary duties, causing harm that cannot be remedied through the appellate review process." *Two Unnamed Petitioners*, 363 Wis. 2d 1, ¶ 81 (citation omitted).

Given its narrow function, a petition for a supervisory writ will not be granted unless: "(1) an appeal is an inadequate remedy; (2) grave hardship or irreparable harm will result; (3) the duty of the trial court is plain and it must have acted or intends to act in violation of that duty; and (4) the request for relief is made promptly and speedily." *Kalal*, 271 Wis. 2d 633, ¶ 17 (citation omitted).

B. Davis cannot meet the high burden for a supervisory writ because he cannot satisfy all of the required criteria.

In the court of appeals, Respondents maintained that Davis failed to meet his burden on the second and third factors. Respondents assumed *arguendo* that the first and

fourth requirements were satisfied in Davis's favor.[6] Given its significance here, the State begins with the third factor related to plain duty before briefly addressing the second factor related to extraordinary hardship. Because Davis failed to establish a violation of a plain duty or extraordinary hardship, the court of appeals properly denied his writ petition.

1. The circuit court did not have a plain duty to grant the substitution request in this case.

The driving factor in this case is whether the circuit court violated a plain duty when it denied Davis's substitution request under the facts presented here. The court of appeals properly exercised its discretion when it denied Davis's petition for a supervisory writ. The circuit court did not violate a plain duty when it denied his untimely request for substitution. A review of relevant authority shows why this is so.

The plain duty requirement is paramount since, in essence, a supervisory writ is designed "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). "A plain duty 'must be clear and unequivocal and, under the facts, the responsibility to act must be imperative.'" *Two Unnamed Petitioners*, 363 Wis. 2d 1, ¶ 80 (citation omitted).

---

[6] However, Respondents also question whether an appeal is an inadequate remedy. Existing precedent permits parties to appeal substitution decisions. *Clark v. State*, 92 Wis. 2d 617, 631, 286 N.W.2d 344, (1979). But this Court has indicated a preference for a supervisory writ to address a trial court's decision on the timeliness of substitution requests. *Id.*

Wisconsin courts have construed statutory substitution deadlines "strict[ly]." *State v. Zimbal*, 2017 WI 59, ¶ 39, 375 Wis. 2d 643, 896 N.W.2d 327. Under this Court's precedent, strict compliance with substitution deadlines may be overlooked only under certain narrow exceptions, such as when a government-created obstacle makes it impossible for the litigant to exercise the right to substitution.

Precedent has only identified a few instances of when a government-created obstacle may excuse an untimely judicial substitution request, such as: (1) a litigant not knowing the appointed judge before the deadline; and (2) a circuit court declining to adhere to a previously extended deadline.

Government-created obstacles include when a litigant does not have notice of his or her appointed judge before the deadline runs. For example, in *Clark v. State,* section 971.20(4) governed when a request for judicial substitution was timely filed. *Clark v. State*, 92 Wis. 2d 617, 621–22, 286 N.W.2d 344 (1979). Critically, in that case, the record did not reveal when Clark or his attorney first learned of the judicial assignment. *Id*. at 624–25. This court reasoned that the key to the statutory right of substitution was the defendant's ability to exercise his substitution right "intelligently," or, in other words, with knowledge of who the judge was. *Id*. at 628. Because it was not clear that Clark could intelligently exercise his right to substitution prior to the deadline, this Court suggested that it was inclined to hold that the substitution request was timely.[7] *Id*. at 628–29.

The Wisconsin court of appeals reached a similar conclusion in *State ex rel. Tessmer*. There, the date of arraignment was the triggering event for a substitution request to be timely under Wis. Stat. § 971.20(4). *State ex rel.*

[7] This court went on to hold, however, that Clark forfeited his substitution request by allowing the judge to preside over the case without objection. *Clark*, 92 Wis. 2d at 621, 631.

Tessmer v. Cir. Ct. Branch III, In & For Racine Cnty., 123 Wis. 2d 439, 441–42, 367 N.W.2d 235 (Ct. App. 1985). The defendant appeared pro se at the arraignment, but was not made aware of who his assigned judge was prior to arraignment. *Id.* at 441–43. The defendant then retained counsel, who filed a request for substitution of the judge after the arraignment date. *Id.* at 441. The circuit court denied the request as untimely. *Id.*

The court of appeals granted Tessmer's writ petition, holding that under the particular facts of the case, the request for substitution took place within a reasonable time period. *Id.* at 444. The court's holding was driven by the fact that, prior to arraignment, the defendant did not know what judge would be assigned to try his case. *Id.* at 443. The defendant was unable to exercise his right to substitution "intelligently," and the court therefore construed the statute liberally in his favor. *Id.* 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.

The court of appeals employed a similar analysis in *State ex rel. Tinti.* Because the defendant and his attorney did not have notice of the specific assigned judge prior to arraignment, "the filing deadline of [section 971.20(4)] must be relaxed to allow for an intelligent opportunity to exercise the right of substitution." *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).

Aside from lacking sufficient notice of the assigned judge, government-created obstacles also include when a circuit court judge affirmatively extends the deadline but then later declines to adhere to the extension. In *State v. Zimbal*, the court of appeals concluded that the defendant's substitution request was untimely because it fell outside of the statutory time limit. *Zimbal*, 375 Wis. 2d 643, ¶ 1. Zimbal

argued that the court erred for three reasons, including because "the circuit court instructed him that the filing of a motion for substitution should be deferred until after an attorney was appointed." *Id.* ¶ 2.

This 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(7)] 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.*

The *Zimbal* court's reasoning did not turn on the fact that Zimbal was treated as pro se during the relevant time period. *Id.* ¶ 37. The court focused on the fact that *the circuit court affirmatively ruled* that substitution would be addressed after the defendant was appointed counsel. *Id.* ¶ 46. Thus, "[s]imilar to the arraignment cases [*Baldwin*, *Tessmer*, and *Tinti*], a government-created obstacle prevented Zimbal from exercising the statutory right to substitution before the statutory deadline expired." *Id.* ¶ 47. Under the circumstances, it was reasonable to "restart the 20 day deadline once counsel had been appointed because the circuit court extended the deadline." *Id.* ¶ 52.

Here, Davis's judicial substitution request was untimely under both the state statute and the local court rule. Under Wisconsin law, requests for substitution of the originally assigned trial judge must be filed "before making any motions to the trial court and before arraignment." Wis. Stat. § 971.20(4). In a Dane County misdemeanor case such as this one, a substitution request must be made within 20 days after the initial appearance. Dane Cnty. Local R. 208. It is not unusual for defendants in misdemeanor cases to enter pleas during their initial appearance, thereby rendering the

initial hearing an arraignment as well. *See Tinti*, 159 Wis. 2d at 788. Thus, as a practical matter, Dane County Local Rule 208 gives misdemeanor defendants an additional twenty days beyond the statute to request substitution.[8]

Davis has never argued that deadlines pursuant to county local rules should not also be strictly construed, and Respondents see no reason why local rule deadlines should be interpreted differently than statutes. To do otherwise would undercut local rules' intended effect and undermine the orderly administration of the court system.

The circuit court properly denied Davis's untimely substitution request based on controlling precedent. In *Clark*, *Tessmer*, and *Tinti*, the defendant did not have notice of the judge before the substitution deadline ran, and the defendant was therefore unable to intelligently exercise his right to substitution. Davis, on the other hand, *did* have notice of his assigned judge on the same day that his 20-day substitution deadline began to run under the local rule. (Pet-App. 11, 27.) Thus, this line of cases does not support his position that the circuit court had a plain duty to grant his untimely substitution request.[9] Nor does *Zimbal*, where the circuit

---

[8] Davis has never argued that the local rule's effective extension of the statutory deadline to request substitution is impermissible, nor did he present that argument in his petition for this Court's review. That issue, to the extent there is one, is not before this Court because it was not included in the petition grant, and it has not been developed in briefing at any point in this matter. *Brown Cnty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 42, 307 N.W.2d 247 (1981); *see also Wirth v. Ehly*, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980) (superseded on other grounds).

[9] In his brief, Davis cites *State v. Baldwin*, where this Court allowed an exception to the rule of strict adherence to the statutory filing deadline because the defendant was arraigned before he received notice of which judge would hear his case. *See Baldwin v.*

court instructed the pro se defendant to wait until after counsel was appointed to seek substitution. Here, the circuit court did not instruct Davis to wait until after counsel was appointed to seek substitution.

Davis has failed to show that the circuit court had a plain duty to grant his substitution request. No "government-created obstacle" recognized in case law prevented him from intelligently exercising his right to substitution. The circuit court properly denied Davis's substitution request as untimely, and the court of appeals properly denied the petition for supervisory writ.

2. Davis has not established extraordinary hardship.

Davis has never provided adequate law or facts to explain how he would sustain irreparable harm or extraordinary hardship if the circuit court did not grant his late substitution request. Davis did not meet his burden in the court of appeals, and his arguments to this Court do not establish otherwise.

"The standard for 'extraordinary hardship' has been met in few cases." *Buchanan*, 346 Wis. 2d 735, ¶ 16. The burden is on the petitioner "to allege sufficient facts reasonably to demonstrate. . . that extraordinary hardship will in fact result if [the writ] is not granted." *State ex rel. Di Salvo v. Cnty. Ct. of Washington Cnty., Branch II*, 79 Wis. 2d 27, 31, 255 N.W.2d 459 (1977).

Davis has not met that standard here. In the court of appeals, he argued that he "would clearly be harmed if forced to proceed with no confidence in the fairness of his assigned trial court judge." (R-App. 10.) Davis does not address the

---

State, 62 Wis. 2d 521, 530–32, 215 N.W.2d 541 (1974). Thus, it is distinguishable from the facts in this case for the same reasons *Tinti*, *Tessmer*, *Clark* are distinguishable.

extraordinary hardship prong in his brief to this Court. But he argues that as a general matter, every accused person is entitled to a fair trial by an impartial judge. (Davis's Br. 12–13.)

Respondents agree that defendants are entitled to a fair trial by an impartial judge. But the right to judicial substitution is a statutory right, not a constitutional right. *See Zimbal*, 375 Wis. 2d 643, ¶ 74 (Ziegler, J., concurring). The disqualification provisions of Wis. Stat. § 757.19, and the body of case law pertaining to judicial recusal, can address constitutional protections related to impartial tribunals. Davis has never explained how, when he knew his judge but filed his substitution request two months too late, he would sustain extraordinary hardship or irreparable harm if the court did not make an exception for him.

To the extent Davis's argument qualifies as a claim of extraordinary hardship or irreparable harm, he did not meet his burden. For this additional reason, his petition was properly denied.

C. Davis's new argument, raised for the first time in his brief to this Court, lacks merit.

Davis has abandoned his position presented in the court of appeals and petition for review to this Court. In the court of appeals, he argued that the delay in appointment of counsel itself was a government-created obstacle that prevented him from intelligently exercising his right to substitution. Now, in this Court, he argues that when the court commissioner entered a plea on Mr. Davis's behalf, this was a government-created obstacle that triggered the substitution deadline under Wis. Stat. § 971.20, and prevented him from exercising his right to substitution before he had notice of his assigned judge and before he was appointed counsel. (Davis's Br. 10.) Davis's new arguments miss the mark.

1. Wisconsin law does not support construing Davis's substitution request as timely under the circumstances presented here.

Davis's initial appearance and arraignment were held on the same day, as is routinely done in misdemeanor cases throughout the state. *See State ex rel. Tessmer*, 123 Wis. 2d at 442 (noting "[t]he arraignment in misdemeanor traffic cases typically occurs at the defendant's initial court date.")

As a practical matter, the Dane County Local Rule gave Davis twenty days beyond section 971.20(4)'s deadline to request substitution. Davis acknowledges this. (Davis's Br. 17–18.) So, even if he did not have notice of the assigned judge before the deadline under Wis. Stat. § 971.20(4) had run, that is irrelevant because the local rule was akin to a 20-day extension beyond the statutory deadline. *Cf. Zimbal*, 375 Wis. 2d 643, ¶ 40 (circuit court must adhere to an extension).

Davis's new argument fails to properly account for Dane County Local Rule 208, which gave him 20 days after his initial appearance to request judicial substitution. Here, the operative question in this case is whether Davis had notice of his assigned judge before his deadline under the *local rule* had run. He did.

But even assuming the statute alone controlled, this Court should not grant Davis relief because it's a new argument presented for the first time in his brief to this Court. Davis did not present this argument in circuit court or the court of appeals, and because of this, the parties have not briefed whether the circuit court's purported decision to enter pleas prevented him from intelligently exercising his right to substitution. And, the record is not adequately developed to consider the argument. For example, there is no transcript in the record that reflects whether Davis objected to the court's entry of his pleas, or whether the attorney representing him at that hearing did. Presumably, there was no objection and,

thus, Davis may have forfeited his argument. *Caban*, 210 Wis. 2d 597, ¶ 14.

In Davis's view, "[a]n intelligent exercise of the right to substitution includes the ability to confer with appointed or retained counsel regarding whether to exercise the right of substitution." (Davis's Br. 17.) As discussed above, the cases he cites do not support that proposition, and thus, the circuit court did not violate a plain duty by denying his substitution request on the ground that he had not yet been appointed counsel. (Davis's Br. 17.)

For all of these reasons, this Court should decline to hold that Davis's substitution request was timely under Wis. Stat. § 971.20(4) and Dane County Local Rule 208.

2. Given this record, equitable tolling is not warranted.

As a final matter, equitable tolling is not warranted here. Davis's argument for equitable tolling fails for the same reasons discussed above; that is, at the threshold. Davis did not request equitable tolling in circuit court or in the court of appeals, and the supervisory writ posture of this case counsels against this Court granting that relief. Further, the cases he relies on do not support his position.

Davis argues for equitable tolling. (Davis's Br. 19.) Davis cites then-Chief Justice Roggensack's concurring opinion in *Zimbal*. (Davis's Br. 19–20.) But this concurrence was not the controlling opinion; the majority did not grant Zimbal relief based on equitable tolling. *Zimbal*, 375 Wis. 2d 643, ¶ 53. That aside, the facts of this case are distinguishable, and don't fit the circumstances that supported Justice Roggensack's theory for equitable tolling in *Zimbal*. A review of Justice Roggensack's reasoning shows why the case is inapposite.

This Court has "employed equitable tolling when a required act is dependent on a prior necessary act of another over whom the person seeking equitable tolling has no control." *Zimbal*, 375 Wis. 2d 643, ¶ 66 (Roggensack, C.J., concurring). Circumstances beyond one's control include when a prisoner deposits a petition for review in a prison mailbox, and then has no control over when prison staff place the document in the mail to the court. *State ex rel. Nichols v. Litscher*, 2001 WI 119, ¶¶ 24–28, 247 Wis. 2d 1013, 635 N.W.2d 292. They also include when an inmate's right to administrative review depends on the Wisconsin Department of Corrections providing a trust account statement to the court. *State ex rel. Walker v. McCaughtry*, 2001 WI App 110, ¶ 16, 244 Wis. 2d 177, 629 N.W.2d 17.

In light of these cases, Justice Roggensack would have equitably tolled Zimbal's deadline to substitute, given the facts: "Here, Zimbal requested counsel; however, he had no control over when counsel would be appointed. On October 7, while Zimbal was unrepresented, the circuit court said that Zimbal's substitution request would wait until counsel was appointed." *Zimbal*, 375 Wis. 2d 643, ¶ 68 (Roggensack, C.J., concurring). Zimbal "relied on the circuit court's directive that his substitution request would wait until after counsel was appointed," his reliance was in good faith, and the State had not shown it would be prejudiced by the application of equitable tolling. *Id.* ¶ 70. For these reasons, Justice Roggensack concluded "that the circuit court's October 7, 2013 decision [to instruct Zimbal to address substitution after he was appointed counsel] tolled the temporal requirements for substitution under § 971.20(7) until after counsel was appointed." *Id.*

This case is different. Davis had notice of his appointed judge the day of his initial appearance, and the day an attorney appeared on his behalf. He had twenty days after that date to request judicial substitution. Dane Cnty. Local R.

208. No circumstances truly beyond Davis's control, like those in *Nichols* and *Walker*, prevented him from exercising his right to substitute. And the circumstances in *Zimbal* are also materially different, because there, the circuit court specifically instructed Davis to wait until after counsel was appointed to address judicial substitution. Equitably tolling Dane County Local Rule 208's deadline is not appropriate, given the facts in this case. (Davis's Br. 21.)

Davis argues that "the circuit court proceeded with arraignment instead of employing another mechanism to ensure intelligent exercise of the right to substitution." (Davis's Br. 21.) "[B]ecause Mr. Davis was without appointed counsel prior to arraignment, and not provided notice of the assigned judge prior to arraignment, the applicable Wis. Stat. § 971.20 deadline was equitably tolled until counsel was appointed." (Davis's Br. 21.)

Tolling the statutory deadline is not warranted here. The record does not reveal specifically how the arraignment hearing played out, nor does it reveal whether Davis objected to the procedure the court employed. But more fundamentally, it was not the court's responsibility to sua sponte "employ a mechanism" to ensure that Davis met his substation request deadline. And further, Davis's argument, again, fails to account for Dane County Local Rule 208, which is the operative authority for his deadline to substitute.

***

Davis's shift in argument, coupled with the fact that this appeal stems from a petition for supervisory writ, does not make this case a good vehicle for law development. Davis has offered no compelling reason for this Court to decide his case, let alone reverse in his favor. This Court should dismiss this appeal without rendering an opinion, or it should affirm.

CONCLUSION

Respondents respectfully request that this Court dismiss this appeal, or alternatively, affirm the court of appeals' denial of Davis's petition for supervisory writ.

Dated this 8th day of August 2023.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE
Assistant Attorney General
State Bar #1070979

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1740
(608) 294-2907 (Fax)
vandermeusejl@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,096 words.

Dated this 8th day of August 2023.

Electronically signed by:

Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 8th day of August 2023.

Electronically signed by:

Jennifer L. Vandermeuse
JENNIFER L. VANDERMEUSE
Assistant Attorney General