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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**, and **DONALD JUECK**, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JENNIFER BIAS, in her official capacity as the Wisconsin State Public Defender; **ELLEN THORN**, in her official capacity as Chair of the Wisconsin Public Defender Board; **JOHN J. HOGAN**, in his official capacity as Vice Chair of the Wisconsin Public Defender Board; **JOSEPH MIOTKE**, in her official capacity as Secretary of the Wisconsin Public Defender Board; **JAMES M. BRENNAN**, in his official capacity as a member of the Wisconsin Public Defender Board; **ANTHONY COOPER, SR.,** in his official capacity as a member of the Wisconsin Public Defender Board; **T.R. WILLIAMS**, 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; and **MAI NENG XIONG**, in her official capacity as a member of the Wisconsin Public Defender Board,

Defendants.

Case No. 2022-CV-1027

Hon. Thomas J. Walsh

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs request that this Court certify a class of all individuals who, after January 1, 2019, were charged by the State of Wisconsin with a crime that carries a potential term of imprisonment, appeared before a judge for an initial appearance, requested and were found eligible for public defense counsel, yet did not receive an attorney within 30 days after their initial appearances solely because the Wisconsin Office of the State Public Defender ("SPD") failed to appoint one on their behalf.

This case presents a textbook example of a class that should be certified under Section 803.08 of the Wisconsin Statutes because the SPD has adopted grossly deficient policies and practices that have caused thousands of defendants in Wisconsin to be deprived of their constitutional right to have counsel appointed within a reasonable time period—or at least within 30 days, a point by which a defendant's ability to adequately defend their case is at a substantial risk of impairment and beyond which further delay is *per se* unreasonable.

"Wisconsin courts 'look to federal case law for guidance'" in determining whether classes should be certified,[1] and the United States Court of Appeals for the Seventh Circuit has explained that a class action can be certified "in a case such as this one, in which the plaintiffs assert that the defendants' policy or practice caused them to be [deprived of a right] for an unconstitutionally-unreasonable length of time."[2] Thus, if "plaintiffs can present classwide evidence that a [defendant] is engaging in a policy or practice which rises to the level of a systemic" violation, courts like this one "can identify 'conduct common to members of the class' which advances the litigation."[3] That is the case here.

While Plaintiffs maintain that a delay of even a few days can have catastrophic consequences for an individual facing a criminal accusation, discovery has shown that waits of 30 days or more are a tipping point in which impairment of one's ability to defend their case is inevitable. Indeed, discovery

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[1] *Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶ 5, 388 Wis. 2d 546, 933 N.W.2d 654.
[2] *Driver v. Marion Cnty. Sheriff*, 859 F.3d 489, 492 (7th Cir. 2017) (citation omitted).
[3] *Phillips v. Sheriff of Cook Cnty.*, 828 F.3d 541, 557 (7th Cir. 2016) (citation omitted).

has revealed that the SPD was maintaining reports of individuals who had not been appointed counsel within 30 days.[4] Moreover, the State Public Defender testified that these reports were kept because, "internally," there was a "concern about people waiting for more than 30 days . . . having the ability to defend their cases impaired because they were waiting for such a long period of time."[5]

Even so, discovery has shown that, across all counties in Wisconsin, since January 1, 2019, at least 8,445 defendants experienced delays in appointment of counsel greater than 30 days.[6]

This is direct evidence demonstrating the imminent need for class certification so that this case can proceed to a merits decision and this Court can ensure the constitutional right to counsel as well as the promise of equal justice under the law are fulfilled.

Given what has been learned, judicial intervention is necessary because discovery has revealed that the SPD's policies and practices suffer from systematic and gross deficiencies that *facilitate the long delays* experienced by the proposed class members, and, at a minimum, expose them to a substantial risk of harm. Indeed, Defendants produced the SPD's Operations Manual for Case Appointments and Client Representation, and in the Section on "Appointing Counsel," rather than adopting a policy for the appointment of counsel within *any amount* of time (let alone a *reasonable amount* of time), the SPD adopted a policy that says the SPD need only appoint counsel "as soon as possible," effectively granting itself *an infinite amount* of time to identify and secure a specific lawyer to handle a case.[7] The State Public Defender conceded as much, testifying that, because the Policy's "as soon as possible" language has no definition, she could not rule out that it "might be" "a year" or more before counsel is appointed, and such a delay would still not violate the SPD's policy.[8]

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[4] *See, e.g.*, Ex. 14, Email from Katherine Drury ("Drury Email") at DEF000659–000665. Unless otherwise stated, all exhibits referenced herein are attached to the Declaration of Sophie LaCava. Pincites for the exhibits refer to the Bates number in the lower right corner of the exhibits, where such Bates number is available. The referenced expert reports (e.g., "Primus Report") are also exhibits to the LaCava Declaration.

[5] Ex. 6, Deposition Transcript of Jennifer Bias ("Bias Dep. Tr.") at 95:2–13.

[6] Ex. 3, Declaration of Kirti Gupta ("Gupta Decl.") at ¶ 11.

[7] Ex. 1, SPD Operations Manual at 7.

[8] Ex. 6, Bias Dep. Tr. at 69:5–13.

Discovery has revealed that the SPD's grossly deficient policies and practices infect the SPD's "system" for appointing counsel. This was repeatedly demonstrated by the testimony of the Defendants and other witnesses employed by the SPD. For example, when asked if the SPD has any policies specific to timely appointment of counsel for qualified defendants, the SPD's Deputy State Public Defender said, "No."[9] When asked if there is any policy to deal with a situation where the SPD cannot find a staff attorney or a private bar attorney to take on a case, she again said, "No."[10] Witness after witness testified that there are no central, formal, or informal policies dictating how cases are assigned.[11] They testified there was no centralized system for tracking which defendants are awaiting to be assigned counsel.[12] Indeed, the SPD does not provide local offices any guidance about prioritizing cases—by custodial status, charge type, age of the case, length of time waiting for an attorney, vulnerability of the defendant, or otherwise—such that, "practically speaking,"[13] there is no policy or practice providing any guidance, standard, or "order in which cases are appointed and assigned."[14]

Put simply, though the law requires the SPD to ensure the timely appointment of counsel, discovery has shown that the SPD's "system" for safeguarding this right is an unmonitored free-for-all in which the SPD allows Wisconsin's private attorneys to pick the cases they want, whenever they want, and to leave the rest—resulting in lengthy delays for thousands of qualified defendants.

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[9] Ex. 7, Deposition Transcript of Katie York ("York Dep. Tr.") at 38:7–11.

[10] *Id.* at 51:24–52:3.

[11] *See*, *e.g.*, *id.* at 38:9–10 ("[D]oes the [SPD] have any policies in place specific to timely appointing counsel for eligible criminal defendants? A. No."); Ex 8, Deposition Transcript of Kim Reske ("Reske Dep. Tr.") at 16:22–25 ("Q. . . . Is there any policy or guidance that's determining how it is you prioritize cases or make them available to private bar attorneys? A. There is not a policy on that.").

[12] *See, e.g.*, Ex. 9, Deposition Transcript of Kathleen Pakes ("Pakes Dep. Tr.") at 50:3–6 (when asked "if the SPD has a system that shows how many people are currently waiting to be appointed counsel," responding, "I doubt it," and that she was "not aware of one"); Ex. 10, Deposition Transcript of James Brennan, ("Brennan Dep. Tr.") at 35:17–20 (Q. "Is there any reporting about the number of defendants awaiting appointment of counsel?" A. "Not on a county-by-county basis . . . ."); *id.* at 36:2–5; Ex. 11, Deposition Transcript of Katherine Drury ("Drury Dep. Tr.") at 55:19–25 (noting that she "absolutely [did] not" have "access to Google Sheets [tracking appointments] for other regions"); Ex. 7, York Dep. Tr. at 54:16–22 (stating that she did "not have the numbers" on "how often the goal of appointing counsel within 72 hours is achieved," and that she had "no idea" if anyone would have those numbers).

[13] Ex. 8, Reske Dep. Tr. at 18:11–24.

[14] *Id.*

While this Court originally accepted Defendants' argument that "[e]ach Plaintiff and each proposed class member has their own set of facts that will determine the reasonableness of the delay in receiving appointed counsel," causing the Court to express "skepticism that the commonality prerequisite could ever be satisfied,"[15] discovery has shown that the SPD's grossly deficient policies and practices—not individualized circumstances—are causing the delays suffered by class members. This common conduct "provide[s] the 'glue' necessary to litigate otherwise highly individualized claims as a class"[16] and should assuage the Court's skepticism. For example, in one of the SPD's presentations unearthed in discovery, the SPD acknowledged that the "elephant in the room" was that the "SPD was having [a] difficult time finding counsel" due to systematic problems.[17] The individual circumstances of each eligible indigent criminal defendant were never mentioned.[18] And discovery further confirmed that each eligible indigent criminal defendant's individual circumstances were ***not*** the problem because the State Public Defender admitted that 72 hours "would be more than enough time for an appointment" aside from the SPD's administrative difficulties prioritizing counsel.[19]

Indeed, one of the most telling indicators that the ability to promptly secure counsel is wholly unrelated to the facts and circumstances of individual cases was the SPD's securing of counsel for each of the Named Plaintiffs in this case. While these individuals had different charges, were in varying jurisdictions, and had an array of other distinctions, the SPD provided counsel to each of them within days of their bringing this lawsuit. How? The former State Public Defender admitted that she directed her team to find counsel immediately for the Named Plaintiffs.[20] Why? Because she conceded in an internal email to her team that they needed to do so because, in her words, the SPD would "have

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[15] Doc. 118, Class Cert. Order at 6.
[16] 6 *Phillips*, 828 F.3d at 551(citation omitted) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 352).
[17] Ex. 15, Availability of Counsel Presentation at DEF002156–0002157.
[18] *See id.*
[19] Ex. 6, Bias Dep. Tr. at 69:22–70:2.
[20] Ex. 12, Deposition of Kelli Thompson ("Thompson Dep. Tr.") at 146:8–19.

nothing to stand on if we don't have staff take the [cases that were pending for more than 30 days]."[21] This is the reality for thousands of other defendants.

In truth, the SPD has nothing to stand on when 30 days have passed yet the SPD has not appointed counsel to indigent criminal defendants who are qualified for counsel. This lawsuit seeks to remedy these grossly deficient policies and practices with injunctive relief, which is entirely appropriate in a cases like this where there is "evidence that a [defendant] had a policy that regularly and systemically impeded timely" adherence to the law, and the "evidence suggest[] that a [defendant] had such a consistent pattern of egregious delays in [adhering to the law] that a trier of fact might infer a systemic unconstitutional practice."[22] Again, these challenged "policies and practices are the 'glue' that holds together the putative class," because the "policies and practices [are] unlawful as to every [eligible indigent defendant] or . . . not," and "[t]hat inquiry does not require [court] to determine the effect of those policies and practices upon any individual class member (or class members) or to undertake any other kind of individualized determination."[23]

For these reasons, as detailed below, Plaintiffs can prove their claims through common proof by satisfying each of the necessary requirements of Section 803.08 of the Wisconsin Statutes:

- **Numerosity** is satisfied because discovery has revealed that at least 8,445 defendants experienced delays in appointment of counsel greater than 30 days,[24] confirming the Court's suspicion that "the number of class members" across all Wisconsin counties since January 1, 2019 "would certainly fall in the thousands."[25]

- **Commonality** is satisfied because of common questions that can be resolved in one stroke, like whether **(1)** the first 30 days of the prosecution is a "critical stage" of criminal proceedings; and **(2)** a 30-day delay in appointment of counsel resulting from the SPD's grossly deficient policies and practices is per se unreasonable under *Rothgery*. Because "plaintiffs have taken aim at [] specific polic[ies]" and practices "that appl[y] equally to all class members, and the plaintiffs have offered evidence to show that the challenged policy [and practices] cause[] systemic delays across the entire class," "[t]hat

[21] Ex. 16, Email from Kelli Thompson ("Thompson Email") at DEF000266.
[22] *Phillips*, 828 F.3d at 557 (citing, among other things, *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014)).
[23] *Orr*, 953 F.3d at 499 (citing *Parsons*, 754 F.3d at 678).
[24] Ex. 3, Gupta Decl. at ¶ 11.
[25] Doc. 118, Class Cert. Order at 5.

suffices to show commonality," irrespective of concerns that the reasons for a specific delay "is inherently individualized."[26]

- **Typicality** is satisfied because "commonality and typicality tend to merge,"[27] and, as this Court has already found, Plaintiffs and the Class have suffered the same injury and have the same basis for their claims under the U.S. and Wisconsin Constitutions: they have been denied appointed counsel for 30 days or more after their initial appearances.

- **Adequacy of Representation** is satisfied because Plaintiffs' claims are typical of those of the class such that their interests are presumptively aligned, and they are represented by qualified, experienced, and capable counsel as this Court has already found.

- **Injunction class** status is warranted, finally, because this class action satisfies Section 803.08(2)(b) given that Defendants' failure to appoint counsel within 30 days is a "refus[al] to act on grounds that apply generally to the class," and Plaintiffs' requested declaratory judgment and injunction would apply equally to "the class as a whole."

For these reasons, Plaintiffs respectfully request that the Court (1) amend or supersede its prior order denying class certification and (2) certify the Class. Plaintiffs separately request that the Court approve the undersigned counsel to serve as class counsel under Section 803.08(12).

BACKGROUND AND STATEMENT OF FACTS

Under both the U.S. and the Wisconsin constitutions, Wisconsin must appoint attorneys for certain criminal defendants that cannot afford legal representation. According to the United States Supreme Court's decision in *Rothgery v. Gillespie County, Texas*, such appointment must occur within a *reasonable* amount of time after the prosecution begins, and an *unreasonable* delay violates the defendant's constitutional right to counsel.[28] Relatedly, failure to provide legal representation during the important, preparatory period following the start of the prosecution constitutes a complete denial of counsel during a "critical stage" of the proceedings, which is also a violation of the defendant's constitutional right to counsel.[29]

[26] *Scott v. Dart*, 99 F.4th 1076, 1091 (7th Cir. 2024).
[27] *Id.* (citation omitted).
[28] *See* 554 U.S. 191, 212 (2008).
[29] *Cf. State v. O'Brien*, 2014 WI 54 ¶ 40, 354 Wis. 2d 753, 850 N.W.2d 8.

Despite these clear constitutional directives, for years, Wisconsin has failed to provide lawyers to thousands of defendants for weeks, months, and—in some cases—*over a year* after charges are filed and the defendants are brought into court for their initial appearances. In the words of former State Public Defender, Kelli Thompson, the situation was—and continues to be—"absolutely a crisis."[30]

The structure, policies and practices, scope, and effects of that crisis are described below.

I. The Structure of Wisconsin's Public Defense System

To fulfill its constitutional obligation to promptly provide counsel to qualified defendants, Wisconsin has enacted a statutory scheme that provides for the establishment, funding, and operation of a statewide public defense system administered by the SPD under the supervision of the State Public Defender and State Public Defender Board (the "SPD Board").[31]

The SPD is an independent government agency responsible for providing legal representation to qualified defendants in Wisconsin. The stated mission of the SPD is to "zealously represent clients, protect constitutional rights, and advocate for an effective and fair criminal justice system."[32]

The SPD is led by the State Public Defender.[33] By statute, the State Public Defender is responsible for "supervis[ing] the operation, activities, policies and procedures of the [SPD]"[34] and "mak[ing] all final decisions regarding the disposition of any case handled by the office,"[35] among other responsibilities. To carry out its mandate, the State Public Defender may "delegate the legal representation of any person to any [certified] member of the State Bar of Wisconsin[.]"[36] The current State Public Defender is Defendant Jennifer Bias.[37]

[30] Ex. 17, *On The Issues: Kelli Thompson* Transcript ("On The Issues Tr.") at 21–22.
[31] *See generally* Wis. Stat. ch. 977.
[32] *See Mission And Vision*, Wisconsin State Public Defenders, https://www.wispd.gov/mission-and-vision (last visited Jan. 8, 2025).
[33] Wis. Stat. §§ 977.05–.08.
[34] *Id.* § 977.05(4)(a).
[35] *Id.* § 977.05(4)(b).
[36] *Id.* § 977.05(5)(a).
[37] *State Public Defender: Jennifer Bias*, Wisconsin State Public Defenders, https://www.wispd.gov/team-1/jennifer-bias (last visited Jan. 8, 2025); *see also* Ex. 6, Bias Dep. Tr. at 44:4–6.

The SPD Board has ultimate supervisory authority over the State Public Defender and the SPD.[38] By statute, the SPD Board must appoint the State Public Defender and may remove the State Public Defender through a specified procedure.[39] Moreover, the SPD Board may promulgate certain kinds of rules for the SPD's operation, including those for determining eligibility for SPD representation,[40] and for handling conflict of interest cases.[41] That said, the SPD Board may not (and does not) exercise day-to-day supervision over SPD operations.[42] The current SPD Board consists of Defendants Ellen Thorn, John Hogan, Joseph Miotke, James M. Brennan, Anthony Cooper, Sr., Ingrid Jagers, T.R. Williams, and Mai Neng Xiong.[43]

Through their collective administration of the SPD, Defendants are the public officials responsible for fulfilling Wisconsin's constitutional obligation to promptly appoint public defense counsel to qualified defendants.[44] Accordingly, they are the proper defendants against whom to assert the right-to-counsel claims of Plaintiffs and the Class.

II. The SPD's Appointment Policy and Public Defense Crisis

The SPD provides legal representation to qualified defendants by appointing either SPD staff attorneys or members of the private bar willing to accept SPD appointments.[45] As to the latter, the SPD maintains a registry of roughly 900 private bar attorneys certified to take SPD appointments.[46] To be certified, attorneys must complete an application process with SPD.[47] According to the SPD's

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[38] Wis. Stat. §§ 977.02–04.
[39] *Id.* §§ 977.02(1), 977.03(1).
[40] *Id.* § 977.02(2m).
[41] *Id.* § 977.02(6).
[42] *Id.* § 977.04.
[43] *Public Defender Board*, Wisconsin State Public Defenders, https://www.wispd.gov/public-defender-board-members (last visited Jan. 8, 2025).
[44] *About SPD*, Wisconsin State Public Defenders, https://www.wispd.gov/about-spd (last visited Jan. 8, 2025).
[45] Ex. 12, Thompson Dep. Tr. at 109:15–18.
[46] Ex. 9, Pakes Dep. Tr. at 44–45.
[47] *Id.* at 32-35; *see also* Wis. Adm. Code § PD 1.04.

Assigned Counsel Division Manual, certified private bar attorneys have complete discretion over whether to accept SPD appointments and which appointments to accept.[48]

The State Public Defender has the ultimate responsibility of securing counsel,[49] but largely delegates this duty to the local SPD offices. The local SPD offices determine whether to assign a case to an SPD staff attorney or to look for a member of the private bar.[50] The factors considered in this determination are essentially the same across the state and include the SPD staff attorney workloads as well as ethical considerations, such as whether the SPD believes it would be a conflict of interest to represent a particular defendant.[51] According to the SPD, "[t]he most important consideration is the timely appointment of counsel."[52] And the State Public Defender has the final say on appointment policies and whether a case is handled by an SPD staff attorney or a member of the private bar.[53] The SPD assigns approximately 60% of cases to its staff attorneys and 40% to the private bar.[54]

The State Public Defender also largely delegates the responsibility for *finding* private bar attorneys to the local SPD offices.[55] But noticeably, the State Public Defender does not provide direction or guidance to the local SPD offices about whether or how to prioritize cases.[56] Unsurprisingly, this results in a haphazard free-for-all in which (1) the local offices send lists of available appointments to the private-bar attorneys *en masse*, (2) the private-bar attorneys pick and choose the more "desirable" cases, and (3) defendants with less "desirable" cases are left waiting indefinitely.[57]

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[48] Ex. 18, Assigned Counsel Division Manual at 12 ("Attorneys may accept or decline cases . . . There is no minimum number of cases that [they] must take.").

[49] Ex. 6, Bias Dep. Tr. at 66:10–12.

[50] *Id.* at 21:15–18.

[51] *Id.* at 21:18–22.

[52] *See* Ex. 1, SPD Operations Manual at 8.

[53] Ex. 6, Bias Dep. Tr. at 46:17–20, 47:14–16.

[54] Ex. 9, Pakes Dep. Tr. at 32:22–33:2.

[55] *See* Ex. 1, SPD Operations Manual at 7 ("The local representative of the [SPD] has the responsibility for assigning . . . counsel[.]").

[56] *See* Ex. 12, Thompson Dep. Tr. at 119:23–120:1 ("Q. So the [SPD] and the administrative office was not telling local offices, 'This is how [we] need to prioritize cases'? A. No."); *id.* at 119:4–5 ("A. . . I would never say, "You have to prioritize this.").

[57] *See* Ex 8, Reske Dep. Tr. at 16:23–25 ("Q. . . . Is there any policy or guidance that's determining how it is you

In addition to lack of guidance, the SPD does little to monitor the number of open cases statewide. The SPD does not have a centralized system for determining how many defendants are waiting for attorneys across the state, let alone how long these individuals have been waiting.[58] Instead, when the SPD wants to obtain this information, it must obtain and piece together informal, ad hoc reports from the local offices.[59] Nor does the SPD have any established procedures mandating the local offices to escalate the cases that have been pending for extraordinary amounts of time.[60]

The only policy that the SPD has is its written official policy to secure legal representation "as soon as possible" with a stated goal of appointing an attorney within 72 hours.[61] Nothing in the policy defines "as soon as possible," and the State Public Defender admitted under oath that it is undefined so it "might be" "a year" or more before counsel is appointed under the SPD's policy.[62] Nor does the SPD monitor whether it is meeting its goal of appointing counsel within 72 hours.[63]

Ultimately, when reviewed in total, Defendants and their staff admitted that the SPD does not have any enforced policies or procedures to ensure that defendants are appointed counsel within any particular time after their prosecutions begin or a system of prioritization to mitigate the amount of time individuals spend waiting—let alone within their stated goal of 72 hours.[64]

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prioritize cases or make them available to private bar attorneys? A. There is not a policy on that."); *id.* at 18:20–23 ("Q . . . practically speaking, is there like an order in which cases are appointed or assigned? A. No.").

[58] *See* Ex. 7, York Dep. Tr. at 48:5–8 ("Q. . . . There is not a centralized system for tracking which defendants are awaiting to be assigned counsel; is that correct? A. Correct.").

[59] *See* Ex. 12, Thompson Dep. Tr. at 31:23–32:2 ("I would have no ability . . . as the state public defender to track locally. I would have to call [the local offices] and say . . . 'what are we looking at?'").

[60] *See id.* at 117:17–23 ("Q. So there [is] no . . . system for sending things up the chain . . . ? . . . A. No. . . Q. . . . it just was more informal and ad hoc? A. Right. . . .").

[61] Ex. 1, SPD Operations Manual at 7; Ex. 12, Thompson Dep. Tr. at 124:1–2 ("Q. So the SPD's goal is to appoint counsel within 72 hours . . . ? A. . . . [Y]es."); Ex. 8, Reske Dep. Tr. at 43:5–11("Q. And that's the goal, appointing counsel within 72 hours of the determination of eligibility, correct? A. Correct. Q. Is your appointment team aware of this goal? A. I believe so.").

[62] Ex. 6, Bias Dep. Tr. at 68:17–23.

[63] *See* Ex. 12, Thompson Dep. Tr. at 125:1–4 ("Q. Does the SPD office monitor in how many cases it's meeting the goal . . . ? A. I don't know . . . ."), 125:16–18 ("Q. Do you have any sense about how often the SPD would not hit that goal? A. No. I couldn't say."); Ex. 7, York Dep. Tr. at 54:16–18 ("Q. Do you know how often the goal of appointing counsel within 72 hours is achieved? A. I do not . . . ."). Nor do the local SPD offices; Ex. 8, Reske Dep. Tr. at 43:12–14 (Q. Does your office in any way know or track to determine how often this goal is met? A. We do not track that, no.").

[64] *See* Ex. 7, York Dep Tr. at 38:711 ("[D]oes the [SPD] have any policies in place specific to timely appointing counsel for eligible criminal defendants? A. No.").

As a result, over the last decade, the Wisconsin public defense system has been plagued with widespread delays in the appointment of counsel lasting weeks, months, and even years. Indeed, both the current and former state public defenders concede that these delays have been a major concern.[65] And as set forth below, these delays have not been limited to a few counties or regions. Nor have they affected only certain types of cases. Rather, these delays have adversely impacted thousands of defendants charged with all kinds of offenses in every corner of the state.

Wisconsin's public defense system has been deteriorating over the last decade. As Defendant Jennifer Bias, the current state public defender, recounts, "in 2015 I felt we were showing some signs [of] maybe beginning to struggle . . ."[66] By 2018, Bias testified that the problem was acute in the Western and Northern parts of the state.[67] And by fall of 2019 at the latest, these delays had escalated into a statewide emergency. Speaking at the Marquette University Law School on October 15, 2019, then-State Public Defender Kelli Thompson repeatedly characterized the situation as a "crisis":

> [I]t's a crisis . . . . I'm you know jumping up and down and yelling about it. . . . people should not be sitting in custody without representation because we can't find an attorney to take this case. . . that . . . throws their entire life upside down when we do that.[68]

Thompson shared that these delays were not limited to certain kinds of cases,[69]and she testified that the delays were not limited to certain parts of the state and were ongoing.[70]

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[65] *See* Ex. 12, Thompson Dep. Tr. at 14:20–15:10 ("Q. Are you aware of . . . qualified indigent defendants in Wisconsin experiencing . . . delays [in the appointment of counsel]? A. . . . Yes . . . [t]his was an ongoing issue for our agency for some time. . . . Essentially, we have individuals who qualify for [SPD] representation who are in the system who need attorneys. We do not always have enough attorneys who are willing or able to take the number of cases . . . ."); Ex. 6, Bias Dep. Tr. at 76:10–16 ("Q. . . . Do you agree that there has been a longstanding problem in Wisconsin with getting enough lawyers to ensure that counsel can be appointed for . . . [e]very indigent criminal defendant? A. Yes . . . .").

[66] Ex. 6, Bias Dep. Tr. at 77:6–7.

[67] *Id.* at 79:7–81:23.

[68] Ex. 17, On the Issues Tr. at 21–22; *see also* Ex. 12, Thompson Dep. Tr. at 27:15–17 ("[I]n 2019 at $40 an hour . . . we just couldn't find enough attorneys to take it. So many people were coming into the system. . . .").

[69] Ex. 17, On the Issues Tr. at 21 ("[B]efore it used to be the really serious cases, but these were . . . what I would consider more the run-of-the mill cases.").

[70] *See* Ex. 12, Thompson Dep. Tr. at 29:5–11 ("[I]f I'm calling it a crisis in 2019, it was something that we were seeing across the state. . . . even in bigger counties . . . it was still a concern. And it wasn't just at the moment. It's looking forward"); *id.* at 27:20–21 ("[I]t wasn't just an individual county issue[.]").

Thus, even before the COVID-19 pandemic began, Wisconsin's public defense system was failing,[71] and, unsurprisingly, the COVID-19 pandemic exacerbated this already dire situation.[72] By 2021, according to current State Public Defender Bias, the "incredible backlog" of cases had spread "statewide."[73] At that point, even usually better performing "metropolitan areas like Madison and Milwaukee were having challenges" with appointment, and the SPD was "having staff challenges" across the entire state.[74] Even as the COVID-19 pandemic retreated, moreover, the widespread delays continued past the time that Thompson ended her tenure as Public Defender in October of 2023.[75]

Wisconsin's public defense crisis continues to this day. Indeed, when asked to identify parts of the state where it is difficult to make appointments, current State Public Defender Bias answered: "As of today? . . . . Everywhere."[76] Moreover, Kate Drury, in speaking to her experience as a Regional Attorney Manager, stated that it was "common" to "require a call to every lawyer in Wisconsin" in order to obtain appointed counsel for clients waiting for private-bar representation.[77]

III. The Scope and Effects of Wisconsin's Public Defense Crisis

Although Defendants concede that there is a crisis, a major issue has been ascertaining its scope. As explained above, the SPD does not track how long defendants are waiting to be appointed attorneys in any centralized or systematic manner.[78]

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[71] *See* Ex. 19, Jan. 31, 2020 SPD Board Meeting Minutes at DEF001936 ("An incredible backlog has resulted from the lack of available counsel.").

[72] Ex. 12, Thompson Dep. Tr. at 53–55 ("And then COVID hit, so then that obviously had a significant impact.").

[73] Ex. 6, Bias Dep. Tr. at 85:4–5; 87:15–20.

[74] *Id.* at 87:17–20.

[75] Ex. 12, Thompson Dep. Tr. at 51:12–52:12 (Thompson admitting the "ongoing public defender crisis" referenced in June 2022 SPD board meeting minutes is the same as from her October 2019 remarks); *id.* at 52:14–21 (admitting the backlog still existed when she left office in October of 2023).

[76] Ex. 6, Bias Dep. Tr. at 76:17–22.

[77] *See* Ex. 11, Drury Dep. Tr. 42:17–43:1.

[78] See Ex. 9, Pakes Dep 60:23–61:2("[T]here's no [s]tatewide monitoring of which defendants or how many defendants are waiting to be appointed counsel, right? A. I am not aware of it. . . ."); *see also* Ex. 7, York Dep. Tr. at 54:16–18 ("Q. Do you know how often the goal of appointing counsel within 72 hours is achieved? A. I do not have the numbers . . . Q. Do you know if there is anyone who would have those numbers? A. No. . . I have no idea.").

Accordingly, to determine the scope of the delays, Plaintiffs retained Dr. Kirti Gupta and her team from Cornerstone Research ("Cornerstone"), an expert analytics and consulting firm. Building on information produced by Defendants in discovery, Dr. Gupta and Cornerstone conducted a comprehensive analysis of publicly available data from the Wisconsin Circuit Court Access Portal ("CCAP"), which is a reliable source of case docket information utilized by the SPD itself.[79] Pursuant to this analysis, Dr. Gupta and Cornerstone identified **8,445** indigent criminal defendants in felony cases awaiting appointed counsel for more than 30 days after their initial appearances.[80] The results of this analysis underscore that the lengthy delays in appointment of counsel are a state-wide problem, impacting criminal defendants facing a range of charges. Further, Cornerstone's analysis provides insight into the actual number of defendants in the state of Wisconsin impacted by these delays—something on which the SPD itself was unable to provide even an informed guess.

To assess the significance of these delays, Plaintiffs retained Professor Eve Brensike Primus, a distinguished professor at the University of Michigan Law School and expert in indigent defense systems, who evaluated Wisconsin's system for appointing counsel. Leveraging her experience as a public defender, academic, and author of many works on the right to counsel, she attended numerous hearings in Wisconsin, and reviewed statutes, case law, interviews, and empirical studies to find systemic constitutional violations in Wisconsin's public defense system, including prolonged delays in appointing counsel and inadequate representation during critical pretrial stages.[81] She concluded these issues undermine defendants' Sixth Amendment rights and necessitate structural reform.[82]

Plaintiffs also retained Dr. Aaron S. Benjamin, a professor of psychology and neuroscience at the University of Illinois Urbana-Champaign, to analyze the effects of delayed investigations on

[79] *See, e.g.*, Ex. 10, Brennan Dep. Tr. 62:2–7 (Q. "Are you familiar with the Wisconsin Circuit Court access portal?" A. "Yes . . ." Q. "And in your experience, is it an accurate and reliable source of information?" A. "We all rely on it, yes.").

[80] Ex. 3, Gupta Decl. ¶ 11.

[81] *See generally*, Ex. 2, Report of Eve Primus ("Primus Report").

[82] *Id.* ¶¶ 112–113.

witness memory in forensic contexts. Drawing from his extensive research on human memory, forgetting, and decision-making, Dr. Benjamin reviewed scientific literature and applied psychological principles to assess the degradation of witness testimony over time.[83] His findings emphasize that memory quality decreases rapidly shortly after an event, making early evidence collection crucial.[84] He concluded delays increase the risk of memory distortion, loss of critical details, and susceptibility to post-event influences, ultimately compromising the accuracy and reliability of eyewitness testimony.[85]

And finally, Plaintiffs retained Professor Brian L. Landers, a seasoned expert in law enforcement practices, criminal justice education, and evidence management in the state of Wisconsin, to evaluate the impact of judicial delays on criminal case evidence. Landers analyzed the effects of time on the collection, storage, and analysis of physical and witness evidence.[86] His findings indicate that delays can significantly compromise evidence integrity, degrade physical evidence, and diminish witness reliability.[87] And he concluded that timely prosecution is critical to maintaining the availability and reliability of evidence, and delays pose substantial risks to the integrity of criminal investigations.[88]

In sum, consistent with the other evidence uncovered in this case, and testimony from the Defendants, these experts opined and concluded that these lengthy delays in the appointment of counsel impair defendants' ability to adequately defend themselves against the charges for which they stand accused, irrespective of the facts of each individual's case.

For example, without defense counsel, defendants are likely not able to adequately identify, collect, and preserve exculpatory evidence, which risks fundamentally compromising their defense.[89]

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[83] *See generally*, Ex. 4, Report of Aaron Benjamin ("Benjamin Report").
[84] *Id.* at 4–6.
[85] *Id.*
[86] *See generally*, Ex. 5, Report of Brian Landers ("Landers Report").
[87] *Id.*
[88] *See id.* at 4.
[89] *See generally* Ex. 2, "Primus Report" ¶ 81 ("[E]xtended delay may also lead to the disappearance of evidence and the deterioration of witness memories."); *id.* ¶ 70 ("Unrepresented individuals are not equipped to conduct pretrial investigations, prepare defenses, interview witnesses, hire experts, hire investigators, review discovery, or request preservation of

At least three types of evidence are at substantial risk of deterioration because of delays in the appointment of counsel. First, extended delays in the appointment of counsel may prevent defendants from identifying, collecting, and preserving ***physical evidence*** such as DNA.[90] Second, protracted delays may prevent defendants from identifying, collecting, and preserving ***digital evidence*** such as video recordings, which are often subject to automatic deletion protocols.[91] And third, lengthy delays in the appointment of counsel may prevent defendants from properly identifying, collecting, and preserving ***testimony of witnesses*** before their memories fade and become unreliable. As explained by Dr. Benjamin, the reliability of witness evidence substantially deteriorates as time passes:

> When an investigation is not promptly begun, there is a significant risk that forgetting will reduce the quality of the evidence . . . Information will be lost, intervening events will contaminate existing memories, and confidence in one's reports and identifications will be increasingly untethered from the accuracy of those reports. These risks all increase as more time passes between the event and the recovery of witness evidence. To mitigate these risks, defense counsel should be appointed promptly so that they may begin investigating the existence of and preserving exculpatory evidence.[92]

Thus, if defense counsel is not promptly appointed, a defendant may not be able to collect and preserve exculpatory evidence.[93] Accordingly, lengthy delays in the appointment of counsel compromise the ability of defendants to identify, collect, and preserve evidence, which may fundamentally

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evidence."); *see also* Ex. 13, Thorn Dep. Tr. 98:7–10 ("Q. [I]s the ability of defendants to gather relevant evidence hindered by not getting appointed counsel within a timely manner? A. Yes."); Ex. 10, Brennan Dep. Tr. at 53:13–18 ("Q. In your experience, do witness memories fade over time? A. Yes. Q. Is it possible that physical evidence could deteriorate? A. That's possible, yes."); Ex. 6, Bias Dep. Tr. at 39:5–9 ("[I]f a client names witnesses or describes evidence, over time, those witnesses may disappear, evidence may erode. I think those are the two largest concerns with regard to the time factor. . . ."); Ex. 9, Pakes Dep. Tr. at 72:7–73:1 (noting that an attorney should investigate as soon as possible because "people's memories fade," "witnesses disappear," and that "digital evidence and video surveillance may be overwritten").

[90] *See* Ex. 5, Landers Report at 6 (noting that because physical evidence deteriorates, "the race against time begins the moment the events have occurred"); *see also* Ex. 12, Thompson Dep. Tr. 82:15–16 ("Q. Physical evidence deteriorates? A. Right."); Ex. 9, Pakes Dep. 72:15–19 ("Q. Would you agree that other evidence, such as physical evidence . . . may also be lost over time? A. . . . Physical evidence could be, sure."); Ex. 10, Brennan Dep. 53:16–18 (agreeing it is possible that physical evidence deteriorates over time).

[91] *See generally* Ex. 5, Landers Report.

[92] *See generally* Ex. 4, Benjamin Report at 1; *see also* Ex. 6, Bias Dep. Tr. at 40:18–21 ("Q. And irrespective of the case, would you agree that people's memory are going to fade regardless of what type of case it is? A. I think over time people's memories fade, yes."); Ex. 12, Thompson Dep. Tr. at 82:13–14 ("Q. Memories fade? A. Memories fade.").

[93] *See* Ex. 2, Primus Report ¶ 69 ("Late-appointed counsel is unable to interview the client and witnesses while their memories are fresh before important details are forgotten.").

compromise their defense or negatively impact their decision on whether to accept a plea or go to trial.

Lengthy delays in appointment of counsel also impair defendants' ability to navigate the legal system during critical stages. Unrepresented individuals are not able to adequately handle many of the crucial events and decisions that frequently occur during those first 30 days after the initial appearance. Research demonstrates that delays in appointing counsel affect decisions for pleading guilty;[94] contesting bail and custody decisions;[95] engaging in plea negotiations;[96] asserting constitutional rights (speedy trial, right to counsel, etc.);[97] and handling competency issues.[98]

PROPOSED CLASS DEFINITION

In light of the above, and the ruinous effects of Defendants' practices, Plaintiffs seek to certify the following class of indigent criminal defendants under Section 803.08 of the Wisconsin Statutes:

> All individuals who, after January 1, 2019, have been charged by the State of Wisconsin with a crime that carries a potential term of imprisonment, appeared before a judge for an initial appearance, requested and were found eligible for public defense counsel, yet did not receive public defense counsel within 30 days after their initial appearances solely because the SPD failed to appoint an attorney on their behalf.

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[94] *Id.* ¶¶ 80, 88 ("The lack of available counsel increases the pressure on [defendants] to plead guilty without adequately understanding the consequences of such a plea or the alternatives, because there is not an attorney to review discovery with them, explain the charges, investigate their cases, research the applicable law, and counsel the defendant about options.").

[95] *Id.* ¶¶80–81, 89–90 ("The extended delay between the first formal appearance and the appointment of trial counsel compromises these defendants' abilities to make arguments about bail and conditions of release."); *id.* ¶ 5 ("Without attorneys, these indigent criminal defendants do not have any legal advice or assistance to help them advocate for pre-trial release or modification of release conditions."); *id.* ¶ 72 ("Unrepresented individuals are unable to make legally-counseled arguments to the court, whether orally or in writing.").

[96] *Id.* ¶ 71 ("Unrepresented individuals are unable to negotiate with the prosecution without waiving their constitutional rights.").

[97] *Id.* ¶ 60 ("Without attorneys, these indigent criminal defendants do not have any legal advice or assistance to help them . . . make speedy trial demands."); *id.* ¶ 72 ("Unrepresented individuals are unable to make legally-counseled arguments to the court, whether orally or in writing.").

[98] *Id.* ¶ 60 ("Without attorneys, these indigent criminal defendants do not have any legal advice or assistance to help them . . . navigate complicated competency issues."); *id.* ¶ 72 ("Unrepresented individuals are unable to make legally-counseled arguments to the court, whether orally or in writing.").

The class definition has been modified in two important respects from the class definition proposed in Plaintiffs' initial motion for class certification. First, the class definition only includes defendants who have waited 30 days or longer, which, as discussed below is rooted in evidence uncovered and adduced during discovery that shows 30 days is the outermost period of reasonableness for not appointing counsel before constitutional concerns arise. Second, the class definition addresses the Court's concern that the delays experienced by some defendants resulted from case-specific circumstances. For example, the hypothetical defendant who extended their delay in appointment in counsel because they rejected the initial attorney the SPD provided would not be a member of the class.

LEGAL STANDARD

Satisfying the prerequisites for this class action is a multi-step process under Sections 803.08(1) and 803.08(2)(b) of the Wisconsin Statutes. Section 803.08(1) "requires the plaintiff to first establish three facts about the proposed class and the representative—referred to as numerosity, commonality, and typicality—and one fact about the plaintiff's ability to represent the class."[99] To do this, a "plaintiff must show that: (a) The class is so numerous that joinder of all members is impracticable[;] (b) There are questions of law or fact common to the class[;] (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class[;] [and] (d) The representative parties will fairly and adequately protect the interests of the class."[100] Once the Section 803.08(1) prerequisites are satisfied, for injunctive relief classes like this one, plaintiffs need only satisfy Section 803.08(2)(b), which can be done by establishing that the defendant "has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[101]

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[99] *Harwood*, 2019 WI App 53, ¶ 23.
[100] *Id.* (citing Wis. Stat. § 803.08(1)).
[101] Wis. Stat. § 803.08(2)(b).

ARGUMENT

I. All Section 803.08(1) requirements are satisfied.

A. Numerosity is satisfied [Rule 803.08(1)(a)].

To start, the putative class satisfies the prerequisite of numerosity, which requires that the class be "so numerous that joinder of all members is impracticable."[102] As this Court has explained, there is "no specific number for class size" that is necessary to meet the numerosity requirement.[103] Indeed, as the Seventh Circuit has explained, and this Court and other Wisconsin judges have recognized, a "class may be certified without determining its size, as long as it is 'reasonable to believe it large enough to make joinder impracticable and thus justify a class action suit.'"[104] That said, in both Wisconsin state and federal courts, there is a presumption of numerosity based on numbers alone when the putative class consists of 40 or more individuals.[105]

Here, **there are at least 8,445 class members**, [106] which should allay the Court's concerns about numerosity. Numerosity is satisfied because Plaintiffs' expert Dr. Gupta has taken the information provided by the SPD in discovery and analyzed it along with publicly available data to determine that at least 8,445 qualified defendants in felony cases suffered delays of more than 30 days after their initial appearances because of the SPD's failure to appoint counsel on their behalf.[107]

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[102] Wis. Stat. § 803.08(1)(a).

[103] Doc. 118, Class Cert. Order at 3.

[104] *Id.* (quoting *Orr*, 953 F.3d at497) (citation omitted); *see also Fotusky v. ProHealth Care, Inc.*, 2023 WI App 19, ¶ 42, 407 Wis. 2d 554, 991 N.W.2d 502 (citation omitted) (Neubauer, J., concurring) (same).

[105] *See Harwood*, 2019 WI App. 53, ¶ 55 (holding that a 42-member proposed class satisfied numerosity); *Hammetter v. Verisma Sys.*, 2021 WI App 53, ¶ 10, 399 Wis. 2d 211, 963 N.W.2d 874, *review denied*, 2022 WI 98 ("In *Harwood* we determined that for purposes of satisfying the numerosity requirement, forty-two identified class members was sufficient."); *accord Mulvania v. Sheriff of Rock Island City*, 850 F.3d 849, 859 (7th Cir. 2017) ("While there is no magic number that applies to every case, a forty-member class is often regarded as sufficient . . . ."); Newberg on Class Actions § 3:12 ("[A] class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone.").

[106] Although it is more than sufficient to establish numerosity, Dr. Gupta's determination necessarily undercounts the number of class members for two reasons. First, Dr. Gupta focused only on defendants for which the SPD's assignment to the private bar could be readily determined from the docket. Second, Dr. Gupta focused only on defendants charged with *felonies*, and defendants charged with certain *misdemeanors* may also be constitutionally entitled to an attorney, depending on the precise offense. Accordingly, there are likely thousands of additional class members.

[107] Ex. 3, Gupta Decl. at ¶ 10.

The first reason the Court had found that numerosity was not satisfied was because, prior to discovery, Plaintiffs were unable to adduce "evidence of any indigent defendants in 2019 or 2020 who have not received appointed counsel within fourteen days of their initial appearance."[108] But those concerns should be alleviated because the SPD produced a document identifying 334,150 indigent defendants who the SPD determined were qualified for public defense counsel in 2019 and 2020,[109] and Dr. Gupta was able to estimate that at least **8,445 of these individuals had not received counsel within 30 days** of their initial appearance because the SPD failed to provide them with an attorney.[110]

The second reason the Court previously found that numerosity was not satisfied was because, without discovery, Plaintiffs were unable to show "more evidence of class members in other counties" (beyond "Brown, Outagamie, Marathon, and Racine" counties) who had "been waiting to receive appointed counsel."[111] But Dr. Gupta's report demonstrates that there are significant numbers of class members in all of the counties in Wisconsin.[112] Moreover, witnesses with firsthand experience of the scope of the problem testified to this reality. For example, when asked to identify parts of the state where it is difficult to make appointments, current State Public Defender answered: "As of today? . . . . Everywhere."[113] And, the SPD's Regional Attorney Manager, stated that it was "common" to "require a call to every lawyer in Wisconsin" to obtain appointed counsel for clients waiting for private-bar representation.[114] These admissions were legion.[115]

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[108] Doc. 118, Class Cert. Order at 4.
[109] Ex. 3, Gupta Decl. at ¶¶ 6–7.
[110] *Id.* ¶ 10.
[111] Doc. 118, Class Cert. Order at 5.
[112] Ex. 3, Gupta Decl. at Appx. B.
[113] Ex. 6, Bias Dep. Tr. at 76:17–22.
[114] Ex. 11, Drury Dep. Tr. at 42:17–43:1.
[115] *See, e.g.*, Ex. 12, Thompson Dep. Tr. at 15:2–3 (acknowledging that delays in appointing counsel have been "an ongoing issue for our agency for some time"); Ex. 10, Brennan Dep. Tr. at 92:16–20 (noting that delays affect "many counties in the state"); Ex. 8, Reske Dep. Tr. at 37:8–9 (acknowledging the existence of a "consistent" backlog); Ex. 7, York Dep. Tr. at 65:1–7 (admitting that the SPD "was experiencing difficulties in finding counsel for trial and appellate cases" prior to COVID-19).

Put simply, discovery has borne out what this Court suspected: that "the number of class members . . . would certainly fall in the thousands."[116] To the extent the Court wants specific examples, Plaintiffs have included with this submission case dockets pertaining to 50 individuals who would be class members, which further establishes there are more than 40 potential class members in the Class.[117] Thus, because the putative class is composed of thousands of people, and is increasing in size by the day, it would be impracticable to join such an enormous number of individuals as plaintiffs. Numerosity is therefore satisfied.[118]

B. Commonality is satisfied [Rule 803.08(1)(b)].

Next, Plaintiffs' proposed class satisfies Section 803.08's prerequisite of commonality, which requires that "[t]here are questions or law or fact common to the [proposed] class."[119] In Wisconsin, "the focus of the commonality inquiry turns on whether, as a result of the common questions, there is 'cause to believe that all class members' claims can be productively litigated at once.'"[120] "For the class's claims to be productively litigated at once, they 'must depend upon a common contention that is capable of class-wide resolution.'"[121] And a "common contention is capable of class-wide resolution if it can be proven or disproven with common evidence, and a determination of its truth or falsity will resolve an issue that is central to the validity of each class member's claims."[122]

In cases like this one, brought under Section 803.08(2)(b), it is well-established that "[c]hallenges to a program's compliance with the mandates of its enabling legislation, even where plaintiff-

[116] Doc. 118, Class Cert. Order at 5.

[117] *See* Ex. 20, Class Member Dockets. Should the Court require additional case dockets pertaining to other class members, Plaintiffs can easily provide them.

[118] *See Hammetter*, 2021 WI App 53, ¶ 10 (finding that defendants could not successfully dispute numerosity because "there appear[ed] to be thousands [of class members]"); *Weaver v. Reagen*, 701 F. Supp. 717, 721 (W.D. Mo. 1998) (holding that because joinder of unknown future class members is impracticable, the numerosity requirement was satisfied); *Henderson v. Thomas*, 289 F.R.D. 506, 510 (M.D. Ala. 2012) ("[T]he fluid nature of a plaintiff class . . . counsels in favor of certification.").

[119] Wis. Stat. § 803.08(1)(b).

[120] *Nat'l Collegiate Student Loan Tr. 2007-4 v. Seldal*, 2023 WI App 50, ¶¶ 38-39, 996 N.W.2d 411, *attached as Ex. 24* (quoting *Harwood*, 388 Wis. 2d 546, ¶25).

[121] *Id.* (quoting *Dukes*, 564 U.S. at 350, and citing *Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 374 (7th Cir. 2015)).

[122] *Id.* (citing *Harwood*, 388 Wis. 2d 546, ¶25, which cites *Dukes*, 564 U.S. at 350).

beneficiaries are differently impacted by the violations, have satisfied the commonality requirement."[123] In such circumstances, courts have rejected the notion "that commonality requirements cannot be met . . . because of [] individualized circumstances," because such an "argument has been squarely rejected by the Supreme Court," and such "classes have been certified in a legion of civil rights cases where commonality findings were based primarily on the fact that defendant's conduct is central to the claims of all class members irrespective of their individual circumstances and the disparate effects of the conduct."[124] "This is especially true where plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them, and there is therefore no need for individualized determinations of the propriety of injunctive relief."[125]

As the Seventh Circuit has explained, "[w]here the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question."[126] The Seventh Circuit has stated that when a plaintiff has shown that there are systematic or gross deficiencies with a defendant's statutory program, a group of plaintiffs' individual circumstances will not "preclude class certification in a case such as this one, in which the plaintiffs assert that the defendants' policy or practice caused them to be detained for an unconstitutionally-unreasonable length of time."[127] That is because the Seventh Circuit has explained that "the proper focus in determining commonality is whether the prospective class can 'articulate at least one common question that will actually advance all of the class members' claims.'"[128] Indeed, the Seventh Circuit has noted there can be commonality, and that "a class action probably could be brought[,] where plaintiffs presented some evidence that a prison had a policy that regularly and systemically impeded timely examinations,"[129] or

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[123] *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994); *see also* 3B James W. Moore & John E. Kennedy, Moore's Federal Practice ¶ 23.06–1, at 23–162 (1993) (citing cases).

[124] *Baby Neal for & by Kanter*, 43 F.3d 48 at 57.

[125] *Id.*

[126] *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014).

[127] *Driver v. Marion Cnty. Sheriff*, 859 F.3d 489, 492 (7th Cir. 2017).

[128] *Id.* (quoting *Phillips*, 828 F.3d at 550).

[129] *Phillips*, 828 F.3d at 557(citing *Parsons*, 754 F.3d at 686).

"where evidence suggested that a prison had such a consistent pattern of egregious delays in medical treatment that a trier of fact might infer a systemic unconstitutional practice."[130]

It is against this backdrop that there are common questions common question of law and fact, including whether, under the U.S. and Wisconsin constitutions, **(1)** the first 30 days of the prosecution is a "critical stage" of criminal proceedings; and **(2)** a 30-day delay in appointment of counsel, when caused by the SPD's policies and practices, is per se unreasonable under *Rothgery*.

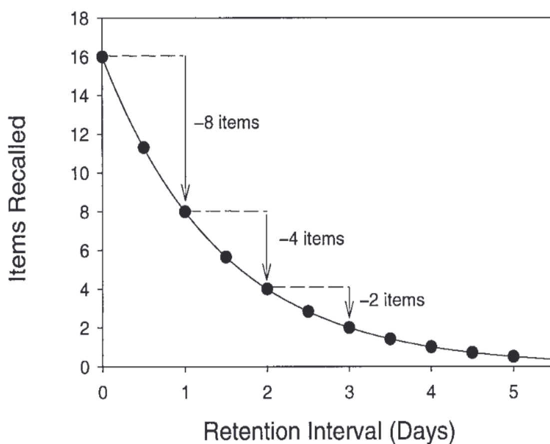
Common Question 1: The first common question—whether the first 30 days of prosecution is a "critical stage" of the criminal proceedings—is straightforward and undeniably "of such a nature that it is capable of classwide resolution—which means that [its] determination . . . will resolve an issue that is central to the validity of each one of the claims in one stroke."[131] After all, the denial of counsel during a "critical stage" of the prosecution violates the right to counsel.[132] And a "critical stage" is "a 'step of a criminal proceeding' that holds 'significant consequences for the accused.'"[133] Thus, answering whether the 30-day pretrial period after the initial appearance constitutes a "critical stage" of the criminal proceedings is a question "capable of classwide resolution."

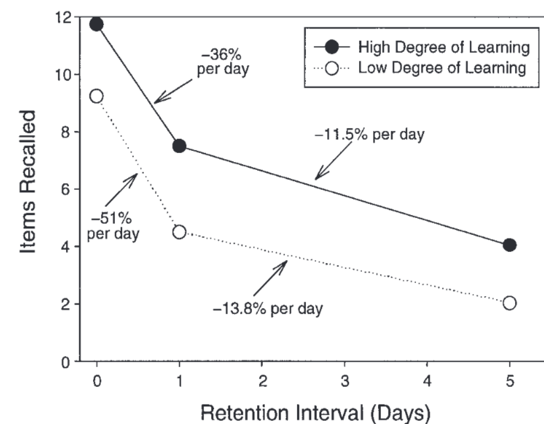
Plaintiffs have adduced record evidence showing that the 30-day period "holds 'significant consequences for the accused,'"[134] as shown in the findings of Professor Primus, who traveled to Wisconsin and observed multiple proceedings in multiple courts in Wisconsin where judges were continuing indigent defendants' cases beyond Wisconsin's statutory time limits based solely on SPD's difficulty finding counsel. Based on her experiences and case analysis, she opined that, during the first 30-days after being charged and deemed eligible for public defense counsel, the SPD is regularly prejudicing qualified indigent criminal defendants by depriving them of counsel at critical stages such as

[130] *Id.* (citing *Holmes*).
[131] *Harwood*, 2019 WI App 53, ¶ 25 (quoting *Dukes*, 564 U.S. at 350).
[132] *Schmidt v. Foster*, 911 F.3d 469, 478-79 (7th Cir. 2018) (citing *United States v. Cronic*, 466 U.S. 648, 659 (1984)).
[133] *Id.* (quoting *Bell v. Cone*, 535 U.S. 685, 696 (2002)).
[134] *Id.*

the critical pre-trial investigation period; the critical preliminary hearing stage; and critical bond review hearing stage the preliminary hearing, pretrial release hearings.[135] And as Professor Primus details, these periods in the first 30 days hold significant consequences for the accused. Research and empirical studies show that defendants who are detained pretrial are significantly more likely to be convicted and when they are convicted they receive significantly longer sentences than their similarly situated peers who are released pretrial. Prompt pretrial release allows individuals to maintain employment, be engaged in services and treatment, participate in the community, and provide care and support to family members, all of which improve case and life outcomes for those involved in the legal system.

Professor Aaron Benjamin also provided evidence showing that the initial 30-day period holds significant consequences for the accused due to its impacts on memory. He provided a detailed opinion explaining how, regardless of the offense type, evidence provided by witnesses is prone to degradation and contamination. He shared that forgetting follows a mathematical function in which losses are greatest in the earlier days, tapering off as additional time passes, but that each and every additional day that passes is the most important remaining day:





[135] Ex. 2, Primus Report at ¶¶ 91-93.

Based on his research and experience, irrespective of the case type, he found that "[m]emory for details and for attribution are especially at risk when the collection of evidence is delayed."[136]

And Professor Brian Landers provided evidence showing that the 30-day period holds significant consequences for the accused also. Relying on his experience as a professor and former police officer and investigator, he pulled a multitude of objective treatises, studies, and reports, to conclude that time delays in criminal prosecution proceedings negatively impact physical as well as witness-based evidence.[137] He also explained how the Wisconsin State Crime Laboratory Bureau (WSCLB) sets the policies on evidence analyzation, and it has a long-standing policy that quantitative and qualitative analysis of drug evidence will not be accepted until a trial date is known—something that won't happen unless and until counsel is appointed.[138] As set forth in detail in his report, there are numerous examples of evidence degradation that will occur, regardless of the type of charge a defendant is facing, their prior criminal history, the jurisdiction they are arrested in, or the judge assigned to their case.

All this is only confirmed by the record evidence. The SPD admitted to keeping internal reports of individuals who had not been appointed counsel within 30 days.[139] The State Public Defender admitted that "internally at the SPD" these lists were kept because there was "definitely" a "concern about people waiting for more than 30 days," and she agreed that those people waiting were "having the ability to defend their cases impaired because they were waiting for such a long period of time."[140]

Thus, this is certainly a common question of law and fact. If the Court agrees with Plaintiffs about the importance of the 30 days after their initial appearance then—by definition—Wisconsin will have denied counsel to Plaintiffs and the class members during a "critical stage," violating their rights to counsel. Conversely, if the Court agrees with Plaintiffs regarding the question of whether the first

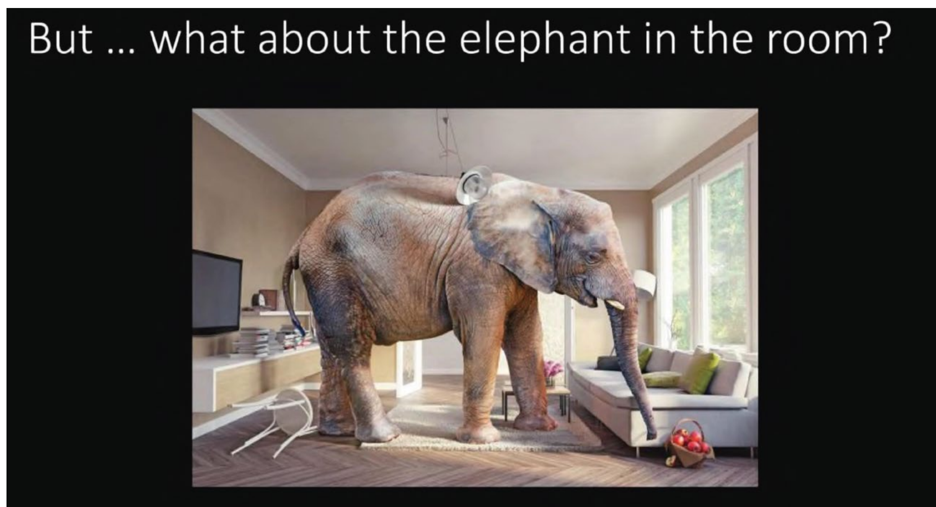
[136] Ex. 4, Benjamin Report at 2–5.
[137] Ex. 5, Landers Report at 4.
[138] *Id.* at 7–8.
[139] *See, e.g.*, Ex. 14, Drury Email.
[140] Ex. 6, Bias Dep. Tr. at 95:8–13.

30 days following initial appearance represent a "critical stage" in the case, then it may find no constitutional violation occurred. Either way, the Court's determination will "resolve an issue that is central to the validity of each one of the claims in one stroke,"[141] satisfying the element of commonality.

Common Question 2: The second common question—whether a 30-day delay in appointment of counsel, when caused by the SPD's policies and practices, is per se unreasonable under *Rothgery*—is also capable of classwide resolution.

While this Court previously denied class certification because of its "skepticism that the commonality prerequisite could ever be satisfied" due to the individualized circumstances of each indigent criminal defendant,[142] commonality can be satisfied because discovery has confirmed that the SPD's lengthy delays appointing counsel result completely from their grossly deficient (and, in many instances, nonexistent) policies and inadequate systematic practices for providing legally mandated defense counsel for eligible indigent criminal defendants. For example, in an internal presentation to the SPD Board, the SPD acknowledged in a document that the "elephant in the room" was that the "SPD was having [a] difficult time finding counsel" due to systematic problems:

Figure 1: Ex. 15 at DEF002156



[141] *Harwood*, 2019 WI App 53, ¶ 25

[142] Doc. 146, Mot. to Compel Order at 5.

Figure 2: Ex. 22 at DEF002133

Slide 7: elephant – SPD having difficult time finding counsel

- PB rate increase (appreciate the help) – 3 months saw improvement - then pandemic
- Now: (1) Already not enough attorneys in rural counties, (2) covid encouraged retirements, (3) less people taking trial cases (some took appellate), (4) as things open up attorneys already have a full caseload because of backlog – saturated ground
- Hopeful people will come back
- Staff turnover – retirements, private practice, corp counsel, DA, state agencies, ALJs, nowhere yet/burnout and pay – in offices –
    - In pandemic workload increased for staff – and everything took longer (jails, prisons)
    - Childcare issues
    - Emotional toll – concern for clients
    - Thankful for support w/ parity pay – hopeful it will help
- Increased cases in some counties
- Things we are doing: budget has positions in it for us, where can - hiring LTEs, constantly hiring, constantly promoting managers

Further, discovery demonstrated that the SPD did not treat certain putative class members differently than others.[143] Regardless of where they were located across the state and what they were charged with, all potential class members were subject to the SPD's policies and practices relating to the timely assignment of counsel, which resulted in a haphazard free-for-all that was—and is—the SPD's "system" of appointing private bar attorneys. And, as an unfortunate result, all putative class members suffered the same injury: they did not receive counsel within 30 days.

Further, Plaintiffs have adduced fact and expert testimony that undercuts the notion that individual circumstances of a case—as opposed to the SPD's appointment policies and practices—are to blame for unreasonable constitutional delays. In their depositions, witness after witness testified that the SPD has no policies in place to ensure the uniform appointment of counsel, and witness after witness also testified that the SPD's local offices receive no central guidance regarding the same.[144]

[143] *See* Ex. 12, Thompson Dep. Tr. at 119:23–120:1 ("Q. So the state public defender and the administrative office was not telling local offices, 'This is how we need to prioritize cases?' A. No."); *id.* at 119:4–5 ("A. . . . I would never say, "You have to prioritize this."); Ex. 8, Reske Dep. Tr. at 16:23–25 ("Q. . . . Is there any policy or guidance that's determining how it is you prioritize cases or make them available to private bar attorneys? A. There is not a policy on that."); *id.* at 18:20–23 ("Q. . . . practically speaking, is there like an order in which cases are appointed and assigned? A. No.").

[144] *See, e.g.*, Ex. 7, York Dep Tr. at 38:9–10 ("Q. . . . [D]oes the [SPD] have any policies in place specific to timely appointing counsel for eligible criminal defendants? A. No."); Ex. 12, Thompson Dep. Tr. at 117:17–23 ("Q. So there [is] no . . . system for sending things up the chain . . . ? A. . . . No. . . Q. . . . it just was more informal and ad hoc? A. Right[.]").

Perhaps most glaringly, discovery revealed that the SPD *could* promptly and quickly provide counsel to criminal defendants, regardless of the circumstances, but that their polices and systems promoted the ad hoc, random, and selective processes used to secure counsel that was wholly unrelated to an individual defendant's case or circumstances. Indeed, the former State Public Defender admitted that she directed her office to prioritize the appointment of counsel for the named plaintiffs.[145] Internal emails provided in discovery confirmed that she did so to prioritize counsel for these individuals because she said, otherwise, "we have nothing to stand on if we don't have staff take them."[146] Given this admission, Defendants have "nothing to stand on" because their standardless, haphazard appointment process shows that they *could* appoint counsel for those who are most in need, if only they had *some* standards to ensure it is systematically and timely done.

Put simply, the facts of this case demonstrate that the delays in appointing counsel beyond 30 days stem from the SPD's policies and practices (or lack thereof), which cannot be squared with Wisconsin law. Professor Primus attended hearings in Wisconsin, watching person after person have their cases continued because of a lack of available counsel. Her review of Wisconsin's criminal procedures support that counsel must be appointed to the criminal defendant within days to enable the appointed attorney to prepare for a pretrial detention and preliminary hearings, conduct investigations, and to research, write, and file pretrial motions—all of which must typically be done within ten days.[147] These practices align with the SPD's "goal of appointing within 72 hours of determination of eligibility."[148] This is their goal because, as the SPD's Assigned Counsel Director explained, it was her belief that appointments for indigent criminal defendants should take place by a defendant's "next court date."[149]

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[145] Ex. 12, Thompson Dep. Tr. at 146:8–19.
[146] Ex. 16, Thompson Email at DEF000266.
[147] Ex. 2, Primus Report at ¶ 67.
[148] Ex. 1, SPD Operations Manual at 7.
[149] Ex. 9, Pakes Dep. Tr. at 65:2–18.

Others felt the same.[150] Indeed, the SPD was keenly aware that the more there were delays, the more there would be significant consequences for the accused. In fact, the SPD gave presentations stating that their "overarching goal should be to obtain competent counsel as expeditiously as possible" because the deadline for preliminary hearing is "only ten days, such that **extensions of time that are much longer than that time period appear to run afoul of the legislature's intent**."[151] Yet, because of their systemic shortfalls, the SPD consistently runs afoul of the legislature's intent more than three times over for the proposed class—supporting Professor Primus's conclusion that "the kind of delays experienced by the Plaintiffs and the putative class in this case are patently unreasonable given the requirements of Wisconsin's criminal system."[152]

Given this reality, the class here is akin to the class in *Driver v. Marion County Sheriff*, in which the Seventh Circuit found that commonality was satisfied because "the class members already qualify" for the relief they seek, "and all that is left are the ministerial actions to accomplish that" relief "which are within the control of the" Defendants.[153] The Seventh Circuit explained "that at some point the State has no legitimate interest in" failing to comply with the law "for an extended period of time, and if the regular practice exceeds that time period deemed constitutionally-permissible, the State is not immune from systematic challenges such as a class action."[154] And the same is true here.

Under these circumstances, as in *Driver* "there is no reason to believe that individual issues would account for that delay."[155] Indeed, the "the same conduct . . . by the [SPD] gives rise to the same kind of claims from all class members," and whether such systematic conduct is constitutional

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[150] *See, e.g.*, Ex. 11, Dury Dep. Tr. at 51:21–52:4 ("I don't think clients should have to wait for appointments. . . . Clients need lawyers. Lawyers are important in their cases. It is really important that you get a lawyer assigned to a represent a client as quickly as possible.").

[151] Ex. 22, SPD Outline for Availability of Counsel Presentation at DEF002147.

[152] Ex. 2, Primus Report at ¶ 6.

[153] 859 F.3d 489, 491 (7th Cir. 2017).

[154] *Id.* at 491-92 (citing *Cnty. of Riverside*, 500 U.S. at 55, 58–59).

[155] *Id.* at 492.

is a "common question."[156] That is why this is a case with a common question, because, "at some point well short of the [30-day period] alleged here, there is no reason to believe that individual issues would account for th[e] delay," and the 30-day period has definitionally "caused [class members] to be detained for an unconstitutionally-unreasonable length of time."[157] Indeed, as in the Seventh Circuit's decision in *Orr v. Shicker*, the challenged "policies and practices" here "are the 'glue' that holds together the putative class," because "either . . . the policies and practices [are] unlawful as to every [eligible indigent defendant] or . . . not," and "[t]hat inquiry does not require [court] to determine the effect of those policies and practices upon any individual class member (or class members) or to undertake any other kind of individualized determination."[158] And as in the Seventh Circuit's decision in *Scott v. Dart*, because "plaintiffs have taken aim at a specific policy" and practices "that appl[y] equally to all class members, and the plaintiffs have offered evidence to show that the challenged policy [and practices] cause[] systemic delays across the entire class," "[t]hat suffices to show commonality," irrespective of concerns that the reasons for a specific delay "is inherently individualized."[159]

Noticeably, since this Court's previous decision on class certification, both the District of Oregon and the Ninth Circuit Court of Appeals have found that commonality was satisfied, and approved the certification of a class, in similar circumstances.[160] These decisions are in accord with decisions from Missouri, Maine, Washington, New York, and Michigan where courts certified similar classes making similar arguments in similar circumstances.[161] This case should be no different.

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[156] *Suchanek*, 764 F.3d at 756.
[157] *Driver*, 859 F.3d at 492.
[158] 953 F.3d at 499.
[159] 99 F.4th at 1091.
[160] *See, e.g.*, *Betschart v. Garrett*, 700 F. Supp. 3d 965, 977 (D. Or. 2023) (concluding that commonality was satisfied for and provisionally certifying statewide class of in-custody defendants who had suffered a *seven*-day delay in appointment of counsel); *Betschart v. Oregon*, 103 F.4th 607, 619-21 (9th Cir. 2024) (court declined to reverse injunction requiring appointment of counsel to class members within seven days or release from custody, reasoning that the plaintiffs were likely to succeed in establishing, on a class-wide basis, that a seven-day delay violates the class's Sixth Amendment rights).
[161] *See* LaCava Decl. at ¶ 24 & Ex. 23.

Here, this Court simply must determine whether the 30+ day delays in the appointment of counsel that result from relying on the SPD's polices and practices are delays that exceed the time period deemed constitutionally permissible. Of course, Plaintiffs believe the answer is yes because, at the end of the day, the Wisconsin Supreme Court has "condemned" delays in the appointment of counsel that take longer than 14 days, consistently finding such delays to be unreasonable.[162] And Defendants have yet to provide any response to why a time period double this time could conceivably be deemed "reasonable." So, as a legal matter, if the Court agrees with Plaintiffs that this period *per se* unreasonable, then—by definition—Wisconsin will have not provided counsel within a reasonable time, violating their rights to counsel. Conversely, if the Court disagrees with Plaintiffs, it will not have violated Plaintiffs and the class members' rights to counsel under this theory. But again, either way, the Court's determination will "resolve an issue that is central to the validity of each one of the claims in one stroke,"[163] and commonality is satisfied.

C. Typicality is satisfied [Rule 803.08(1)(c)].

Third, Plaintiffs satisfy the prerequisite of typicality, which requires "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class." Wis. Stat. § 803.08(1)(c). The analysis for "commonality and typicality tend to merge."[164] Typicality requires that the named plaintiffs' claims "arise from the same practice or course of conduct that gives rise to the claims of other class members, are based on the same legal theory, and ultimately have the same essential characteristics as the claims of the class at large."[165] A named plaintiffs' injuries need not "be identical with

[162] *See Jones v. State*, 37 Wis. 2d 56, 69, 155 N.W.2d 571(1967); Doc. 48, Am. Compl., ¶ 72.
[163] *Harwood*, 2019 WI App 53, ¶ 25.
[164] *Scott*, 99 F.4th at 1091 (citation omitted).
[165] *Hammetter*, 2021 WI App 53, ¶ 20 (cleaned up); *see e.g.*, *Harwood*, 2019 WI App 53, ¶ 57 (finding typicality where the trial court concluded that the named plaintiff and the class had suffered the same injury, had the same legal basis for their claims, and would be entitled to the same remedy if the statutory violation was established).

those of the other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct."[166]

In ruling on Plaintiff's prior motion, the Court concluded that typicality was satisfied,[167] and there is no need for the Court to change its decision in that respect. Indeed, although the class proposed in the instant motion is defined slightly differently, the Court should again conclude that Plaintiffs' claims are typical of the Class. Plaintiffs and the Class have suffered the same injury: they were denied appointed counsel for 30 days or more after their initial appearances solely because Wisconsin failed to provide attorneys for them. Because of this denial, Plaintiffs and the Class have the same legal basis for their claims: violations of their right to timely appointed counsel under the U.S and the Wisconsin Constitutions. And Plaintiffs and the Class are entitled to the same relief: a declaratory judgment that, among other things, declares that their constitutional rights have been violated and that Wisconsin's public defense system is unconstitutional as to them.

D. Adequacy of representation is satisfied [Rule 803.08(1)(d)].

Finally, Plaintiffs satisfy the last prerequisite of adequacy of representation, which requires "the representative parties will fairly and adequately protect the interests of the class." Wis. Stat. § 803.08(1)(d). "In determining adequacy of representation, the primary criteria are: (1) whether the plaintiffs or counsel have interests antagonistic to those of absent class members; and (2) whether class counsel are qualified, experienced and generally able to conduct the proposed litigation."[168] As the Court previously concluded,[169] both criteria are satisfied here.

For one, Plaintiffs' and the class members' interests align. Plaintiffs do not have antagonistic interests to the class members they seek to represent. The typicality and adequacy of representation

[166] *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001).
[167] *See* Doc. 118, Class Cert. Order at 6–7.
[168] *Hammetter*, 2021 WI App 53, ¶ 21 (quotation omitted).
[169] Doc. 118, Class Cert. Order at 7–8.

inquiries are similar in this regard. If the named plaintiffs' claims are typical of those of the class, their interests are aligned absent a showing to the contrary.[170] As established above, Plaintiffs' claims are substantially similar to the class members. They have all suffered the same injury—the denial of counsel for at least 30 days after their initial appearances. And the requested declaratory judgment and injunction will benefit the Plaintiffs and class members equally. Thus, the interests of Plaintiffs and the class members are in alignment.

Further, Plaintiffs are represented by qualified, experienced counsel that are able to conduct this lawsuit. Section 803.08(12) states that "[i]n appointing class counsel, the court must consider . . . (1)the work counsel has done in identifying or investigating potential claims in the action[;] (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action[;] (3) counsel's knowledge of the applicable law[; and] (4) the resources that counsel will commit to representing the class."[171] "[E]xperienced and qualified law firms and legal aid agencies, are more than capable of serving as adequate class counsel."[172]

Here, Plaintiffs are represented by qualified, experienced, and capable attorneys from a coalition of advocacy organizations and law firms.

Lisa M. Wayne and Bonnie Hoffman of the National Association of Criminal Defense Lawyers and Jason D. Williamson of the Center on Race, Inequality, and the Law have significant experience handling class actions challenging public defense systems and have extensive knowledge of the applicable law.[173] John A. Birdsall and Henry R. Schultz are career Wisconsin defense attorneys who maintain a deep familiarity with Wisconsin's public defense system.[174] And the attorneys from Winston

[170] *See Harwood*, 2019 WI App 53, ¶ 57; *Gomez v. V. Marchese & Co.*, 2022 WL 3228047, at *21 (E.D. Wis. Aug. 10, 2022) (noting that "[t]o be an adequate representative '[a] named plaintiff must be a member of the putative class and have the same interest and injury as other members'" and concluding adequacy was met because "[t]he defendants have not identified any conflicts of interest") (quoting *Beaton v. SpeedyPC Software*, 907 F.3d 1018, 1027 (7th Cir. 2018)).

[171] Wis. Stat. § 803.08(12).

[172] *Holmes v. Godinez*, 311 F.R.D. 117, 222 (N.D. Ill. 2015).

[173] *See* LaCava Decl. at ¶¶ 25-27.

[174] *Id.* ¶¶ 28-29.

& Strawn LLP have expertise in the "nuts and bolts" of class action litigation and can draw upon the resources of a global law firm with a substantial commitment to pro bono work.[175]

To date, Plaintiffs' counsel has done extensive work investigating potential claims and identifying individuals who have been wronged by Defendants' failure to timely appoint counsel to qualified defendants. This includes identifying the names, locations, charges, and hearing dates of indigent defendants across the state of Wisconsin who are waiting to be appointed an attorney. Moreover, counsel has no interests in conflict with the putative class members.

Accordingly, as the Court previously found, adequacy of representation is satisfied, and Plaintiffs' counsel are qualified to be class counsel.

II. Section 803.08(2)(b) is satisfied.

Once "numerosity, commonality, typicality, and adequacy are established, the second part of the test is to determine if § 803.08(2) is satisfied," which it is here.[176] A putative class action must fall into one of the "types" of class actions in Section 803.08(2). One such type is a Section 803.08(2)(b) class action, which mirrors a Rule 23(b)(2) class action and may be maintained if "[t]he party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[177]

"The key to the [803.08(2)(b) class action] is the indivisible nature of the injunctive or declaratory remedy warranted."[178] This Rule "applies only when a single injunction or declaratory judgment would provide relief to each member of the class" and "not . . . when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant."[179]

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[175] *Id.* ¶ 30.

[176] *See Rave v. SVA Healthcare Servs., LLC*, 2021 WI App 36, ¶ 7, 90 N.W.2d 632 (Table), 2021 WL 1621411, *attached as Ex. 25*.

[177] Wis. Stat. § 803.08(2).

[178] *Dukes*, 564 U.S. at 360.

[179] *Id.*

"Colloquially, [Section 803.08(2)(b)] is the appropriate rule to enlist when the plaintiffs' primary goal is not monetary relief, but rather to require the defendant to do or not do something that would benefit the whole class."[180]

Plaintiffs' proposed class action satisfies Section 803.08(2)(b). Plaintiffs allege that the SPD failed to appoint public defense counsel on their and the Class's behalf within 30 days—constituting a "refus[al] to act on grounds that apply generally to the class."[181] As demonstrated above, Plaintiffs adduced evidence in discovery that the SPD fails to maintain policies and procedures sufficient to ensure prompt appointment of counsel—conduct that "applies generally" to the Class. Further, Plaintiffs seek a declaratory judgment that Defendants' omission in this regard, among other things, was unreasonable and violated their and the Class's rights, thus requiring "corresponding declaratory relief . . . respecting the class as a whole."[182] And Plaintiffs' requested injunctive relief is class-wide as well: they seek an order prohibiting Defendants from administrating Wisconsin's public defense system in violation of the constitutional rights of Plaintiffs and the Class and requiring Defendants to establish a constitutional system.

Accordingly, the requirements for certification under Section § 803.08(2)(b) are satisfied.

CONCLUSION

For these reasons, Plaintiffs request that the Court alter and reverse its prior order on class certification and certify the proposed class under Section 803.08. Plaintiffs also request that the Court approve the undersigned counsel to serve as class counsel pursuant to Section 803.08(12).

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[180] *Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi.*, 797 F.3d 426, 441 (7th Cir. 2015); *see also* Maureen Carroll*, Class Actions, Indivisibility, and Rule 23(B)(2)*, 99 B.U. L. Rev. 59, 64 (2019) (noting that class actions for injunctive or declaratory relief "help to ensure that any system-wide problems receive a system-wide response").

[181] Wis. Stat. § 803.08(2)(b).

[182] *Id.*

Dated: January 10, 2025

By: */s/ Sean H. Suber*

LINDA T. COBERLY*
MICHAEL P. MAYER (Bar No. 1036105)
SEAN H. SUBER*
JAMES W. RANDALL*
ANNIE R. STEINER*
SOPHIE R. LACAVA*
ELAYNA R. NAPOLI*
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600
IndigentDefenseTeam@winston.com

JASON D. WILLIAMSON*
TASLEEMAH TOLULOPE LAWAL*
CENTER ON RACE, INEQUALITY, AND THE LAW, NEW YORK UNIVERSITY SCHOOL OF LAW
139 MacDougal Street
New York, NY 10012
(212) 998-6452
Jason.Williamson@nyu.edu

LISA M. WAYNE*
BONNIE HOFFMAN*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1660 L Street NW, #1200
Washington, DC 20036
(202) 872-8600
LWayne@nacdl.org
BHoffman@nacdl.org

JOHN A. BIRDSALL (Bar No. 1017786)
BIRDSALL MULLER LLC
WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1219 North Cass Street
Milwaukee, WI 53202
(414) 831-5465
John@birdsallobear.com

HENRY R. SCHULTZ (Bar No. 1003451)
SCHULTZ LAW OFFICE
WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
P.O. Box 42
Crandon, WI 5452
(715) 804-4559
Schultz.Hank@gmail.com

Attorneys for Plaintiffs and the Putative Class

*Admitted *pro hac vice*

CERTIFICATE OF SERVICE

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

Date: January 10, 2025

By: *_/s/ Sean H. Suber_*
SEAN H. SUBER

An Attorney for Plaintiffs and the Putative Class