

FILED
12-16-2022
Clerk of Circuit Court
Brown County, WI

STATE OF WISCONSIN

CIRCUIT COURT

BROWN COUNTY

ANTRELL THOMAS, MELVIN CLEMONS, CHRISTIAN PITTMAN, CHANCE KRATOCHVIL, KELSIE MCGESHICK, JEROME BROST, DWIGHT MOORE, SEBASTIAN POPOVICH, MELINDA MESHIGAUD, ELMORE ANDERSON, CASHUN DRAKE, TERRY JOHNSON, TIMOTHY WILLIAMS, WILLIAM LOWE, TIVON WELLS, DAVADAE BOBBITT, DONALD JUECK, and CORY HANSEN, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

ANTHONY S. EVERS, in his official capacity as the Governor of Wisconsin; **KELLI THOMPSON**, in her official capacity as the Wisconsin State Public Defender; **JAMES M. BRENNAN**, in his official capacity as Chair of the Wisconsin Public Defender Board; **JOHN J. HOGAN**, and in his official capacity as Vice Chair of the Wisconsin Public Defender Board; **ELLEN THORN**, in her official capacity as Secretary of the Wisconsin Public Defender Board; **ANTHONY COOPER, SR.**, in official capacity as a member of the Wisconsin Public Defender Board; **REGINA DUNKIN**, in her official capacity as a member of the Wisconsin Public Defender Board; **PATRICK J. FIEDLER**, in his official capacity as a member of the Wisconsin Public Defender Board; **INGRID JAGERS**, in her official capacity as a member of the Wisconsin Public Defender Board; **JOSEPH MIOTKE**, in his official capacity as a member of the Wisconsin Public Defender Board; and **MAI NENG XIONG**, in her official capacity as a member of the Wisconsin Public Defender Board.

Defendants.

Case No. 2022-CV-1027

Civil Case Code 30704 –
Other Injunction or
Restraining Order

Hon. Thomas J. Walsh

AMENDED CLASS ACTION COMPLAINT

Plaintiffs Antrell Thomas, Melvin Clemons, Christian Pittman, Chance Kratochvil, Kelsie McGeshick, Jerome Brost, Dwight Moore, Sebastian Popovich, Melinda Meshigaud, Elmore Anderson, Cashun Drake, Terry Johnson, Timothy Williams, William Lowe, Tivon Wells, Davadae Bobbitt, Donald Jueck, and Corey Hansen (collectively, “Plaintiffs”), on behalf of themselves and all others similarly situated, hereby allege as follows:

INTRODUCTION

1. The United States Constitution and the Wisconsin Constitution guarantee that people accused of crimes have the right to the assistance of an attorney for their defense. The United States Supreme Court has recognized that this right to counsel is “a bedrock principle” that constitutes the very “foundation for our adversary system” of criminal justice.¹ And the Wisconsin Supreme Court has emphasized that “[t]he right to counsel in criminal proceedings is a fundamental constitutional right and a cornerstone of our justice system.”²

2. Furthermore, because “lawyers in criminal courts are necessities, not luxuries,”³ the United States Constitution and Wisconsin Constitution demand that the State of Wisconsin provide attorneys—at the State’s expense—to otherwise qualified defendants who cannot afford legal representation. Such provision of public defense counsel must occur “within a reasonable time” after the prosecution begins “to allow for adequate representation at any critical stage before trial, as well as at trial itself.”⁴

3. Although the United States Constitution and Wisconsin Constitution require the State of Wisconsin to provide timely, effective legal representation to qualified defendants, the State has discretion over the manner by which it does so.

¹ *Martinez v. Ryan*, 566 U.S. 1, 12 (2012).

² *In re Petition to Amend SCR 81.02*, S. Ct. Order 17-06, 2018 WI 83, at 4 (June 27, 2018) (eff. Jan. 1, 2020).

³ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁴ *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 212 (2008).

4. The State of Wisconsin has enacted a statutory and regulatory scheme that provides for the establishment, funding, and operation of a statewide public defense system. At the center of this system is the Office of the State Public Defender (“SPD”). By statute, the SPD is responsible for providing an attorney to every defendant that qualifies for public defense counsel, either by directly representing him or her or by paying a member of the private bar to do so (at a statutorily prescribed rate). Statutes and regulations govern whether a defendant is eligible for direct SPD representation or whether a private attorney must be appointed on his or her behalf. The SPD’s funding comes from the biennial budget bills passed by the Wisconsin Legislature and signed into law by the Governor.

5. Pervasive, interconnected problems plague Wisconsin’s public defense system, resulting in a severe shortage of attorneys available to represent qualified defendants. Due in large part to insufficient funding (which prevents the SPD from offering competitive salaries), the SPD struggles to recruit and retain the number of staff attorneys necessary for the agency to represent all defendants who qualify for direct SPD representation, resulting in an enormous backlog of cases. Furthermore, the SPD cannot recruit enough private attorneys to represent all defendants who require private bar representation, largely because the SPD is required by statute to pay private attorneys the abysmally low rate of \$70 per hour. And even if the SPD could legally pay private attorneys more (it cannot), because of the SPD’s chronic underfunding, the SPD would not have enough funds to do so.

6. The severe shortage of public defense attorneys in Wisconsin has created a constitutional crisis. As there are not nearly enough lawyers to represent all the qualified defendants, thousands of defendants in Wisconsin have experienced—or are currently experiencing—unreasonable delays in receiving appointed counsel lasting weeks, months,

and—in some cases—*more than a year*. In an April 2022 interview, Defendant Kelli Thompson, the Wisconsin State Public Defender, admitted that the SPD had over 35,000 open cases and speculated that it would take *years* for the SPD to work through this backlog.⁵

7. Although this issue is present in every part of the state, it is especially acute in Brown County. In 2021, facing a backlog of “approximately 350 defendants . . . which currently need SPD representation, 17 of which have been in custody and sought representation for over 100 days,”⁶ the County Board of Supervisors passed a resolution calling on the Governor and Legislature to take action. They did not. And in the nearly two years since, the situation has not improved. Indeed, recent data suggests that hundreds of Brown County defendants are waiting months for legal representation.⁷

8. The delays described above amount to actual *denial* of counsel. And they have dire consequences for defendants and the justice system as a whole. As Wisconsin Supreme Court Justice Dallet explained in a recent case:

Uncounseled defendants may be hindered in their ability to prepare a defense, engage in plea negotiations, or seek pretrial release... [n]ot to mention that delays in appointing counsel may lead to the same negative consequences as any other pre-trial delay, such as postponing closure for victims or increasing the chance that witnesses may become unavailable⁸

9. One representative case, that of Plaintiff Christian Pittman, illustrates the depth and scope of the problem in Brown County and across the state.

⁵ ‘UpFront’: State Public Defender Says It Will Take Years to Clear 35,000-Case Backlog, WISPOLITICS (Apr. 18, 2022), <https://www.wispolitics.com/2022/upfront-state-public-defender-says-it-will-take-years-to-clear-35000-case-backlog/>.

⁶ Proceedings of the Brown County Board of Supervisors 9 (Mar. 17, 2021), *available at* https://www.browncountywi.gov/i/minutes/d20c97471382/03_mar_2021_-_official.pdf.

⁷ See Ex. A.

⁸ *State v. Lee*, 2022 WI 32 ¶¶ 12–15, 401 Wis.2d 593, 973 N.W.2d 764 (Dallet, J., dissenting).

10. On May 25, 2022, Mr. Pittman was arrested and charged by complaint in Brown County with a Class E felony, a Class I felony, and various misdemeanor offenses, all relating to the alleged use of a firearm during a domestic dispute. Mr. Pittman had his initial appearance the same day. At the initial appearance, the State's lawyer, an assistant district attorney, asserted that the State had charged Mr. Pittman with "a very serious offense." And although he had a job and ties to the community, Mr. Pittman was detained pending trial based on a probation hold and his inability to pay his \$5,000 cash bond.

11. By statute, Mr. Pittman was entitled to have a preliminary hearing within ten days of his initial appearance. The preliminary hearing is a critical stage of the criminal proceeding, at which Mr. Pittman was constitutionally entitled to be represented by counsel.⁹

The purpose of the preliminary hearing is:

[T]o prevent hasty, malicious, improvident, and oppressive prosecutions, to protect the person charged from open and public accusations of crime, to avoid both for the defendant and the public the expense of a public trial, and to save the defendant from the humiliation and anxiety involved in public prosecution, and to discover whether or not there are substantial grounds upon which a prosecution may be based.¹⁰

At the initial appearance, Mr. Pittman waived the ten-day time limit for the preliminary hearing to allow the SPD time to search for a lawyer to represent him.

12. Twenty-two days passed and Mr. Pittman was not appointed counsel. At a status conference on June 16, 2022, the SPD reported that it had made 114 contacts to private counsel, but no one was willing to represent Mr. Pittman. The Court Commissioner noted that this was a systemic problem, explaining, "There's a shortage of attorneys willing to take

⁹ *State v. O'Brien*, 2014 WI 54 ¶ 40, 354 Wis. 2d 753, 850 N.W.2d 8.

¹⁰ *Thies v. State*, 178 Wis. 98, 103, 189 N.W. 539 (1922).

Public Defender cases.” Mr. Pittman again waived his statutory right to a preliminary hearing within ten days, again to give the SPD time to find him a lawyer.

13. The next court hearing, described as an “adjourned initial appearance,” took place twenty-one days later, on July 7, 2022. Mr. Pittman asked the Court Commissioner for a signature bond and explained, “I’m able to work and hire my own lawyer. But I can’t hire a lawyer and be in custody at the same time.” The Commissioner declined to give Mr. Pittman a signature bond and instead gave Mr. Pittman the “choice” of having a preliminary hearing within ten days if he was willing to waive his right to counsel. Mr. Pittman objected to any further delay, informing the court that the SPD “told me it would be six to nine months before they would be able to find me a Public Defender.” The Commissioner responded that “if you’re in custody for 60 days and you haven’t had an attorney yet, we’re authorized to send this matter upstairs to the Judges to see if they’ll appoint you an attorney.” Mr. Pittman asked whether the Commissioner could “appoint me an attorney now.” But the Commissioner said, “No. The Judges say we have to at least have you in custody or wait at least 60 days.” The Commissioner set another hearing for just past the sixty-day mark and said, “If you don’t have an attorney by then, we’re going to set this matter upstairs . . . and then you can ask [the judge] if he’ll appoint you an attorney; okay?”

14. Twelve more days passed, and Mr. Pittman was not appointed counsel. At a court hearing on July 19, 2022, Mr. Pittman renewed his request for a signature bond “so I can be able to work for an attorney, just in case one isn’t appointed to me.” The State opposed this request, and the Commissioner again denied it. When the Commissioner noted that no lawyer had yet been appointed, Mr. Pittman repeated what he had been told by the SPD, that

he would likely not be appointed counsel for “six to nine months.” The Commissioner responded, “Right. They are actively looking for an attorney for you.”

15. Nine more days passed, and Mr. Pittman was not appointed counsel. At the next court hearing—again styled an “adjourned initial appearance”—on July 28, 2022, the Commissioner noted, “It’s now been two months, and the Public Defender has indicated that they’ve made 337 contacts to try to get you an attorney . . . and have been unsuccessful.” The Commissioner then offered to schedule a hearing before a Brown County judge so Mr. Pittman could ask for an appointed attorney. When the Commissioner asked whether Mr. Pittman would again waive the ten-day time limit for his preliminary hearing, Mr. Pittman said no, and he again renewed his request for a signature bond so he could hire his own lawyer.

16. Eleven more days passed, and Mr. Pittman was not appointed counsel. A status conference was held before a Brown County judge on August 8, 2022. At the hearing, the court noted that the SPD had made 392 contacts to the private bar but had not found an attorney willing to represent Mr. Pittman. For the fourth time, Mr. Pittman asked for a signature bond, but the court said that would be taken up at the next court hearing. The court—which, according to the Commissioner, was the only one able to secure counsel for Mr. Pittman—noted, “I can’t create a lawyer out of thin air obviously,” and explained, “We have way more cases in our county than we have lawyers willing to take them . . . and it’s been an ongoing problem for years now in our part of the state.”

17. Although the Commissioner had previously told Mr. Pittman that he could ask the court for a lawyer, the court allowed only that it would “add [Mr. Pittman’s] name” to the “priority list” for counsel, “since it’s been almost three months.” The court found good

cause to delay the preliminary hearing beyond ten days because “the real miscarriage of justice would be forcing Mr. Pittman to go forward on a preliminary hearing without a lawyer if he wants to be represented by a lawyer.” Remarkably, the court explained that Mr. Pittman—who had appeared in court six times, and who had first appeared in court nearly three months earlier—was actually still in the midst of his initial court appearance. As the court put it, “I interpret the statutes to mean that the initial appearance is not over until a lawyer has been assigned to you by the public defender’s office.” And, the court said, Mr. Pittman’s three-month-long initial appearance would continue, because “unfortunately, the only situation that we’re in here . . . is giving the public defender’s office more time to locate an attorney for you.”

18. Fifteen more days passed, and Mr. Pittman was not appointed counsel. On August 23, 2022, Mr. Pittman was named as a plaintiff in the complaint filed in this case. Seven days later, on August 30, 2022, Mr. Pittman, still without a lawyer, filed a motion to dismiss his criminal case for failure to hold the preliminary hearing within ten days, as required by Wisconsin law. The motion also objected to the delays Mr. Pittman had endured and demanded a speedy trial.

19. The same day, August 30, the Court Commissioner held another “adjourned initial appearance.” The SPD reported that it had made 481 contacts to private counsel, but there was still no lawyer willing to represent Mr. Pittman. As the Commissioner said, “There’s a limited number of attorneys willing to take cases through the Public Defender’s Office at the rate of pay currently provided by the state. That’s a difficult situation here.”

20. The Commissioner then offered Mr. Pittman the following options:
(a) schedule the preliminary hearing within ten days, with no lawyer likely to be appointed

by then; (b) schedule another hearing before the Brown County judge to again ask for an appointed lawyer; or (c) simply give the SPD more time to look for a lawyer. As the Commissioner noted, “my hands are tied. I can’t appoint you an attorney. The Judge has the ability to do so. I cannot.” Yet, at Mr. Pittman’s last hearing before the Brown County Judge, the Judge claimed that his hands were also tied and the only option was to give the SPD more time to look for a lawyer. Because Mr. Pittman did not have counsel, there was no one to note this exchange for the record.

21. In response to this menu of options (to give up his right to a lawyer or just keep waiting), Mr. Pittman told the Commissioner, “I really don’t know. I really don’t want to proceed with this unless I got legal representation for this case, sir.” Accordingly, the Commissioner ordered the case sent back to the Brown County Judge “to see if he’ll consider appointing counsel for the defendant. There’s nothing much more we can do down here at this point.” But the Commissioner did exercise some authority, namely by finding good cause to continue the delay of Mr. Pittman’s preliminary hearing.

22. Finally, nine days later, on September 7, 2022, Mr. Pittman was appointed counsel. From the date of his arrest and initial appearance, Mr. Pittman was denied counsel for a total of 105 days. The State, whose relationship with Mr. Pittman was “solidly adversarial” upon charging Mr. Pittman with very serious crimes, was represented by counsel for the 105 days in which it repeatedly opposed his request for a signature bond.¹¹

23. As Mr. Pittman’s case reveals, in Wisconsin, it is now a regular practice to charge defendants with serious crimes, impose terms of bail that either keep defendants incarcerated before trial or otherwise significantly restrict their liberty, and then hit the pause

¹¹ *Rothgery*, 554 U.S. at 202.

button for weeks or months, leaving defendants unrepresented and in legal purgatory while the SPD searches in vain for a lawyer. These indefinite delays threaten multiple harms, including “oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused’s] defense will be impaired by dimming memories and loss of exculpatory evidence.”¹²

24. In many cases, the State papers over these delays and their resulting harms by pretending that defendants who have appeared in court many times over the course of months are still undergoing an “initial appearance.” And the State shuttles defendants back and forth between court hearings, telling defendants: (1) You are charged with serious crimes; (2) You have the right to be represented by counsel to defend you against these crimes; (3) We are unable to honor your right to counsel; (4) Our inability to provide counsel is widely known, repeated, and systematic; (5) No one—not the court, the SPD, nor the District Attorney—can help you; and (6) Your choices are to waive your right to counsel or to simply wait indefinitely while the State continues to violate your right.

25. Throughout this process, state officials avert their eyes from a basic reality. If the State of Wisconsin is not prepared to prosecute criminal defendants, including by affording them the right to counsel guaranteed by the United States and Wisconsin Constitutions, then the State’s prosecutions of criminal defendants should be dismissed, at least until the State is prepared to proceed.

26. Mr. Pittman and his fellow Plaintiffs are criminal defendants who have been charged with offenses punishable by a term of imprisonment and—despite having requested and been found eligible for public defense counsel at or after their initial appearances—were

¹² *Doggett v. United States*, 505 U.S. 647, 654 (1992).

denied an attorney for fourteen days or more. Plaintiffs seek to represent a Class of all current and future similarly situated individuals (hereinafter, “the Class”).

27. Defendants are the Wisconsin state officials responsible for administering Wisconsin’s public defense system or otherwise fulfilling Wisconsin’s constitutional obligations to timely provide counsel to qualified defendants.

28. The delays experienced by Plaintiffs and the Class are unreasonable because appointment of counsel within fourteen days after the start of the prosecution is necessary “to allow for adequate representation at any critical stage before trial, as well as at the trial itself.”¹³

29. Accordingly, Wisconsin’s public defense system is unconstitutional as to Plaintiffs and the Class. And by administering this unconstitutional system, and thereby failing to timely appoint attorneys for Plaintiffs and the Class, Defendants have violated—or are currently violating—Plaintiffs’ and the Class’s constitutional rights to counsel.

30. To remedy this constitutional crisis, Plaintiffs request that the Court enter an order:

- a. certifying, upon Plaintiffs’ forthcoming motion, a class of all current and future defendants who—on or after January 1, 2019—requested and were found eligible for public defense counsel but did not receive an attorney within fourteen days of their initial appearances (or a subset of the same);
- b. declaring (1) that the delays in receiving appointed counsel experienced by Plaintiffs and the Class are unreasonable, (2) that Wisconsin’s public defense system is

¹³ *Rothgery*, 554 U.S. at 212.

- unconstitutional as to Plaintiffs and the Class, and (3) that Defendants have violated—
or are currently violating—Plaintiffs’ and the Class’s constitutional rights to counsel;
- c. enjoining Defendants from administering Wisconsin’s public defense system insofar as it continues to unconstitutionally prevent the unrepresented Plaintiffs and Class members from timely receiving counsel;
 - d. directing Defendants to promptly establish a constitutional public defense system that timely provides attorneys to the unrepresented Plaintiffs and the Class members; and
 - e. directing the SPD to enter a limited appearance on behalf of all unrepresented Plaintiffs and Class members and to move to dismiss their cases on the basis that their rights to counsel were violated.

JURISDICTION AND VENUE

30. This is a civil rights action brought pursuant to 42 U.S.C. § 1983 for the deprivation of civil rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

31. This action also seeks relief for the deprivation of rights as secured by Article I, Section 7 of the Wisconsin Constitution.

32. The Court has jurisdiction over this dispute pursuant to Article VII, Section 8 of the Wisconsin Constitution and Wisconsin Statutes section 753.03, which provide for subject matter jurisdiction over civil matters within this State.

33. Venue is proper in Brown County pursuant to Wisconsin Statutes section 801.50 because at least one of the claims arises in this county.

34. This case presents an actual case and controversy arising under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution.

PARTIES

I. Plaintiffs

35. Plaintiff Antrell Thomas is a resident of La Crosse, Wisconsin. His case is pending in La Crosse County. Mr. Thomas's initial appearance occurred on August 26, 2021. Mr. Thomas is being detained at Dodge Correctional Institution. After being denied counsel for 378 days, Mr. Thomas received an attorney on September 8, 2022 (sixteen days after the initial complaint in this case was filed).

36. Plaintiff Melvin Clemons is a resident of Green Bay, Wisconsin. His case is pending in Brown County. Mr. Clemons's initial appearance occurred on March 30, 2022. He then had "adjourned" initial appearances on May 18, 2022; June 7, 2022; July 1, 2022; July 29, 2022; and September 9, 2022. As of July 28, 2022, the SPD made 812 contacts without securing counsel for Mr. Clemons. Ex. B, OSPD Appointment of Counsel Report re M. Clemons. After being denied counsel for 161 days, Mr. Clemons received an attorney on September 7, 2022 (seventeen days after the initial complaint in this case was filed).

37. Plaintiff Christian Pittman is a resident of Green Bay, Wisconsin. His case is pending in Brown County. Mr. Pittman's initial appearance occurred on May 25, 2022. He then had "adjourned" initial appearances on June 16, 2022; July 7, 2022; July 28, 2022; August 8, 2022; and August 30, 2022. Mr. Pittman is being detained in the Brown County Jail and was told by the SPD that he could expect a six- to nine-month wait for an attorney.

After being denied counsel for 105 days, Mr. Pittman received an attorney on September 7, 2022 (seventeen days after the initial complaint in this case was filed).

38. Plaintiff Chance Kratochvil is a resident of Wausau, Wisconsin. His case is pending in Langlade County. Mr. Kratochvil's initial appearance was on April 25, 2022. He then had "adjourned" initial appearances on May 9, 2022; May 16, 2022; May 23, 2022; June 6, 2022; June 20, 2022; July 18, 2022; August 1, 2022; August 22, 2022; September 13, 2022; September 26, 2022; and October 10, 2022. After being denied counsel for 155 days, Mr. Kratochvil received an attorney on September 27, 2022 (twenty-seven days after the initial complaint in this case was filed).

39. Plaintiff Kelsie McGeshick is a resident of Crandon, Wisconsin. Her cases are pending in Forest County. Ms. McGeshick's initial appearance occurred on May 24, 2022. She then had "adjourned" initial appearances on June 8, 2022; July 20, 2022; and August 10, 2022. After being denied counsel for 114 days, Ms. McGeshick received an attorney on September 15, 2022 (twenty-three days after the initial complaint in this case was filed).

40. Plaintiff Jerome Brost is a resident of Sheboygan, Wisconsin. His case is pending in Sheboygan County. Mr. Brost's initial appearance occurred on July 15, 2022. He then had status conferences before the court on July 18, 2022; July 25, 2022; August 8, 2022; August 22, 2022; and August 31, 2022. After being denied counsel for forty-eight days, Mr. Brost received an attorney on September 1, 2022 (nine days after the initial complaint in this case was filed).

41. Plaintiff Dwight Moore is a resident of Milwaukee, Wisconsin. His case is pending in Milwaukee County. Mr. Moore's initial appearance occurred on July 18, 2022.

After being denied counsel for 122 days, Mr. Moore received an attorney on November 17, 2022 (eighty-six days after the initial complaint in this case was filed).

42. Plaintiff Sebastian Popovich is a resident of Green Bay, Wisconsin. His case is pending in Brown County. Mr. Popovich's initial appearance occurred on June 14, 2022. Mr. Popovich is being detained in the Brown County Jail. As of October 5, 2022, the SPD made 598 contacts without securing counsel for Mr. Popovich. Ex. C, OSPD Appointment of Counsel Report re S. Popovich. Mr. Popovich has been denied legal representation for 185 days after his initial appearance.

43. Plaintiff Melinda Meshigaud is a resident of Manitowoc, Wisconsin. Her case—which involves two misdemeanor charges—is pending in Brown County. Ms. Meshigaud's initial appearance occurred on August 10, 2021. Two bench warrants were issued early in the case when Ms. Meshigaud failed to appear. She was in a drug treatment facility and returned on warrant on January 25, 2022. She then had “adjourned” initial appearances on March 15, 2022; May 3, 2022; June 7, 2022; August 9, 2022; September 27, 2022; and November 29, 2022. As of November 28, 2022, the SPD made 4,735 contacts without securing counsel for Ms. Meshigaud. Ex. D, OSPD Appointment of Counsel Report re M. Meshigaud. Her next appearance is scheduled for January 27, 2023. Ms. Meshigaud is not in custody. She has been denied legal representation for 325 days after her return on warrant and 493 days after her initial appearance.

44. Plaintiff Elmore Anderson is a resident of Green Bay, Wisconsin. His case is pending in Brown County. Mr. Anderson's initial appearance occurred on October 3, 2022. As of November 30, 2022, the SPD made 335 contacts without securing counsel for Mr. Anderson. Ex. E, OSPD Appointment of Counsel Report re E. Anderson. His next

appearance is scheduled for December 21, 2022. Mr. Anderson is in custody at Brown County Jail and has been denied legal representation for seventy-four days after his initial appearance.

45. Plaintiff Cashun Drake is a resident of Milwaukee, Wisconsin. His case is pending in Milwaukee County. Mr. Drake's initial appearance occurred on November 9, 2022. He then had an "adjourned" hearing on September 18, 2022. Mr. Drake is in custody and has been denied legal representation for thirty-seven days after his initial appearance.

46. Plaintiff Terry Johnson is a resident of Milwaukee, Wisconsin. His case is pending in Milwaukee County. Mr. Johnson's initial appearance occurred on October 29, 2022. He then had "adjourned" hearings on November 8, 2022, and December 7, 2022. His next appearance is scheduled for December 20, 2022. Mr. Johnson is in custody and has been denied legal representation for forty-eight days after his initial appearance.

47. Plaintiff Timothy Williams is a resident of Milwaukee, Wisconsin. His case is pending in Milwaukee County. Mr. Williams's initial appearance occurred on November 14, 2022. His next appearance is scheduled for December 29, 2022. Mr. Williams is in custody, and he has been denied legal representation since November 22, 2022—twenty-four days.

48. Plaintiff William Lowe is a resident of Manitowoc, Wisconsin. His case is pending in Manitowoc County. Mr. Lowe's first "adjourned" initial appearance before the court occurred on September 12, 2022. The initial appearance was then reset for September 19, 2022. A preliminary hearing was then set and rescheduled on September 28, 2022; October 5, 2022; October 20, 2022; November 10, 2022; November 23, 2022; and December 7, 2022. Mr. Lowe is in custody, and he has been denied legal representation for ninety-five days.

49. Plaintiff Tivon Wells is a resident of Manitowoc, Wisconsin. His case is pending in Manitowoc County. Mr. Wells's first adjourned initial appearance before the court occurred on September 26, 2022. The initial appearance was then reset for October 3, 2022. A preliminary hearing was then set and rescheduled for October 12, 2022; October 26, 2022; November 22, 2022; and December 13, 2022. Mr. Wells is in custody, and he has been denied legal representation for eighty-one days.

50. Plaintiff Davadae Bobbitt is a resident of Green Bay, Wisconsin. His case is pending in Brown County. Mr. Bobbitt's initial appearance before the court occurred on August 26, 2022. A preliminary hearing was then set for August 31, 2022, at which Mr. Bobbitt waived his right to an attorney for the preliminary hearing. Mr. Bobbitt was arraigned on September 19, 2022, and a status conference is set for January 10, 2023. As of September 16, 2022, the SPD had made forty-six contacts and failed to secure representation for Mr. Bobbitt. Ex. F, OSPD Appointment of Counsel Report re D. Bobbitt. Mr. Bobbitt is in custody, and he has been denied legal representation for 112 days.

51. Plaintiff Donald Jueck is a resident of Antigo, Wisconsin. His case is pending in Langdale county. Mr. Jueck's initial appearance occurred on October 6, 2022. Further adjourned initial appearances occurred on October 10, 2022; October 24, 2022; November 14, 2022; and December 12, 2022. Mr. Jueck is in custody, and he has been denied legal representation for seventy-one days.

52. Plaintiff Cory Hansen is a resident of Milwaukee, Wisconsin. His case is pending in Langdale County. Mr. Hansen's initial appearance occurred on September 12, 2022. Further adjourned initial appearances occurred on September 26, 2022; October 10,

2022; October 25, 2022; November 14, 2022; and December 12, 2022. Mr. Hansen is in custody, and he has been denied legal representation for ninety-five days.

II. Defendants

53. Defendant Anthony S. Evers is the Governor of Wisconsin. He is sued in his official capacity. As the Governor of Wisconsin, Defendant Evers is responsible for, among other things, administering Wisconsin's public defense system.

54. Defendant Kelli Thompson is the Wisconsin State Public Defender and is appointed by the Board of the Wisconsin State Public Defender under Wisconsin Statutes section 997.02. She is sued in her official capacity. As Wisconsin State Public Defender, Defendant Thompson is responsible for, among other things, administering Wisconsin's public defense system.

55. Defendant James M. Brennan is the Chair of the Wisconsin Public Defender Board appointed by the Governor pursuant to Wisconsin Statutes section 15.78. He is sued in his official capacity. As Chair of the Wisconsin Public Defender Board, Defendant Brennan is responsible for, among other things, administering Wisconsin's public defense system.

56. Defendant John J. Hogan is the Vice-Chair of the Wisconsin Public Defender Board appointed by the Governor under Wisconsin Statutes section 15.78. He is sued in his official capacity. As Vice-Chair of the Wisconsin Public Defender Board, Defendant Hogan is responsible for, among other things, administering Wisconsin's public defense system.

57. Defendant Ellen Thorn is the Secretary of the Wisconsin Public Defender Board appointed by the Governor under Wisconsin Statutes section 15.78. She is sued in her official capacity. As Secretary of the Wisconsin Public Defender Board, Defendant Thorn is responsible for, among other things, administering Wisconsin's public defense system.

58. Defendant Anthony Cooper, Sr. is a member of the Wisconsin Public Defender Board appointed by the Governor under Wisconsin Statutes section 15.78. He is sued in his official capacity. As a member of the Wisconsin Public Defender Board, Defendant Cooper is responsible for, among other things, administering Wisconsin's public defense system.

59. Defendant Regina Dunkin is a member of the Wisconsin Public Defender Board appointed by the Governor under Wisconsin Statutes section 15.78. She is sued in her official capacity. As a member of the Wisconsin Public Defender Board, Defendant Dunkin is responsible for, among other things, administering Wisconsin's public defense system.

60. Defendant Patrick J. Fielder is a member of the Wisconsin Public Defender Board appointed by the Governor under Wisconsin Statutes section 15.78. He is sued in his official capacity. As a member of the Wisconsin Public Defender Board, Defendant Fielder is responsible for, among other things, administering Wisconsin's public defense system.

61. Defendant Ingrid Jagers is a member of the Wisconsin Public Defender Board appointed by the Governor under Wisconsin Statutes section 15.78. She is sued in her official capacity. As a member of the Wisconsin Public Defender Board, Defendant Jagers is responsible for, among other things, administering Wisconsin's public defense system.

62. Defendant Joseph Miotke is a member of the Wisconsin Public Defender Board appointed by the Governor under Wisconsin Statutes section 15.78. He is sued in his official capacity. As a member of the Wisconsin Public Defender Board, Defendant Miotke is responsible for, among other things, administering Wisconsin's public defense system.

63. Defendant Mai Neng Xiong is a member of the Wisconsin Public Defender Board appointed by the Governor under Wisconsin Statutes section 15.78. She is sued in her

official capacity. As a member of the Wisconsin Public Defender Board, Defendant Xiong is responsible for, among other things, administering Wisconsin's public defense system.

64. Defendants are sued in their official capacities. Each and all aspects of the conduct by Defendants involved in this case was performed under color of federal and state law and by virtue of their authority and in the course and scope of their employment by the State of Wisconsin, the Wisconsin's Public Defender Board, and the State Public Defender's Office.

GENERAL ALLEGATIONS

I. Wisconsin is constitutionally required to provide counsel to qualified defendants within a reasonable time after their initial appearances.

65. Both the United States Constitution and the Wisconsin Constitution safeguard a criminal defendant's right to counsel. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."¹⁴ Similarly, Article I, Section 7 of the Wisconsin Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel."¹⁵ The right to counsel under the United States and Wisconsin Constitutions "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty[.]"¹⁶

¹⁴ U.S. Const. amend. VI.

¹⁵ According to the Wisconsin Supreme Court, the right to counsel under the Wisconsin Constitution is identical to its federal counterpart. *See State v. Delebreau*, 2015 WI 55 ¶¶ 52–57, 362 Wis.2d 542, 864 N.W.2d 852.

¹⁶ *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

66. Nearly sixty years ago, the United States Supreme Court held that each state must provide a lawyer for certain defendants who are unable to afford one.¹⁷ “Lawyers in criminal cases are necessities, not luxuries,” the Court explained, “[w]ithout counsel, the right to a trial itself would be of little to no avail.”¹⁸

67. Because a defendant “requires the guiding hand of counsel at every step [of] the proceedings against him [or her],”¹⁹ the State must appoint an attorney well in advance of trial. Accordingly, United States Supreme Court precedent holds that a defendant’s right to counsel “attaches” upon the State’s “initiation of adversary judicial criminal proceedings” against the defendant.²⁰ At that time, “the defendant is faced with the prosecutorial forces of [the State] and immersed in the intricacies of substantive and procedural criminal law that define his capacity and control his [or her] actual ability to defend himself [or herself].”²¹

68. Once the defendant’s right to counsel attaches, the Sixth Amendment “guarantees [the] defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings.”²² Beyond trial, “[c]ritical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.”²³

69. To provide effective assistance of counsel at these critical stages, however, an attorney must have time and opportunity to properly prepare a defense. Thus, states “must . . . appoint[] [counsel] within a *reasonable* time after attachment[.]”²⁴

¹⁷ *Gideon*, 372 U.S. at 335.

¹⁸ *United States v. Cronin*, 466 U.S. 648, 653 (1984).

¹⁹ *Id.* at 654 n.8.

²⁰ *Rothgery*, 554 U.S. at 198.

²¹ *Id.* at 207.

²² *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009).

²³ *Missouri v. Frye*, 566 U.S. 134, 140 (2012).

²⁴ *Rothgery*, 554 U.S. at 212 (emphasis added).

70. In Wisconsin, a defendant's right to counsel attaches at the defendant's initial appearance before a judge under Wisconsin Statutes section 970.01 (if not earlier).²⁵

71. Accordingly, the U.S. Constitution and the Wisconsin Constitution require that the State of Wisconsin appoint an attorney on behalf of a qualified indigent defendant within a *reasonable* time after his or her initial appearance, and the State's failure to do so violates the defendant's right to counsel.

72. Beyond fourteen days, delays in the provision of appointed counsel cannot be justified by any particularized circumstances and are therefore unreasonable. Indeed, the Wisconsin Supreme Court has "condemned"²⁶ delays in the appointment of counsel that take longer than fourteen days, consistently finding such delays to be unreasonable.²⁷

II. Wisconsin carries out its constitutional obligation to timely provide counsel to qualified defendants through a statewide public defense system.

73. To fulfill its constitutional obligation to appoint attorneys on behalf of qualified defendants within a reasonable time after their initial appearances, Wisconsin enacted a statutory and regulatory scheme for the establishment, funding, and operation of a statewide public defense system.

74. Under this scheme, "the SPD is the primary agency responsible for providing counsel to indigent defendants."²⁸ Indeed, as the Wisconsin Supreme Court has observed, "[t]here is little doubt that the legislature, in creating the [SPD], intended to structure a

²⁵ *Id.* at 209 ("[B]ringing a defendant before a court for initial appearance signals a sufficient commitment to prosecute and marks the start of adversary judicial proceedings.").

²⁶ *Jones v. State*, 37 Wis. 2d 56, 69, 155 N.W.2d 571(1967).

²⁷ *Wolke v. Rudd*, 32 Wis. 2d 516, 520, 145 N.W.2d 786 (1966) (eleven-day delay); *Jones v. State*, 37 Wis. 2d at 69 (fourteen-day delay); *Kaczmarek v. State*, 38 Wis. 2d 71, 78–79 (1968) (ten-day delay); *Okrasinski v. State*, 51 Wis. 2d 210, 213–14, 186 N.W.2d 314 (1971) (decrying "lengthy time lags" between appointment of counsel).

²⁸ *State v. Lee*, 2021 WI App 12 ¶ 37.

comprehensive state-wide program to deal with the appointment of counsel for indigent defendants.”²⁹

75. In addition to being “a statutory creation” itself, the SPD’s “actions are governed by statute and administrative code rules.”³⁰ The SPD’s governing statute is codified at chapter 977 of the Wisconsin Statutes.³¹

76. When a case is referred to the SPD, section 977.08 provides that the SPD “shall assign counsel” to the defendant. The SPD may assign the case either to one of its staff attorneys or to a willing member of the private bar.³² The SPD must pay private attorneys at the statutorily prescribed rate of \$70 per hour (except travel time outside the county, which is compensated at a rate of \$25).³³

77. The SPD’s funding is determined by the biennial budget bills passed by the Wisconsin Legislature. By statute, the SPD is required to prepare and submit the SPD’s proposed biennial budget to the SPD Board for approval.³⁴ Once approved, the SPD Board must submit the proposed budget to the Governor.³⁵

78. After receiving the SPD’s proposed budget, the Governor may modify it before incorporating it into the omnibus biennial budget bill, which is then submitted to the Legislature.³⁶ Like any other bill, the budget bill moves through the legislative process. If enacted, the Governor may sign it into law or veto it (in whole or in part). The SPD’s funding for 2021–2023 is codified at chapter 20 of the Wisconsin Statutes.³⁷

²⁹ *In re Finding of Contempt Relative to Atty’s Fees*, 137 Wis. 2d 65, 76–77, 403 N.W.2d 438 (1987).

³⁰ *State v. Zimbal*, 2017 WI 59 ¶ 36 n.8, 375 Wis.2d 643, 896 N.W.2d 327.

³¹ Wis. Stat. § 977 et seq.

³² See Wis. Stat. §§ 977.05(4)(i), (j), (jm); 977.05(5)(a); 977.07; 977.08.

³³ See Wis. Stat. § 977.08 (4m).

³⁴ See Wis. Stat. § 977.05(4)(c).

³⁵ See Wis. Stat. § 977.02(2).

³⁶ See Wis. Stat. §§ 16.45, 16.46, 16.47.

³⁷ See Wis. Stat. §§ 20.550, 20.005(1) (see fig. 20.005(1) at 74).

79. Although the State Public Defender and the SPD Board are primarily responsible for administering Wisconsin's public defense system, the Governor may modify and must submit the SPD's budget to the Legislature. Furthermore, the Governor is ultimately responsible for ensuring that Wisconsin carries out its constitutional duties. Article 5, Section I of the Wisconsin Constitution provides that the "executive power" of the State of Wisconsin "shall be vested in a governor."³⁸ As the Wisconsin Supreme Court has explained, "Executive power is power to execute or enforce the law"³⁹ In exercising this power, the Governor "shall take care that the laws be faithfully executed."⁴⁰ Accordingly, the Governor bears ultimate responsibility for ensuring that qualified defendants timely receive appointed counsel.

III. Wisconsin's public defense system has failed—and is still failing—to timely provide attorneys to thousands of qualified defendants.

80. Despite requesting and having been found eligible for a state-appointed attorney, thousands of defendants in Wisconsin have experienced—or are currently experiencing—lengthy delays in the provision of public defense counsel. These delays range from several weeks to many months and, in some cases, a year or longer.

81. Indeed, there are currently 11,149 criminal defendants in Wisconsin that have been unrepresented for 14 days or more.⁴¹ 9,970 of these individuals have been without an attorney for 30 days or more; 7,370 have been without an attorney for 60 days or more; and 4,206 have been without an attorney for 120 days or more.⁴² Regardless of whether the percentage that qualify for public defense counsel is 90%, 70%, or 50%, it is apparent that

³⁸ Wis. Const. art. V, § 1.

³⁹ *SEIU, Loc. 1 v. Vos*, 2020 WI 67 ¶ 1, 393 Wis.2d 38, 946 N.W.2d 35.

⁴⁰ Wis. Const. art. V, § 4.

⁴¹ *See Ex. A.*

⁴² *See Id.*

thousands of criminal defendants in Wisconsin are currently being denied legal representation for protracted periods of time. And tens of thousands more defendants have experienced similar lengthy delays but have now—belatedly—received legal representation.

82. As justice delayed is justice denied, these delays are tantamount to actual denials of counsel, and they have catastrophic legal consequences for defendants. Among other consequences, unrepresented defendants struggle to obtain pretrial release.⁴³ Many of these individuals are being detained in a county jail. Although they may be eligible for pretrial release, without an attorney's assistance, they lack the knowledge of how to go about seeking it and the legal skill to effectively prepare and present their arguments for release.

83. Furthermore, there is no question that the absence of an attorney in the initial stages of the prosecution hinders a defendant's ability to prepare a defense.⁴⁴ If exculpatory evidence exists, the average defendant lacks the ability and the expertise to identify and preserve it before it becomes stale or deteriorates completely. Consider a situation where the State has overlooked a key eyewitness whose testimony exculpates the defendant. By the time an attorney is appointed, which could be many months after charges are filed, the attorney may not be able to find the witness, the witness may be dead or otherwise unavailable to testify, or the witness's memory may have faded.

84. Moreover, unrepresented defendants cannot meaningfully engage in plea negotiations.⁴⁵ As the United States Supreme Court has observed, "criminal justice today is for the most part a system of pleas, not a system of trials."⁴⁶ Because plea negotiations are a "critical stage" in the prosecution, the State cannot discuss a potential plea with an

⁴³ *State v. Lee*, 2022 WI 32 ¶¶ 12–15 (Dallet, J., dissenting).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Lafler v. Cooper*, 566 U.S. 156, 157 (2012).

unrepresented defendant unless he or she has waived her right to counsel.⁴⁷ Thus, an unrepresented defendant who wants to engage in plea negotiations must either wait for an appointed attorney—which could be weeks, months, or years, for all the defendant knows—or waive his or her right to legal representation and engage in negotiations with the State on his or her own. But without competent legal representation, it is very unlikely that a defendant will be able to properly evaluate a plea offer or fully understand the consequences of pleading guilty.

85. Beyond the legal consequences, these delays also have devastating personal consequences for defendants. For the defendants who are in custody, the days, weeks, and months spent at a county jail without a lawyer and while their criminal case is in limbo exert an enormous toll. These individuals may lose their jobs, lose opportunities for future employment, and be separated from their families and loved ones while their criminal cases are paused indefinitely. As Defendant Thompson has admitted: “We have individuals whose family members are impacted because they’re not home with their families.”⁴⁸ And in addition to the practical consequences related to lost witnesses or deteriorating evidence, those defendants who are out of custody but still unrepresented, are forced to carry the burden and stigma of a pending criminal prosecution for months on end without the ability to defend themselves.

86. This untenable state of affairs is an open secret in Wisconsin. Earlier this month, a spokesperson for the Eau Claire County District Attorney acknowledged that “criminal defendants are waiting significantly longer than ever before for appointment of an

⁴⁷ *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *Cronic*, 466 U.S. at 659.

⁴⁸ *UpFront*: State public defender says it will take years to clear 35,000-case backlog, WISPOLISTICS.COM (Apr. 18, 2022), available at <https://www.wispolitics.com/2022/upfront-state-public-defender-says-it-will-take-years-to-clear-35000-case-backlog/>.

attorney to represent them . . . result[ing] in prolonged delays of justice for crime victims and defendants.”⁴⁹

87. In April of this year, the SPD acknowledged that it was facing a backlog of more than 35,000 cases.⁵⁰ In Milwaukee County alone, which an SPD spokesperson described as “ground zero for the issue,” there were 5,000 backlogged cases as of that time.⁵¹

IV. Wisconsin’s deficient public defense system is causing a severe shortage of public defense attorneys, resulting in the unconstitutional delays experienced by defendants.

88. The unconstitutional delays experienced by defendants across Wisconsin are the result of a severe shortage of public defense attorneys. As the Dunn County District Attorney put it, “there are too many defendants and not enough attorneys.”⁵²

89. There is a shortage of both staff attorneys and private bar attorneys. Currently, the SPD does not employ enough staff attorneys to represent all the defendants who qualify for appointed counsel. As of April 2022, the SPD was around 17–20% short of being fully staffed.⁵³

90. The SPD is unable to hire enough attorneys largely because it cannot offer even remotely competitive salaries. In Wisconsin, SPD staff attorneys have the lowest average salary for attorneys employed by the public sector.⁵⁴ Their average salary is 30% less than

⁴⁹ Daniel Gomez, *Shortage in Public Defense Attorneys Delay Court Proceedings for Defendants*, WEAU (Dec. 8, 2022), <https://www.weau.com/2022/12/08/shortage-public-defense-attorneys-delay-court-proceedings-defendants/>.

⁵⁰ WISPOLITICS, *supra* note 5.

⁵¹ Ubah Ali, *Private Attorneys Step In After Thousands of Cases Continue to Be Delayed Due to Lack of Public Defenders*, TMJ4 (Apr. 22, 2022), <https://www.tmj4.com/news/local-news/private-attorneys-step-in-after-thousands-of-cases-delayed-due-to-lack-of-public-defenders>.

⁵² Gomez, *supra* note 49.

⁵³ WISPOLITICS, *supra* note 5.

⁵⁴ Jeremiah Mosteller, *Toward Swifter Justice: Overburdened Prosecutors and Public Defenders Linked to Wisconsin Court Backlogs*, BADGER INSTITUTE (Sept. 2022) at 11, https://www.badgerinstitute.org/wp-content/uploads/2022/09/ProsecutorDefender_FINALforWEB.pdf.

attorneys employed by the Attorney General's office and nearly 20% less than attorneys employed by counties.⁵⁵ SPD staff attorney salaries lag behind public defender salaries in other states too; indeed, the starting salary for an SPD staff attorney is only \$55,536—over \$8,000 below the national average and nearly \$15,000 below neighboring Minnesota.⁵⁶

91. Compounding the problem is the high attrition rate. Because the SPD is understaffed, the attorneys are inundated with cases.⁵⁷ Faced with low pay and enormous caseloads, SPD staff attorneys are leaving at an alarming rate. Over the last two years, the SPD has experienced nearly a 20% turnover.⁵⁸

92. As alarming as attorney shortage is within the SPD, the situation is far worse for members of the private bar.

93. The compensation rate for private attorneys that accept cases from the SPD is set by statute. In 1995, the State of Wisconsin decreased the rate from \$50 per hour to \$40 per hour.⁵⁹ For the next fifteen years, court-appointed attorneys in Wisconsin were paid only \$40 per hour, the lowest rate in the country.⁶⁰ Not surprisingly, the number of private bar attorneys willing and able to accept these appointed cases plummeted.⁶¹ Between 2012 and 2017, the number of private attorneys willing to take SPD appointments dropped by 16%.⁶²

⁵⁵ *Id.*

⁵⁶ *Id.* at 10.

⁵⁷ *Id.*

⁵⁸ *Id.* at 13.

⁵⁹ Shelby Le Duc, *State Public Defender Pay, Accessibility, Causing Gridlock in Brown, Other Wisconsin Courts*, GREEN BAY PRESS GAZETTE (Oct. 22, 2018), <https://www.greenbaypressgazette.com/story/news/2018/10/22/state-public-defender-pay-more-causing-gridlock-wisconsin-courts/1000122002/>.

⁶⁰ *Id.*

⁶¹ *In re Petition to Amend SCR 81.02*, S. Ct. Order 17-06, 2018 WI 83, at 5–6 (June 27, 2018) (eff. Jan. 1, 2020).

⁶² *Id.*

94. Although the Wisconsin Legislature increased the statutory rate to \$70 in 2020, this measure was too little, too late. Over the last two years, despite the modest statutory rate increase, the number of private attorneys accepting court appointments has fallen by another 33%.⁶³

95. As a result, the SPD Office often has to make hundreds of contacts to find a private attorney willing to take a particular case. According to Adrienne Moore, a regional attorney manager for the Racine Region Public Defender's Office: "It is not uncommon for our appointment secretaries to make 250 to 300 contacts on a complex felony."⁶⁴

96. Some cases, however, require significantly more legwork. Take Plaintiff Melvin Clemons. His initial appearance was on May 18, 2022. On July 28, 2022, the SPD informed the court that it had made **812** contacts to private bar attorneys; however, none had agreed to represent him. On September 7, 2022—after a nearly four-month delay—Mr. Clemons finally received an attorney. Then there is Plaintiff Melinda Meshigaud. Her initial appearance was on August 10, 2021. After over sixteen months, she still has not received an attorney. As of November 29, 2022, the SPD represented to the court that it had made **4,735** contacts to private bar attorneys—all of which were unsuccessful.

97. The private bar attorneys that are still willing to take cases from the SPD are overwhelmed with requests to do so. One such lawyer stated that he is asked to consider taking on "close to a thousand" cases each day.⁶⁵

⁶³ *State Public Defender Issues With Kelli Thompson*, STATE BAR OF WIS. ROTUNDA REPORT (July 11, 2022), <https://www.wisbar.org/NewsPublications/RotundaReport/Pages/Article.aspx?ArticleID=29209>.

⁶⁴ Alyssa Mauk, *Attorney Shortage Causing Court Delays in County, State*, J. TIMES (Dec. 9, 2018), https://journaltimes.com/news/local/crime-and-courts/attorney-shortage-causing-court-delays-in-county-state/article_19a456a7-c9f9-543d-8b26-b7acfd8529aa.html.

⁶⁵ Kent Wainscott, *Public Defender Shortage Delays Thousands of Criminal Cases*, WISN (Apr. 4, 2022), <https://www.wisn.com/article/public-defender-shortage-delays-thousands-of-criminal-cases/39632032>.

98. Defendant Thompson has conceded that the status quo is “unsustainable” and “potentially jeopardize[s] the constitutional rights” of the SPD’s clients.⁶⁶

IV. Efforts to address the public defense crisis have been ineffective, and judicial intervention is necessary.

99. There have been modest efforts to address the crisis of public defense in Wisconsin, but these efforts have been ineffective.

100. More than a decade ago, in 2010, the Wisconsin Supreme Court sent an unambiguous message to the Legislature regarding the funding for public defense:

[O]ur criminal justice system is reaching a breaking point. The resources available for the defense of poor people accused of crime has fallen alarmingly, potentially compromising our constitutional responsibility to ensure that every defendant stands equal before the law and is afforded the right to a fair trial guaranteed by our constitution. If this funding crisis is not addressed we risk a constitutional crisis that could compromise the integrity of our justice system.⁶⁷

101. Eight years later, in 2018, the Wisconsin Supreme Court raised its own court-appointed-attorney rate from \$70 per hour to \$100 per hour.⁶⁸ In comparison, the mean billing rate for criminal law attorneys in Wisconsin at that time was \$168 per hour.⁶⁹ While increasing its own rate for court-appointed attorneys, the Court once again sent a clear message to the Wisconsin Legislature:

Chronic underfunding of the Office of the State Public Defender (SPD) has reached a crisis point. That Wisconsin’s compensation rate for SPD appointed attorneys is abysmally low is not in dispute We hope that a confrontation in the form of a constitutional challenge will not occur and trust that the legislature will work with the courts, the SPD, the petitioners, the counties, and other justice partners to ensure adequate

⁶⁶ *Id.*

⁶⁷ *In re Petition to Amend SCR 81.01*, S. Ct. Order 10-03, at 9 (July 6, 2011).

⁶⁸ *In re Petition to Amend SCR 81.02*, S. Ct. Order 17-06, 2018 WI 83, at 18 (June 27, 2018) (eff. Jan. 1, 2020).

⁶⁹ *Id.* at 14.

funding for the SPD that is urgently needed to forestall what is clearly, an emerging constitutional crisis.⁷⁰

102. Despite this small progress, the rate of compensation paid by the state to private attorneys assigned by the Wisconsin SPD remained at a mere \$40 per hour, the lowest in the country, for another two years.⁷¹ This was not even enough to cover overhead expenses.⁷²

103. In 2020, the Wisconsin Legislature finally raised the rate of compensation for private attorneys assigned by the SPD for the first time since 1995.⁷³ Unfortunately, the rate was only raised to \$70 per hour—the very same rate the Wisconsin Supreme Court deemed inadequate two years earlier.⁷⁴

104. Inevitably, these rate increases—modest, static, and inadequate from the start—have not meaningfully protected the constitutional rights of criminal defendants in Wisconsin. Indeed, for too long, the right to counsel has been treated as a right subject to deferral, compromise, and half measures, which inevitably come at the expense of those constitutionally entitled to public defense representation and, collaterally, their children, families, employers, and communities.

105. Because the State of Wisconsin has failed to fulfill its constitutional obligation, judicial intervention is necessary to safeguard the fundamental constitutional rights of criminal defendants across the state.

⁷⁰ *Id.* at 2–18.

⁷¹ *Id.* at 2.

⁷² *Id.* at 6.

⁷³ 2019 Wis. Assembly Bill 56 § 2245 (amending Wis. Stat. § 977.08(4m)).

⁷⁴ Wis. Stat. § 977.08(4m)(d); *In re Petition to Amend SCR 81.02*, S. Ct. Order 17-06, 2018 WI 83, at 13–14 (June 27, 2018) (eff. Jan. 1, 2020).

CLASS ACTION ALLEGATIONS

106. Plaintiffs bring this lawsuit as a class action pursuant to 42 U.S.C. § 1983 and Wisconsin Statutes section 803.08, on behalf of themselves and all others similarly situated who are or will in the future be affected by Defendants' unconstitutional policies, practices, and customs.

107. **Proposed Class:** All current and future defendants who—on or after January 1, 2019—requested and were found eligible for public defense counsel but did not receive an attorney within fourteen days of their initial appearances.

108. **Proposed Thirty-Day Subclass:** All current and future defendants who—on or after January 1, 2019—requested and were found eligible for public defense counsel but did not receive an attorney within 30 days of their initial appearances.

109. **Proposed Sixty-Day Subclass:** All current and future defendants who—on or after January 1, 2019—requested and were found eligible for public defense counsel but did not receive an attorney within 60 days of their initial appearances.

110. **Proposed 120-Day Subclass:** All current and future defendants who—on or after January 1, 2019—requested and were found eligible for public defense counsel but did not receive an attorney within 120 days of their initial appearances.

111. Excluded from the Class is any person who files a valid and timely request for exclusion.

112. Plaintiffs reserve the right to amend or otherwise alter the class definition presented to the Court at the appropriate time in response to facts learned through discovery, legal arguments advanced by Defendants, or otherwise.

113. This action is properly maintainable as a class action.

114. **Numerosity:** The Class is so numerous that joinder of all members is impracticable. Based on data showing that there are currently 11,149 criminal defendants in Wisconsin that have been unrepresented for more than 14 days,⁷⁵ Plaintiffs estimate that there are *thousands* of criminal defendants who—despite requesting and being qualified for public defense counsel—have not received counsel within 14 days of their initial appearances. And tens of thousands more have experienced similar delays but belatedly received counsel.

115. **Commonality:** There are numerous and important questions of law and fact raised in this case that are common to the Class, including, but not limited to, whether Defendants' failure to provide counsel to the Class members within 14 days of their initial appearances is reasonable.

116. **Typicality:** The Plaintiffs' claims or defenses are typical of the claims or defenses of the Class. The delays in the provision of appointed counsel that Plaintiffs have suffered are the same as those of the class members. Plaintiffs' and the Class members' claims arise from the same course of conduct and are based on the same legal theories.

117. **Adequacy of Representation:** The Named Plaintiffs and their attorneys will fairly and adequately protect the interests of the Class. Plaintiffs have no interests antagonistic to the Class, and they are represented by attorneys with significant experience in criminal procedure and complex civil litigation.

118. The prerequisites to maintaining a class action for injunctive or equitable relief are met, as Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole pursuant to Wisconsin Statutes section 803.08(2)(b).

⁷⁵ See Ex. A.

CLAIMS FOR RELIEF

COUNT I

Violation of the Sixth and Fourteenth Amendments to the U.S. Constitution (All Plaintiffs and the Class Against All Defendants)

119. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs of this Complaint.

120. Section 1983 of the U.S. Code provides for a cause of action against any “person” who, under color of state law, subjects an individual “to the deprivation of any rights, privileges, or immunities secured by the Constitution.” A state official sued in their official capacity for prospective equitable relief is a “person” within the meaning of § 1983.

121. The Sixth Amendment to the United States Constitution, as incorporated through the Fourteenth Amendment, requires the State of Wisconsin to ensure that an indigent defendant facing potential imprisonment receive meaningful and effective legal representation at all critical stages of his or her cases.

122. To allow for adequate legal representation, the State must appoint counsel on behalf of such a defendant within a reasonable time after his or her right to counsel attaches. A defendant’s right to counsel attaches at his or her initial appearance under section 970.01 of the Wisconsin Statutes. Thus, the State must appoint counsel within a reasonable time after a defendant’s initial appearance.

123. Under Wisconsin law, Defendants are responsible for administering Wisconsin’s public defense system. In carrying out this responsibility, Defendants act in their official capacities and under color of state law.

124. Plaintiffs and the Class have requested and are qualified for public defense counsel. And Plaintiffs’ and the Class’s rights to counsel attached at their initial appearances.

Thus, the U.S. Constitution requires Defendants to appoint counsel on behalf of Plaintiffs and the Class within a reasonable time after their initial appearances.

125. Although 14 days or more elapsed since the initial appearances of Plaintiffs and the Class, Defendants did not appoint counsel on their behalf.

126. Accordingly, Defendants have violated—or continue to violate—Plaintiffs’ and the Class’s constitutional rights to counsel.

COUNT II
Violation of Article 1, Section 7 of the Wisconsin Constitution
(All Plaintiffs and the Class against All Defendants)

127. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations contained in all preceding paragraphs of this Complaint.

128. The right to counsel guaranteed by Article 1, Section 7 of the Wisconsin Constitution is substantially similar to the Sixth Amendment’s right to counsel and is to be interpreted identically. Accordingly, the Wisconsin Constitution requires the State of Wisconsin to appoint counsel on behalf of indigent defendants within a reasonable time after their initial appearances.

129. The State of Wisconsin has failed to ensure that all indigent criminal defendants receive meaningful and effective legal representation at all critical stages of the case, including at initial appearances or at least within 14 days of their initial appearances, in violation of Article I, Section 7 of the Wisconsin Constitution.

130. Under Wisconsin law, Defendants are responsible for administering Wisconsin’s public defense system. In carrying out this responsibility, Defendants act in their official capacities and under color of state law.

131. Plaintiffs and the Class have requested and are qualified for public defense counsel. And Plaintiffs' and the Class's rights to counsel attached at their initial appearances. Thus, the U.S. Constitution requires Defendants to appoint counsel on behalf of Plaintiffs and the Class within a reasonable time after their initial appearances.

132. Although 14 days or more elapsed since the initial appearances of Plaintiff and the Class, Defendants did not appoint counsel on their behalf.

133. Accordingly, Defendants have violated—and continue to violate—Plaintiffs' and the Class's right to counsel in violation of Article 1, Section 7 of the Wisconsin Constitution.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

- a. certify, upon Plaintiffs' forthcoming motion, the Class and subclasses pursuant to Wisconsin Statutes section 803.08;
- b. declare that the delays in receiving appointed counsel experienced by Plaintiffs and the Class are unreasonable;
- c. declare that Defendants have violated Plaintiffs' and the Class's rights to counsel under the United States Constitution and Wisconsin Constitution;
- d. declare that Wisconsin's public defense system is unconstitutional as to Plaintiffs and the Class;
- e. enjoin Defendants from administering Wisconsin's public defense system insofar as it deprives Plaintiffs and Class members currently without attorneys from timely receiving appointed counsel;
- f. direct Defendants to establish a constitutional public defense system that will timely provide attorneys to unrepresented Plaintiffs and Class members;
- g. direct the SPD to enter a limited appearance on behalf of all unrepresented Plaintiffs and Class members and to move to dismiss their cases on the basis that their rights to counsel were violated (if counsel cannot be promptly provided);

- h. award Plaintiffs and the Class reasonable attorneys' fees and costs incurred during this litigation pursuant to Wisconsin Statutes section 806.04(10) and any other applicable law; and
- i. grant any other relief the Court deems necessary and proper to remedy past harms to Plaintiffs and the Class and to protect them from further harm.

JURY DEMAND

Plaintiffs hereby demand a trial by jury of all issues so triable of right by a jury.

Dated: December 16, 2022

By: /s/ Marc L. Krickbaum

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