STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 22AP1999 - W
(Dane County Case No. 22CM1737)

STATE OF WISCONSIN ex rel. ANTONIO S. DAVIS,

Petitioner-Petitioner,

v.

CIRCUIT COURT FOR DANE COUNTY, HONORABLE ELLEN K. BERZ, and STATE OF WISCONSIN

Respondents.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Ellen Henak
State Bar No. 1012490
Robert R. Henak
State Bar No. 1016803

HENAK LAW OFFICE, S.C.
5205 N Ironwood Road, Suite 100
Milwaukee, Wisconsin 53217
(414) 283-9300

Counsel for Wisconsin Association of
Criminal Defense Lawyers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 22AP1999 - W
(Dane County Case No. 22CM1737)

STATE OF WISCONSIN ex rel. ANTONIO S. DAVIS,

Petitioner-Petitioner,

v.

CIRCUIT COURT FOR DANE COUNTY, HONORABLE ELLEN K. BERZ, and STATE OF WISCONSIN,

Respondents.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief seeking to have this Court hold that, when arraignment occurs prior to the appointment of counsel for an indigent defendant, a request for substitution of judge pursuant to Wisconsin Statutes §971.20 is still timely if filed after the appointment of counsel and before appointed counsel files any motions.

WACDL takes no position on whether a petition for a supervisory writ is the proper vehicle for resolution of this issue. WACDL nevertheless notes that the Court of Appeals has said that"[a] petition for a supervisory writ is the preferable route for review of the trial court's ruling on the form and timeliness of a request for substitution of judge." ***State ex rel Tessmer v. Circuit Court Branch III,*** 123 Wis.2d 439, 441, 367 N.W.2d 235 (Ct. App. 1985); *see also* ***Strong v. Circuit Court for Dane County***,184 Wis.2d 223, 516 N.W.2d 451 (Ct. App. 1994) (issuing

writ); ***State ex rel. Akavickas v. County Court of Marathon County*****,** 77 Wis.2d 297, 252 N.W.2d 386 (1977) (same).

But even if this Court holds that the issuance of a supervisory writ is inappropriate, WACDL urges this Court to decide the underlying issue. This Court previously has decided an underlying statutory interpretation issue when a supervisory writ was sought but the Court believed its issuance inappropriate *See* ***In the Matter of State v. Buchanan***, 2013 WI 31, 346 Wis.2d 735, 828 N.W.2d 847; ***State ex rel. Kalal v. Circuit Court for Dane Co***., 2004 WI 58, ¶26, 271 Wis.2d 633, 681 N.W.2d 110.

ARGUMENT

The History of the Interpretation of Section 971.20--and Fairness to Defendants Who Lack Appointed Counsel Through No Fault of Their Own--Should Compel this Court to Hold that, For an Indigent Defendant Who Has Not Yet Been Appointed Counsel, a Request for Substitution of Judge is Timely if Filed After the Appointment of Counsel.

971.20 creates a defendant's statutory right to one substitution of a judge. If defendants seek substitution on the originally-assigned trial judge, they must make a written request, which "may be filed with the clerk before making any motions to the trial court and before arraignment." ***Id.*** §971.20(4). If a defendant properly files a request, the original judge "has no authority to act further in the action except to conduct the initial appearance, accept pleas and set bail." ***Id.*** §971.20(9). Over approximately the past fifty years, Wisconsin courts have construed this statute broadly to protect the purposes behind the enactment of the statute: the perception of fairness at trial and actual fairness at trial.

The Wisconsin legislature long has protected the defendant's perception of fairness at trial. Judicial substitution has a long history in this state as the current statute's predecessor was Wisconsin Statutes §356.03(1) (1947). Wisconsin courts construed that predecessor statute as "an expression of the 'legislative intent that a person's right to a fair

trial [should] be observed.'" ***Baldwin v. State*****,** 62 Wis.2d 521, 532, 215 N.W.2d 541 (1974) (quoting ***Meverden v. State***, 258 Wis.2d 628, 46 N.W.2d 836 (1951)).

The purpose behind the legislative enactment of the current provision, just as with the earlier statute, is "to ensure a fair and impartial trial for the defendants." Judicial Council Note to §971.20 (1981). It is an alternative to requiring a defendant to allege prejudice by a judge before obtaining a new judge, *see* ***State v. Holmes***, 106 Wis.2d 31, 55, 315 N.W.2d 703 (1982), and the legislature's decision that a defendant need not show prejudice means that denial of the statutory right is not subject to harmless error analysis, ***State v. Harrison***, 2015 WI 5 ¶90, 360 Wis.2d 246, 858 N.W.2d 372. Because prejudice need not be shown, the defendant's perception of the judge becomes as important under the statute as the reality of fairness.

And Wisconsin courts long have interpreted judicial substitution statutes broadly rather than literally. These interpretations have been based upon ensuring the fairness of the trial and upon the defendants' perceptions of that fairness. For example, although Wisconsin Statutes §971.20 (1973-74), unlike today's statute, *see* Wis. Stats. §971.20(5), did not contain a provision allowing substitution against a subsequently assigned trial judge, this Court held that a defendant's substitution request for a subsequently assigned trial judge was timely even though it was not made before making motions and before arraignment. ***Baldwin*****,** 62 Wis.2d 521 The Court noted that "[a] strict construction" of the statute would deny a defendant this statutory right to a fair trial because the defendant "is unable at the time of the arraignment to know what judge is to try his case." ***Id***. at 531. In doing so, this Court distinguished between situations in which "[n]othing prevented the defendant from making the request" and that in which a defendant could not have known that a new judge would be handling the trial. *See* ***id.*** at 532.

The Court subsequently re-affirmed that reasoning in traffic cases, holding that defendants were "entitled to a

reasonable time after assignment to a particular judge becomes known to them" to file a substitution request. ***Akavickas***, 77 Wis.2d 297; *see also* ***Tessmer***, 123 Wis.2d 439 (applying the same rational to substitution in traffic misdemeanor court despite an arraignment where the trial judge was not yet assigned); ***State ex rel. Tinti v. Circuit Court for Waukesha County, Branch 2***, 159 Wis.2d 783, 464 N.W.2d 853 (Ct. App. 1990) (same).

Although the text of Section 971.20(4) imposes time limits and requires substitution "before arraignment," the Wisconsin Supreme Court has allowed substitution after arraignment before. The Court used the concept underlying the decision in ***Baldwin***–that a defendant who is "prevented" from requesting substitution should not be barred from doing so while under that disability–as the basis for this Court's decision in ***State v. Zimbal***, 2017 WI 59, 375 Wis.2d 643, 896 N.W.2d 327. In ***Zimbal***, this Court held that a defendant who followed a cicruit court's instruction to wait to file a substitution request under Wis. Stat. §971.20(7)[1] until after counsel was appointed should not have to comply with the deadline in that subsection. In ruling that Zimbal had made a timely request for substitution, this Court noted that "a government-created obstacle" had prevented him from complying with the statutory deadline. ***Zimbal***, ¶40.

The Court noted that Zimbal's case "was analogous to the arraignment cases because of the "government-created obstacle." ***Id.,*** ¶46. In doing so, the Court "balanced the importance of giving effect to the legislative intent expressed in Wis. Stat. §971.20 and preventing a defendant from using a request as a technique to disrupt scheduled calendaring or delay a scheduled trial." ***Id.***, ¶50-51**.**

The current, repeated and frequent unavailability of

---

[1] Section 971.20(7) allows judicial substitution "within 20 days after the filing of the remittitur" when an appellate court grants a new trial or sentencing.

appointed counsel for long periods of time similarly is a "government-created obstacle." The various actors in the system have long known that the problem is creating a crisis and hurting defendants. As this Court noted in 2017, "[c]hronic underfunding of the Office of the State Public Defender (SPD) has reached a crisis point." S. Ct. Order 17-06 at 1. This Court noted its deep concern about the "impact of prolonged underfunding of the SPD" and agreed that "significant delays in the appointment of counsel" compromised the integrity of the court system. ***Id.*** at 17.

Nor has the problem abated. *See, e.g.,* Dee Hölzel, *In Court Without an Attorney, An Increasingly Common Sight that's Part of a Statewide Legal Logjam*, The Journal-Times (Aug. 2022), at https://journaltimes.com/news/local/in-court-without-an-attorney-an-increasingly-common-sight-thatspart-of-a-statewide-legal/article_5ca19e54-23e3-11ed-9c87-2794e4f3d807.html. Across this state, it can take months before an attorney is appointed to represent a defendant, even though the Office of the State Public Defender has made hundreds and sometimes more than a thousand calls to attorneys. *Id.*

In ***State of Wisconsin v. Jamauel A. Ford***, Racine Co. Case No. 22CF971, for example, the state filed its complaint on July 14, 2022, but Mr. Ford was not appointed counsel for more than a full year. As the Office of the State Public Defender noted in its budget request for 2023-2025, despite an earlier increase in the private bar payment rate, "[t]he hourly rate paid to the private bar attorneys who accept appointments to provide legal representation in Public Defender cases is impeding the SPD's ability to consistently and reliably recruit and retain private bar attorneys who accept appointments and provide effective representation." State of Wisconsin Public Defender Board Agency Budget Request, 2023-2025 Biennium, at https://doa.wi.gov/budget/SBO/2023-25%20550%20SPDl%20Budget%20Request%20a.pdf.

Defendants who have not yet been appointed counsel face an obstacle in obtaining judicial substitution, as ***Zimbal***, 2017

WI 59, demonstrates. Zimbal himself did not manage to make a valid request for substitution even though he had at least limited scope attorney who had advised him. ***Zimbal***, ¶36. Zimbal failed to file a proper written request for substitution although, unlike most defendants awaiting the appointment of counsel for trial, Zimbal knew at least enough to initially make a verbal request for a new attorney. ***Id.*** But even then he incorrectly dubbed it a request that the judge "recuse." ***Id***., ¶10.

In addition, unlike most defendants awaiting the appointment of counsel for trial, an attorney (Zimbal's earlier appellate attorney) had advised him correctly that he could request a different judge, which caused him to put his request in writing, although he sent it to the wrong court. ***Id***., ¶11. Moreover, unlike Zimbal who had dealt with the judge involved before, most defendants facing a decision on judicial substitution will know little about the judge without an attorney to guide them.

Defendants who have only a limited scope attorney at the initial appearance also are unlikely to make a valid request for judicial substitution even if they decide, without guidance, that one is warranted. The limited scope attorney will focus on bail and on the defendant's eligibility for appointment of counsel. Even if the limited scope attorney, like Zimbal's, tells the defendant that he has a statutory right to substitution of counsel,[2] drafting the request and filing the request is not part of that attorney's limited scope of representation. Guiding the defendant as to the pros and cons of using the defendant's one judicial substitution at the outset of the case also is not part of that attorney's limited scope of representation.

Failing to view the systemic difficulties in timely appointment of counsel as a "government-created obstacle"that

---

[2] The circuit court has no obligation to inform defendants of their rights under Wisconsin Statutes §971.20, ***State v. Tappa***, 2002 WI App 303, 259 Wis. 2d 402, 655 N.W.2d 223, and usually does not do so.

prevents defendants awaiting counsel from filing a substitution request causes unrepresented indigent defendants to be at a disadvantage in their perception of the fairness of the system as well as potentially at trial. It adds to the disadvantages that those defendants for whom the Office of the State Public Defender struggles to find appointed counsel already have.

For example, delay in appointing counsel is a delay in prompt investigation of the case. "Each day's delay in the investigation for the defendant and preserving of evidence accrues to the defendant's detriment." ***David v. Missouri***, Cole Co. Cir. Ct., Order of Feb. 18, 2021, at 1. (Class action lawsuit challenging Missouri's use of waiting lists because of a shortage of public defenders).

Defendants who have no attorney to advocate for pretrial release are at a disadvanage because they end up judicial officers who are likely to make "less informed decisions" and more likely to set bail that is "beyond the individual's ability to pay." Douglas L Colbert, Ray Paternoster, & Shawn Bushway, Do Attorneys Really Matter? The Empirical and Legal Case for Representation at Bail, 23 Cardozo L. Rev. 1719, 1720 (2002). In turn, the resulting greater likelihood of being in custody makes it less likely they will have their charges dismissed or obtain acquittals. See Dottie Carmichael & Miner P. Marchbanks III, Wichita County Public Defender Office: An Evalutation of Case Processing, Client Outcomes, and Costs, Texas A&M Uniersity Public Policy Research Institute (Oct. 2012) at https://ppri.tamu.edu/files/WichitaPDOStudy.pdf.

Yet another problem for indigent defendants for whom the appointment of counsel is delayed is the lack of counseling critical to cooperation with authorities and negotiation. Cooperation is often “first come, first served” and only one defendant in a multi-defendant case reaps the benefits of it. *See, e.g.,* ***United States v. Maddox***, 48 F.3d 791, 796-97 (4th Cir. 1995) (holding the government can choose offer a sentencing benefit only to the defendant who pleads first). The delay makes quick resolution of the case extremely difficult, if not impossible.

Without negotiation, quick resolution is impossible.

Failure to interpret Section 971.20 broadly, as its history allows, will add to these disadvantages.

CONCLUSION

WACDL therefore asks that, given the long history of a broad and practical interpretation of Section 971.20 and the fairness considerations, this Court reach the merits and hold that, when arraignment occurs prior to the appointment of counsel for an indigent defendant, a request for substitution of judge pursuant to Wisconsin Statutes §971.20 is still timely if filed after the appointment of counsel and before appointed counsel files any motions.

Dated at Milwaukee, Wisconsin, August 21, 2023.

Respectfully submitted,

WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
Amicus Curiae

HENAK LAW OFFICE, S.C.

Electronically signed by Ellen Henak
Attorney Ellen Henak
State Bar No. 1012490
Attorney Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

5205 North Ironwood Road, Suite 100
Milwaukee, Wisconsin 53217
(414) 283-9300
ellen.henak@sbcglobal.net

WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a nonparty brief produced with a proportional serif font. The length of this brief is 2,219 words.

Signed electronically by Ellen Henak
Ellen Henak