STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP001999 - W

STATE OF WISCONSIN EX. REL. ANTONIO S. DAVIS,

Petitioner,

v.

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

Respondents.

On Appeal from an Order of the Wisconsin Court of Appeals, District IV, Denying a Petition for Supervisory Writ

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AMICUS CURIAE BRIEF OF WISCONSIN STATE PUBLIC DEFENDER

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I. Mr. Davis was denied his right to substitution of judge due to a government-created obstacle, therefore his substitution request should be deemed timely.

Everyday throughout Wisconsin, there are hundreds of people, like Mr. Davis, who have been arrested and are in jail awaiting their initial appearance. To assist those individuals, the SPD assigns "intake attorneys"[1] for all 72 counties from its 38 trial offices. In practice, this means the vast majority of people arrested rely on intake attorneys to assist them during their first appearance before the court. While these attorneys are able to effectively assist *prospective* SPD clients with bail arguments and obvious errors in the criminal complaint, as well as answer basic questions, their representation is necessarily limited.

Through no fault of his own, Mr. Davis lost his statutory right to substitution of judge. First, the court triggered the statutory deadline to assert that right by entering a plea on his behalf—thereby

[1] Usually the intake attorney is an SPD staff attorney (or law student practicing under an attorney), but it could be a private bar attorney or a limited term employee (LTE) attorney who is assisting the local office.

conducting the arraignment at the initial appearance. Then, counsel was appointed prior to the next scheduled hearing, but after the local court rule's 20-day deadline for requesting substitution. Mr. Davis had no control over either obstacle, which led to Mr. Davis's loss of his right to substitution.

This brief will explain the SPD's intake process, the limited scope representation at initial appearances, and why it is untenable to require SPD intake attorneys to engage in a substantive conversation with *prospective* SPD clients about requesting substitution of the assigned judge. That discussion should be left to the client and their appointed or retained counsel. When the court triggers the substitution deadline by entering a plea on behalf of an unrepresented defendant at the initial appearance, it creates a snowball effect that could result—as it did here—in the loss of the right to substitution due to a government-created obstacle.

A. Initial appearances, generally.

Colloquially, what is referred to as an "initial appearance" varies throughout the state. But, statutorily, it means a person's first court appearance after being arrested. Wis. Stat. § 970.01(1). There are certain duties placed upon the court[2] at an initial appearance—including, informing the defendant of the charges, potential penalties, and the right to counsel. Wis. Stat. § 970.02.

[2] Initial appearances are conducted by court commissioners as well as circuit court judges.

The court is not required to take a plea—*i.e.*, conduct an arraignment—at the initial appearance. *See* Wis. Stat. §§ 970.01, 970.02. This is important because it is the arraignment that triggers the deadline for exercising the right to substitution. "A written request for the substitution of a different judge for the judge originally assigned to the trial of the action may be filed with the clerk before making any motions to the trial court and **before arraignment**." Wis. Stat. § 971.20(4) (emphasis added).

For a felony—which is not at issue in this case—pleas are not entered until *after* the preliminary hearing. *See* Wis. Stat. §§ 971.02, 971.05(1). Given that a preliminary hearing is a "critical stage" of the proceeding, a person who wants counsel will have appointed or retained counsel prior to the preliminary hearing, and thus, prior to the deadline for filing a substitution request. *See State v. O'Brien*, 2014 Wi 54, ¶40, 354 Wis. 2d 753, 850 N.W.2d 8.

On the other hand, for a misdemeanor, whether an individual has appointed or retained counsel to represent them at the arraignment—beyond an intake attorney's limited scope representation—will depend on *when* the arraignment occurs. When a plea is taken at the initial appearance, only defendants who have already retained counsel will have *their* attorney to consult with about substitution. In counties like Dane County—with a local court rule extending the time to request substitution—the

extended timeframe is not helpful unless the individual is appointed or retains counsel within the deadline. Here, counsel was appointed prior to the next hearing, but *after* the local court rule's 20-day deadline for requesting substitution.

Thus, the issue here involves a small percentage of cases. Specifically, misdemeanor cases where substitution is requested but the deadline lapsed after it was triggered by the court and before counsel was appointed.

B. SPD's intake process prior to initial appearances.

The intake process can be chaotic.[3] The day begins with a list provided to the local SPD office of those scheduled for initial appearances.[4] In a mid-size office, there are usually 10 to 30 people on the list each day and one intake attorney is assigned to assist all those individuals.[5]

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[3] The intake process varies around the state. To generalize, this brief will primarily focus on practices in mid-size offices similar to Dane County.

[4] In smaller counties it is common for there not to be initial appearances (or bail hearings) every day—*i.e.*, when there are no new arrests. In Milwaukee County, the SPD provides intake counsel 7 days a week. In all other counties, intake counsel is provided 5 days a week, as needed.

[5] Depending on the office, that attorney may also handle intake for cases under chapters 48, 938, 51, 55 and/or intake for multiple counties. The Milwaukee office assigns more than one attorney.

After receiving the intake list, but before the initial appearance, SPD staff work on determining whether each person is financially eligible for appointment of counsel from the SPD. This process varies, but generally means a staff member—attorney or not—reaches out to prospective clients at the local jail, by phone or in-person. They go through a series of confidential questions on a financial eligibility form and also seek information relevant for bond arguments, including information about the prospective client's ties to the community, employment status, living situation, childcare, and any reason for prior missed court dates. If a non-attorney staff member collects this information, it is shared with the intake attorney. The intake attorney assists everyone who wants assistance in court, as additional information is often needed for final eligibility determinations.

When staff is collecting information, they usually will not know what, if any, offenses will be charged in a criminal complaint. In most counties, the complaints are emailed to the SPD office throughout the day, but it's common to receive the complaint minutes before the initial appearance or even during the hearing. This means the intake attorney is reading *all* of the criminal complaints just before or during court and then reviewing the complaint with each prospective client.

Once the case is called, the attorney is listening to the court, the district attorney and trying to ask the defendant questions as well as answer the

defendant's questions, in addition to the court's questions. In short, there is a lot going on at these hearings, yet, they happen quickly.

In the midst of all this—for misdemeanor cases, like Mr. Davis's case—the court informs the individual of the assigned judge. Often, there is little to no time for consultation about the right to substitution. In addition, for several reasons, the intake attorney will not know at the initial appearance whether they will be the attorney appointed to represent the client.

First, a conflict check cannot be completed prior to the initial appearance.[6] For privacy reasons, the state does not identify alleged victims in the complaint. Instead, it provides a key to facilitate the conflict check, but it is rarely, if ever, provided before the initial appearance. Thus, the SPD will not have sufficient information before the initial appearance to ensure no conflicts exist. In general, a conflict of interest arises when an attorney's loyalty to, or exercise of independent judgment on behalf of a client is compromised. *See* SCR 20:1.7, 1.9, 1.10(a)(3). Often, witnesses and alleged victims are former or current clients, which creates potential conflicts. Or, the state may charge multiple co-defendants, creating

[6] *See* Wis. Admin. Code Ch. PD 2.05. "Conflict cases. The state public defender may not represent more than one person at trial charged in the same case or any client whose interests conflict with any other client."

a conflict where the SPD can only appoint staff counsel for one co-defendant.

This is a significant reason why the intake attorney only provides limited scope representation. *See* SCR 20:1.2(c)(1)d. While intake attorneys will assist everyone at their initial appearance, that representation must be limited as a conflict may later be identified. The intake attorney must take care to limit substantive discussions about the case or the individual, while still assisting them at the initial appearance. As a result, requiring the intake attorney to engage in a substantive conversation about whether to request a different judge is untenable. Best practice is for that conversation to occur *after* counsel is appointed.

Beyond ethical considerations and time constraints, it is impractical to have an intake attorney discuss substitution with a *prospective* client. Different attorneys have different perspectives about whether to request substitution of a specified judge. One attorney may have a well-established relationship with a certain judge that another attorney may not. And, the client may have a reason for wanting a different judge. These decisions are fact-specific and should be made based upon intelligent consultation with the attorney representing the charged individual. At the initial appearance, the intake attorney will not know who that attorney will be.

C. Mr. Davis was denied his right to substitution due to a government-created obstacle.

When a government-created obstacle interferes with a defendant's opportunity to make a timely substitution request, Wisconsin courts have reasonably interpreted and applied s. 971.20, finding those requests timely. Here, the government-created obstacle included the court triggering the substitution deadline by entering the plea on Mr. Davis's behalf and then counsel being appointed prior to the scheduled hearing, but after the 20-day local deadline ran.

In *Baldwin v. State*, 62 Wis. 2d 521, 531, 215 N.W.2d 541 (1974), the original judge assigned disqualified himself after arraignment and a new judge was assigned. *Id.* at 528. Baldwin, with appointed counsel, did not file a substitution request until the day of trial. *Id.* This Court deemed that request untimely. *Id.* at 532. However, this Court acknowledged that strictly construing s. 971.20 would deny defendants in many cases the constitutional right to a fair trial and "[make] it impossible to obtain the objective of [s. 971.20]." *Id.* at 530. This Court also noted that "[t]he language of [971.20] must apply as reasonably as possible to all cases to attain its object" and that the right to substitute must have a "reasonable time limit for its exercise." *Id.* at 532.

In *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), the defendant appeared unrepresented at an initial hearing, entered a not guilty plea, was informed of the judge *after* the arraignment, and subsequently retained counsel who filed a substitution request seven days after the arraignment, which was deemed untimely. *Id.* at 441. The court of appeals applied the *Baldwin* rationale, recognizing that the legislative intent of s. 971.20 is to afford the defendant the opportunity to substitute the judge assigned so their right to a fair trial is preserved and that the statute should be applied in a reasonable manner to give effect to that intent. *Id.* at 441-42. The *Tessmer* court concluded that under the facts, including that there was "no evidence that the proceedings were disrupted or delayed, no evidentiary hearings had taken place, no motions were heard and the pretrial was a week away," Tessmer's request for substitution was deemed timely. *Id.* at 444.

Similarly, in *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), the defendant was not informed of the assigned judge until after his plea was entered. *Id.* at 785-86. Tinti had counsel at the hearing, conferred with counsel after the hearing, and filed a substitution request four days after the initial appearance. *Id.* at 786. The court of appeals acknowledged there was an intake system that did not adequately provide notice of the assigned judge prior to arraignment and in applying the

Baldwin/Tessmer rationale, held that "the filing deadline of the statute must be relaxed to allow for an intelligent opportunity to exercise the right of substitution." *Id*. at 789-790.

Most recently, in *State v. Zimbal*, 2017 WI 59, ¶¶40, 46, 52-53, 375 Wis. 2d 643, 896 N.W.2d 327, this Court recognized an exception to the rule of strict adherence when a government-created obstacle interfered with or prevented a defendant from complying with the statutory deadline. Zimbal appeared with limited scope counsel at a status hearing when his case was remitted to the circuit court after a successful appeal. *Id.* at ¶9. He requested substitution orally at that hearing but the court instructed him to wait until after an attorney was appointed to file the substitution request, essentially extending the deadline for filing the request. *Id.* at ¶¶2-3. Once an attorney was appointed, the attorney filed the substitution request 17 days after being appointed, and the court found it untimely. *Id.* at ¶14. This Court reversed, holding Zimbal's request for substitution timely. *Id.* at ¶53.

Like Mr. Davis, in *Tessmer*, *Tinti*, and *Zimbal,* through no fault of the defendants, but due to government-created obstacles, they were initially denied their right to substitution. Thus, like the defendants in those cases, Mr. Davis's substitution request should be deemed timely.

D. Common practices to avoid government-created obstacles to substitution.

As the case law demonstrates, there are government-created obstacles that have interfered with a defendant's opportunity to exercise their right to substitution. However, there are common practices employed throughout Wisconsin that avoid these concerns.

For example, there is no requirement that the court conduct a misdemeanor arraignment at the initial appearance. Whether the arraignment occurs at the initial appearance—thereby triggering the substitution deadline—varies throughout Wisconsin. *See* Wis. Stat. §§ 971.05, 971.06, 970.02.

It is common practice for courts to conduct the arraignment after counsel has been appointed. In some counties, courts may enter pleas for the defendants but reserve all pre-arraignment rights or reserve the right to substitution until an attorney is appointed. And, in some counties, courts conduct the arraignment at the initial appearance, but have a local rule allowing additional time to request substitution.

A couple of counties, like Dane County[7], have local rules that allow for a defendant to exercise their right to substitution even after a plea has been entered. For example, in Outagamie County[8], the local rule allows for seven days from the initial appearance for a substitution request to be filed in a misdemeanor case. And, in Dodge County[9], in felony cases, the local rule allows for "ten days after arraignment to exercise his/her right to substitute the judge assigned to the case."

There are also counties that do not have local rules, where the courts allow up to 10 days from the appointment of counsel to request substitution. These counties acknowledge that the defendant may not have an attorney appointed at the initial appearance and has just been informed of the assigned judge; therefore, they are not able to intelligently exercise their right to substitution until an attorney is appointed. Deeming Mr. Davis's substitution request

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[7] Dane Cnty. Local R. 208, *available at* https://courts.countyofdane.com/documents/Complete-Court-Rule-List-for-Web.pdf, "In all…CM… cases the defendant shall have 20 days after the initial appearance to file a request for substitution of the assigned judge."

[8] *See* Outagamie Cnty. Local R. Sec. 3, *available at* https://www.wisbar.org/Directories/CourtRules/Wisconsin%20Circuit%20Court%20Rules/Outagamie%20County%20Circuit%20Court%20Rules.pdf

[9] *See* Dodge Cnty. Local R. 3.3, *available at* https://www.co.dodge.wi.gov/departments/departments-a-d/circuit-courts/local-court-rules

as timely would not upend practices around the state. It would be consistent with those practices.

Like the defendants in *Baldwin*, *Tinti*, *Tessmer*, and *Zimbal*, Mr. Davis did not have the opportunity to intelligently exercise his statutory right to substitution due to a government-created obstacle. Finding his request timely, when made seven days after counsel was appointed, effectuates the purpose of Wis. Stat. § 971.20, to afford a defendant an opportunity to exercise their right to substitution intelligently and ensure the constitutional right to a fair trial. *Baldwin*, 62 Wis. 2d at 529-31.

CONCLUSION

Based on the circumstances in this case, Mr. Davis's request for substitution should be deemed timely.

Dated this 25th day of September, 2023.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,732 words.

Dated this 25th day of September, 2023.

Signed:

Electronically signed by
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