Appeal No. 2025AP1507-CR

In the

Wisconsin Court of Appeals

District III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES THOMAS GRANDBERRY,

Defendant-Appellant,

ON APPEAL FROM
CIRCUIT COURT OF BROWN COUNTY,
CASE NO. 2024CF1334,
THE HONORABLE BEAU G. LIEGEOIS, PRESIDING

NONPARTY BRIEF
IN SUPPORT OF DEFENDANT-APPELLANT, JAMES THOMAS GRANDBERRY

Amicus Curiae Counsel for
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
LAW FIRM OF CONWAY, OLEJNICZAK & JERRY, S.C.
Attorney R. George Burnett
231 S. Adams Street/P.O. Box 23200
Green Bay, Wisconsin 54305-3200
(920) 437-0476
SBN 1005964
GB@lcojlaw.com

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INTRODUCTION

This case presents the serious question of whether due process requires dismissal with prejudice as the proper remedy when a person is held in pretrial detention for well over a year without being provided counsel.

The National Association of Criminal Defense Lawyers (NACDL) is uniquely situated to assist the Court in answering this important question. Its thousands of members and tens of thousands of affiliate members include public defenders, court-appointed attorneys, and retained counsel in state and federal courts nationwide. As evidenced by its robust amicus filings, reports, evaluations, training, and advocacy work, NACDL has a long-standing history of engagement on issues both nationally and in Wisconsin specifically relating to access to counsel, pretrial practices, and ensuring meaningful criminal defense representation. It served this Court as an amicus in the seminal case *State v. Lee*, 2021 WI App 12, a decision at the center of this matter.

The Wisconsin Supreme Court found delays in appointing counsel impose costs on criminal defendants and their families, in "jobs lost, additional expenses incurred and justice denied." *In re the Petition to Amend SCR 81.02*, 2018 WI 83 (p.19). Delays also create ripple effects reverberating throughout the court system which compromise its integrity. Victims await restitution and closure; witnesses' memories fade as critical details become hazy or lost; and communities lose faith in their legal system because justice delayed is justice denied.

Here, a man presumed innocent spent well over a year in jail without a lawyer and without seeing the charges against him. His incarceration continued in clear contravention of directives that *State v. Lee*, 2021 WI App 12, expressed.

This case involves what this Court must do in response. It certainly can express its disapproval. But that, as this case demonstrates, accomplishes little. It does not restore the time James Grandberry lost in the Brown County Jail, and a strongly worded opinion is unlikely to shape future conduct. After all, *Lee* was a strongly worded opinion, and

the three court commissioners, six assistant district attorneys, and one circuit judge acted as if they had never heard of it.

Only dismissal with prejudice accomplishes something useful. It tells all that egregious violations of due process beget serious consequences.

The State, in contrast, prefers none of this. It asserts the Court should dismiss the case without prejudice, leaving it free to arrest Grandberry again and refile charges, probably very soon. It contends that courts only end prosecutions permanently under "extraordinary circumstances." (Br. p.19). It never explains, however, why what happened in this case fails to qualify.

That is probably because no sensible explanation exists. The State leveled serious charges, obtained a $1 million bail that ensured Grandberry's incarceration, charged him under a sealed complaint so that its accusations remained secret, and deprived him of a lawyer for 440 days. Most would think that this ordeal occurred in some third world country, but certainly not in Green Bay, Wisconsin. Only it did.

ARGUMENT

I. Why a dismissal with prejudice should occur.

A. Straining government budgets supplies no excuse.

The State stresses that this was unintentional, for it could find Grandberry no lawyer despite many inquiries. *Lee*, however, rejected that excuse. *Id.* ¶3.

Moreover, the excuse contradicts Supreme Court jurisprudence: "[U]nreasonable delay . . . cannot be justified by simply asserting that the public resources provided by the State's criminal-justice system are limited and that each case must wait its turn." *Barker v. Wingo*, 407 U.S. 514, 538 (1992) (White, J., concurring). Therefore, economic considerations, such as strained municipal budgets or the very low rates paid defense counsel, never justify the prolonged deprivation of counsel or the lengthy delays that ensue as a consequence.

The Wisconsin Supreme Court characterized this shortage of lawyers willing to accept court appointments as a crisis attributable to low payment rates. 2018 WI 83. The Court described the long history of depressed compensation. Not long ago it was $40 an hour, a rate that lasted decades before it changed a few years ago. *State v. Lee*, 2022 WI 32, ¶11. Court-appointed lawyers still receive compensation far below prevailing market rates, S.C.R. 81.02, and the crisis unsurprisingly continues unabated. The immutable laws of economics ensure that underpaying lawyers guarantees that those requiring court-appointed counsel will remain underserved.

B. The State's policy choice requires it bear the consequences.

The crisis the Supreme Court described therefore emanates from the State's policy decision, so the consequences of that decision should fall on the State, not those it accuses. Funding lawyers to represent those accused of crimes is neither politically urgent nor electorally popular. Dismissing prosecutions, in contrast, is a "serious consequence," *Barker*, 407 U.S. at 522, regarded as politically urgent. For now, prisoners like James Grandberry bear, through no fault of their own, the full ramifications of the State's unwillingness to meet its constitutional obligations. That must change.

C. No excuse exists for this due process violation.

The State possessed sole responsibility for ensuring Grandberry a prompt trial consistent with due process, *Dickey v. Florida*, 398 U.S. 30, 38 (1970), yet no one addressed how this injustice occurred. Why the State ignored *Lee*'s admonitions and no one considered whether due process forbid the absence of counsel and the lengthy, indefinite delays that Grandberry experienced goes unexplained. But whether due to a cavalier disregard of *Lee*'s clear directives or the cumulative neglect of three court commissioners, six prosecutors, and one circuit judge who presided over Grandberry's loss of liberty does not matter. Negligence "falls on the wrong side of the divide between acceptable and

unacceptable reasons" for delay. *Doggett v. United States*, 505 U.S. 647, 657 (1992).

The prosecution is especially culpable for this due process violation. Prosecutors are ministers of justice who must "administer justice rather than simply obtain convictions." *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶28. They must discharge their constitutional responsibilities fairly so that those accused "will not be deprived of their constitutional rights." *State v. Hooper*, 101 Wis.2d 517, 534-5 n.12 (1981). Even though adversaries, prosecutors cannot silently watch judicial errors occur as defendants lose important rights. S.C.R. 20:3.3(a)(2). At least six different assistant district attorneys appeared at Grandberry's hearings, yet not one informed the Court about *Lee*'s requirements or raised the obvious constitutional issues involved with jailing a man without a lawyer or a trial for over a year.

D. Jailing a man for more than a year without the power to do so requires more than temporary dismissal.

Dismissal with prejudice is especially appropriate because the court lost personal jurisdiction under *Lee* and therefore lacked power over Grandberry's case very early. Certainly this Court did not intend dismissal without prejudice under *Lee* to redress a defendant's lost right to counsel that lasted well over a year. The damage is often irreparable, because even in cases remaining static while defendants wait for counsel's appointment, the condition of the evidence does not remain static. A defendant "subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Rothgery v. Gillespie County*, 554 U.S. 191, 209-210 (2008). The value of timely attorney-client communication and immediate investigation is obvious and beyond dispute. Justice often depends on the memory of witnesses, and memories dissipate rapidly over time. Belated appointments after evidence dissipates foreclose adequate representation at trial, regardless of counsel's zeal once finally appointed.

Finally, contrasting rights that the accused must assert, only the State can raise *Lee*, for the accused, who has no lawyer, will never know that *Lee* requires prompt dismissal. Only the state can ensure that dismissal occurs. No excuse exists for abdicating that responsibility here, and the State offers none.

E. Courts possesses authority to order dismissal with prejudice.

The State opposes imposing any universal rule meant to prevent this injustice from recurring. The State explains that circumstances vary and this Court lacks authority to implement a prophylactic rule anyway.

The last idea defies common sense. Prisoners like Grandberry are jailed under conditions courts impose. If courts possess power to order people jailed pretrial under conditions they select, they possess power to order their release under conditions as well. Courts empowered to restrict liberty certainly possess power to restore it, especially when further incarceration threatens constitutional rights.

II. Dismissal without prejudice solves nothing.

The State's proposed remedy—dismissal without prejudice—does nothing to end this crisis or even ensure future courts follow *Lee*.

It certainly offers no incentive for the State to change its tactics, for the State can reverse a dismissal without prejudice quickly and simply by charging again. This means Grandberry will again experience arrest, unconscionably high bail and jailing. He will wait again for the appointment of counsel. Meanwhile, the State sacrifices nothing—even gaining, because speedy trial deadlines probably start over.

And the State isolated Grandberry in jail with $1 million bail imposed solely to keep him incarcerated. Incarceration wears down a prisoner's resistance and improves the State's advantage in plea negotiations. The State suggests, without subtlety, that Grandberry belonged in jail. It names him a drug kingpin. Grandberry's indigency belies that status, but confining Grandberry to jail certainly helped the

State prevent Grandberry from preparing a defense and freed the government to pursue others.

Adopting a dismissal without prejudice then implements a remedy of no consequence. The State's proposal to redress this clear constitutional violation involves a slight increase in its paperwork and nothing more.

III. Prejudice plainly exists.

A. Proof at trial is unnecessary.

The State argues that Grandberry has shown no prejudice and cannot until a trial occurs. Without prejudice, it asserts, there can be no permanent dismissal. Yet establishing prejudice is a peculiar obligation to impose on a man who lacked a lawyer and only attracted this Court's intervention pro se.

Moreover, requiring a trial to prove prejudice is deceptive, since prolonged pretrial detention increases pretrial guilty pleas. Thus, for many, trial proves nothing, since they will never have one.

The State mentions *State v. Lemay*, 155 Wis.2d 202 (1990), for the notion that assessing prejudice must await the outcome at trial. But *Lemay* involved no arrest or loss of liberty, and the accused did not even know that charges existed for years.

The State trivializes Grandberry's lost liberty by contending he must stand trial to prove prejudice. In the State's view, trial is essential because Grandberry must experience prejudice in order to prove it. It is Catch-22 enshrined into Wisconsin law.

B. Prejudice is broader than jeopardizing a defense.

Nevertheless, the State overlooks obvious proof of prejudice.

First, prejudice is presumed with delays lasting more than a year. *Doggett*, 505 U.S. at 652 n.1. It is difficult to understand how Grandberry's prejudice can be presumed but unproven at the same time, especially when the State offers no contrary proof.

Second, research consistently demonstrates that defendants detained the entire pretrial period face markedly worse outcomes than peers with similar charges and criminal histories who are released. Stacie St. Louis, *The Pretrial Detention Penalty, Justice Quarterly* (2023) (https://doi.org/10.1080/07418825.2023.2193624). Institutional pressures to accept a guilty plea, weakened bargaining power, lost community connections, and fewer resources to mount an effective defense explain this disparity. (*Id.*).

Third, American courts do not jail people for many months on secret charges. The State sealed the complaint to conceal its accusations from Grandberry. (R.12:5). Knowing what accusations the accused faces is among the most basic of due process rights. *State v. Kempainen*, 2015 WI 32, ¶19.

Finally, prejudice includes far more than the State acknowledges. The State implies that unless Grandberry can show the delay interfered with his defense, he has lost nothing important. Yet, wholly aside from possible prejudice to a defense, arrest and charges

> seriously interfere with the defendant's liberty, whether he is free on bail or not, and . . . may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

United States v. Marion, 404 U.S. 307, 320 (1971).

Moore v. Arizona, 414 U.S. 25, 26 (1973), expressly rejected the notion that affirmatively demonstrating prejudiced defense was even necessary, since the "major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *Marion*, 404 U.S. at 320.

IV. Extraordinary circumstances exist.

The State acknowledged that a dismissal with prejudice is appropriate under "extraordinary circumstances." (Br. p.19). Although the State finally concedes what happened here was wrong, it never explains how this could be anything but extraordinary. No debate on the subject should exist given that:

(1) A 440-day deprivation of counsel while the accused sits in jail shocks everyone. There is a long historical tradition at common law against lengthy pretrial incarcerations. *Klopfer v. North Carolina*, 386 U.S. 213, 224 (1967).

(2) A man lost his liberty for over a year while the State neither brought him to trial nor appointed counsel to assist in his defense. "The defendant has no duty to bring himself to trial." *Barker*, 407 U.S. at 527. The State has that duty and must ensure its prosecution complies with due process. *Id.* at 538 (White, J., concurring)

(3) The State sealed the details of its charges, so Grandberry lingered in jail without knowing precisely what evidence supposedly justified his prosecution. Article I, Section 7 of the Wisconsin Constitution guaranteed Grandberry the immediate right to know "the nature and cause of the accusation against him."

(4) These deprivations occurred in defiance of this Court's clear directives in *Lee*, without excuse or explanation. The fact that the criminal legal system contributes to the deprivations provides no excuse. It does not matter whether the prosecution, the court, or the court system caused the delay. Omissions by each are attributable to the State. *State v. Ramirez*, 2025 WI 28, ¶40.

(5) The error went beyond ignoring *Lee*. Hearing transcripts show the lower court's cavalier attitude towards the deprivation of these important rights. A commissioner's short-tempered dismissal of Grandberry's pro-se effort to assert his rights exemplifies this attitude. (R.71; App.012-013).

Moreover, once a commissioner finally mentioned *Lee* (after this Court accepted interlocutory review), the court stated only that it had evaluated *Lee*'s factors before extending time limits again. (R.101:3; App.026). It said no more; it explained nothing. Courts' failure to explain a decision abuses discretion *per se*. *State v. Jendusa*, 2021 WI 24, ¶42. And the failure was all the worse because *Lee* required exactly the opposite—a thorough explanation of the decision. 2021 WI App 12, ¶¶45, 50-59 ("The court should recite on the record the factors that lead

it to find good cause and why such factors override the statutory directive that a preliminary hearing be promptly held."). It is hard to understand how the court could profess to follow *Lee* yet ignore its most basic requirement.

(6) This Court might express frustration with the lower court given *Lee*'s clarity. But a critical opinion will not suffice. *Lee* already provided that. An admonition that lower courts erred and future courts should do better solves nothing. The commissioners' deficient effort to follow *Lee* demonstrates that. There must be more meaningful consequences for severe violations of due process.

(7) The prosecution instigated this deprivation by obtaining and continuing to demand a $1 million bond for a man clearly unable to post it. It meant to jail Grandberry while it prosecuted his supposed collaborators. There existed no other purpose. The Eighth Amendment entitled Grandberry to reasonable bail, yet the State ensured his freedom was unattainable.

(8) Especially disturbing is the blatantly false choice that the State demanded of Grandberry. Multiple commissioners required him to elect between a prompt preliminary hearing—a clear right the law gave him—and representation by counsel. (R.66, App.003; R.63, App.010; R.71, App.013; R.67, App.017; R.64, App.021; R.102, App.022; R.101, App.026). But Grandberry was entitled to both. Nothing in the law forced Grandberry to relinquish this statutory right to preserve his constitutional right to counsel. Courts can never require the accused to relinquish one right to preserve another. *Simmons v. United States*, 390 U.S. 377, 394 (1968)(It is "intolerable that one constitutional right should have to be surrendered in order to assert another.").

(9) Not all delays are equal. Delay while the accused is jailed without liberty is not equal to circumstances that existed in *Doggett* and *Barker*, where each defendant was free, and the *Barker* defendant was unaware that he had even been charged.

(10) The State writes that courts loathe dismissing a case with prejudice lest a guilty man go free. But those same courts presume

Grandberry's innocence, and, according to *Barker*, there is simply no "other possible remedy" for egregious delays like this one. *Barker*, 407 U.S. at 522. The State's alternative—dismissal without prejudice—assures no consequence exists for a serious violation of constitutional rights. After all, dismissal today can see reissuance of charges tomorrow, and Grandberry's release into freedom will undoubtedly be short-lived.

(11) For over a year, the State opposed Grandberry's release. It procured his jailing and ensured bail remained unattainable. Only now, when this obvious injustice is exposed to a higher court, does it relent—acknowledging, for the first time, that it cannot defend what happened to Grandberry. The dismissal it urges will only perpetuate the injustice when the State recharges him soon. And, it saves for the State the option to apply this tactic to others who, as history shows, will also find it difficult to obtain counsel until the State resolves this crisis.

(12) None of this was Grandberry's fault. He did nothing to provoke or justify what the State did to him.

CONCLUSION

For these reasons, this Court should order dismissal with prejudice as the appropriate remedy to redress an unconstitutional denial of counsel yielding a prolonged and unwarranted loss of liberty.

Respectfully submitted this ___ day of April, 2026.

Electronically signed by George Burnett
Attorney R. George Burnett
State Bar No. 1005964
Law Firm of Conway Olejniczak & Jerry, S.C.
P.O. Box 23200
Green Bay, WI 54305
P: (920) 437-0476
E: GB@lcojlaw.com

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8) (b), (bm), and (c) for a nonparty brief. The length of this brief is 2,975 words.

Dated this ___ day of April, 2026.

Electronically signed by George Burnett
Attorney R. George Burnett
State Bar No. 1005964
Law Firm of Conway Olejniczak & Jerry, S.C.
P.O. Box 23200
Green Bay, WI 54305
P: (920) 437-0476
E: GB@lcojlaw.com