Exhibit 2

DECLARATION OF PROFESSOR EVE BRENSIKE PRIMUS

I, Eve Brensike Primus, declare, based upon my good faith knowledge and belief, as follows:

Executive Summary of Key Opinions

1. Throughout Wisconsin, indigent criminal defendants who are constitutionally entitled to the effective assistance of trial counsel at all critical stages of their criminal prosecutions are being held for weeks (and even months) without having attorneys appointed to represent them. Those who are not detained pre-trial are often waiting even longer to have criminal defense attorneys appointed in their cases. Their initial appearances are being adjourned indefinitely as their cases get continued again and again, because the Office of the Wisconsin State Public Defender is unable to locate criminal defense attorneys willing to represent them.

2. These delays violate Wisconsin criminal defendants' constitutional rights to effective counsel under both the Sixth Amendment of the U.S. Constitution and Article I, Section 7 of the Wisconsin Constitution in four ways: (a) by failing to provide counsel within a reasonable period of time after the right to counsel has attached; (b) by failing to provide counsel during the critical pre-trial investigation period; (c) by failing to provide counsel for the critical preliminary hearing stage; and (d) by failing to provide counsel for the critical bond review hearing stage.

3. Delays of thirty or more days are per se constitutionally unreasonable. The first month after a defendant's initial appearance is critical, because witnesses' memories are still fresh and evidence is still available. Late investigation is compromised by the disappearance of witnesses, the deterioration of witness memories and crime scenes, and the destruction and/or degradation of physical and technological evidence. In addition, the first month is critical for advocating for the release of the defendant pretrial, which research shows has significant downstream effects on trial and sentencing outcomes. And the first month is critical for

investigating the mental state of a criminal defendant at the time of alleged offense, both to determine whether insanity defenses might apply and to assess the defendants' competency to stand trial.

4. Courts around the country recognize that delays in appointment of counsel like those faced by Plaintiffs and the class here are constitutional violations.

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; preserve evanescent or technological evidence; conduct factual investigations while witnesses' memories are still fresh; make discovery demands; prepare for preliminary hearings to test the validity of the charges; research, prepare, and file pre-trial motions; navigate complicated competency issues; make speedy trial demands; engage in plea negotiations; or prepare for trial.

6. Under Wisconsin's own criminal procedure rules, counsel must be appointed to a criminal defendant within days to enable the appointed attorney to prepare for a pretrial detention hearing, a preliminary hearing, and to research, write, and file pretrial motions. 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.

7. Other statewide public defender systems around the country rely less on the private bar for indigent defense representation, and other states are able to appoint counsel in a more timely fashion.

8. Without a structural change, Wisconsin will continue to violate indigent criminal defendants' rights to counsel in violation of both the U.S. and Wisconsin Constitutions.

Assignment

9. I have been retained by the Plaintiffs in this action and have been asked by counsel to assess the adequacy of the current process for appointing indigent defendants to counsel throughout the state of Wisconsin.

10. In arriving at my conclusions, I have relied on my twenty-four years of experience in public defense; the meeting minutes and publications issued by the Wisconsin Public Defender Board; the pleadings filed in this case; depositions taken in this case; articles and reports about the state of indigent defense in Wisconsin; interviews with Wisconsin attorneys; court proceedings that I have observed in different parts of Wisconsin; docket sheets in criminal cases; court orders about Wisconsin's indigent defense system; Wisconsin's criminal procedure statutes; statutes about Wisconsin's Public Defender System; the operations manuals for the Wisconsin State Public Defender; the Wisconsin Bail Code; the Wisconsin Rules of Professional Responsibility; scholarly articles about indigent defense delivery systems (including my own); psychological research; United States Supreme Court and Wisconsin state court case law; the ABA Standing Comm. on Legal Aid and Indigent Defendants, Ten Principles of a Public Defense Delivery System (2023); the ABA Eight Guidelines of Pub. Def. Related to Excessive Workloads (2009); and the ABA Criminal Justice Standards for the Defense Function.

11. I am being paid $350 per hour for my work on this matter.

12. My review is ongoing and my conclusions may be shaped by additional information that I receive between now and trial. I reserve the right to revise the opinions contained herein in light of additional pertinent information.

Background and Qualifications

13. I am the Yale Kamisar Collegiate Professor of Law at the University of Michigan Law School. I also serve as Director of the University of Michigan Law School's MDefenders Program, a program designed to help law students prepare for careers in indigent defense, and as Director of Michigan Law's Public Defender Training Institute, an intensive immersion program for training aspiring public defenders.

14. I am licensed to practice law in the State of Maryland and the State of Michigan, as well as before the United States District Court for the Eastern District of Michigan, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court.

15. I graduated magna cum laude from Brown University with a Bachelor of Arts in Psychology (with a Concentration in Jury and Courtroom Psychology) and summa cum laude from the University of Michigan Law School. Prior to law school, I worked as a criminal investigator for the Public Defender Service in Washington, D.C., where I investigated murder, rape, and armed robbery cases.

16. Following graduation and a clerkship with Judge Stephen Reinhardt on the United States Court of Appeals for the Ninth Circuit, I have spent more than twenty years doing various forms of indigent defense representation. My public defense career began as a trial-level public defender in the Maryland Office of the Public Defender, handling both misdemeanor and felony cases. I then served as Training Director for incoming assistant public defenders in the Montgomery County district court trial division. Subsequently, I joined the appellate division for the Maryland Office of the Public Defender where I handled felony appeals. Since relocating to Michigan, I have served as a Special Assistant Defender for the Michigan State Appellate Defender Office. I have also worked on federal cases involving ineffective-assistance-of-counsel claims.

Over my career, I have represented over a thousand indigent clients in state, appellate, and post-conviction proceedings.

17. Since 2005, I have been a law professor at the University of Michigan Law School, where I teach classes on criminal law, criminal procedure, evidence, and habeas corpus. I have also taught a seminar on the indigent defense crisis in America.

18. I am the author of more than twenty articles discussing the right to counsel, including systemic right-to-counsel problems in indigent defense delivery systems, ineffective-assistance-of-trial-counsel claims, and the diagnosis and treatment of structural cultural problems in public defender systems. In addition, I am the co-author of four criminal procedure textbooks, including the field-leading casebook, *Kamisar, LaFave, & Israel's Modern Criminal Procedure*, now in its 16th edition from West Academic Publishing; in each of these textbooks, I authored the chapters on the right to counsel.

Findings and Opinions

I. Structure of Wisconsin's Indigent Defense Delivery System

19. The state-funded Office of the Wisconsin State Public Defender (SPD) is primarily responsible for the provision of adult indigent defense services in Wisconsin's 72 counties. SPD is overseen by the Wisconsin Public Defender Board – a nine-member Board appointed by the Governor. SPD employs full-time institutional public defenders who collectively handle approximately 60% of the state's adult trial-level indigent defense caseload.

20. Approximately 40% of the adult trial-level indigent defense caseload in the state is currently handled by private defense counsel. SPD is the primary agency that finds, certifies, and appoints assigned-counsel and/or flat-fee contract attorneys to handle those cases, but local judges may also appoint private counsel to represent indigent individuals at county expense.

21. The private attorneys who handle indigent defense cases in Wisconsin – whether they are appointed by SPD or local judges – are independent contractors who are paid by the hour for their services or are paid a flat fee per case.

22. Because they are not state or county employees, they do not receive government benefits.

23. As a result, these attorneys have to purchase their own benefits packages.

24. And because they are independent contractors, they have to pay self-employment taxes on the money they earn, which further reduces their take-home pay.

25. In addition, their payments are presumed to cover the costs of any overhead expenses associated with running one's own law practice, including the cost of office equipment, reference materials, legal research database licenses, rent, malpractice insurance, and potential student loan debt.

26. Historically, SPD's assigned counsel rates have been abysmally low. As late as 2019, Wisconsin continued to pay only $40 per hour to attorneys doing indigent criminal defense work. That was among the lowest state-paid hourly rates for indigent defense work in the country.

27. Attorneys in Wisconsin were not able to make a living wage doing indigent defense work.

28. Many qualified attorneys would not take cases as a result, and those who did had to supplement their indigent defense work with nonlegal or private legal work, which compromised the time that they had available to work on indigent defense cases.

29. The newer $100 hourly rate is still lower than private market rates and lower than the hourly rate paid to attorneys to handle federal criminal defense cases, which means that many attorneys have not returned to the assigned-counsel rosters even with the increased rates. As James

Brennan, a former chair of the Wisconsin Public Defender Board, put it, the $100 increase "wasn't enough of an inducement to make accepting appointments a more rational business decision for lawyers." Brennan Deposition at 28.

30. Under the current SPD rules, assigned counsel do not get reimbursed for time spent on administrative contacts with SPD; time spent on copying, printing, mailing, opening/closing files, and other administrative work; or time spent completing billing forms and expense requests. Wisconsin State Public Defender, *Assigned Counsel Division Manual* at 28-29 & 36 (2023). Because many assigned counsel attorneys are solo practitioners without administrative assistance, this means that they are required to donate this time without compensation. SPD's rules also do not permit assigned counsel to bill for time spent waiting for court proceedings conducted via audio or video conference or time spent responding to ineffective assistance of counsel claims. *Id.* That too is donated time.

31. SPD's rules also ask assigned counsel who agree to take cases to wait until the conclusion of their representation to submit invoices for the work they perform. Wisconsin State Public Defender, *Assigned Counsel Division Manual* at 37 (2023). Although it is possible for attorneys to submit an interim invoice under certain special circumstances, the default expectation is that attorneys will wait until a case is over to submit an invoice. Attorneys who work in the system report that, because cases can take a while to be resolved, the default assumption that they should wait to be paid for any work performed until the end of the case provides a disincentive for them to take SPD assignments. They also report that the payment system incentivizes those on the roster to take misdemeanors or less complex cases that are likely to be resolved faster so they can get paid sooner.

32. SPD maintains a roster of certified attorneys willing to take particular types of cases in particular courts.

33. SPD does not require private lawyers to agree to take on a certain number of cases or to agree to take on any particular type of case in order to appear on the roster.

34. Many counties in Wisconsin do not have a sufficient number of private attorneys who are willing to accept court-appointed cases, and so must rely on attorneys from other parts of the state who are willing to take on additional cases.

35. These attorneys often must travel many hours for client visits, investigations, and court appearances. At $0.51 per mile, the SPD mileage reimbursement rate is below the IRS mileage reimbursement rate of $0.67 miles per hour.

36. Some attorneys are unwilling to take cases in places where there are prosecutors or judges whom they find difficult or where the jail makes it difficult to see clients. This exacerbates the appointment problems in those jurisdictions.

37. For more than a decade, SPD has had difficulty finding enough private attorneys who are willing to take cases to provide for 40% of the state's indigent defense representation.

38. Even before the COVID-19 pandemic, the state was reporting an incredible backlog of cases due to a lack of available attorneys on the rosters. The State Public Defender described the lack of available counsel statewide as reaching crisis-level proportions.

39. The COVID-19 pandemic exacerbated the lack of available attorneys, because more individuals left the rosters. Individuals also left the SPD agency, leaving fewer full-time personnel to handle cases and putting more pressure on the assigned-counsel system.

40. The SPD is still not fully staffed, which continues to put pressure on the assigned-counsel system. Assistant public defender salaries in Wisconsin are below the national averages

for public defenders. The Wisconsin public defender average salary in 2023 was $56,856, which is substantially lower than the national average public defender salary of $66,193 in 2021. And a recent workload study determined that the state's employed public defenders are overworked – especially in light of new national workload standards for public defenders.

41. Wisconsin Supreme Court Chief Justice Annette Ziegler described the state as facing a lawyer shortage crisis in her state of the judiciary address in 2024.

42. The practice of local judges throughout the state with respect to appointing counsel at county expense varies dramatically. Some judges are reluctant to use that power even though the Wisconsin Court of Appeals has indicated that, "when the state public defender declines to act, the 'necessities of the case' and the demands of 'public justice and sound policy' require that the county be obligated to pay for appointed … counsel." *State v. Dean*, 471 N.W.2d 310, 315 (Wis. Ct. App. 1991).

43. Some lawyers are reticent to accept judicial appointments to indigent defense cases, because some counties impose caps on the number of hours that attorneys are permitted to bill for a case.

44. Wisconsin does not have a comprehensive plan for recruiting new private lawyers to participate in its appointed-counsel system or for prioritizing the assignment of cases to lawyers currently on the rosters.

45. SPD has not established a committee specifically to look into the delays in appointing counsel and propose solutions.

46. Although SPD has an assigned-counsel division, it is solely responsible for certifying, paying, and auditing assigned counsel attorneys. It is not tasked with finding attorneys

to join the rosters or appointing those attorneys to cases. That responsibility is delegated to support personnel in each county office.

47. Administrative personnel in each office are asked to conduct outreach to find attorneys willing to apply to join the rosters and attorneys who are willing to take cases for which they are eligible. In many offices, administrative personnel do this on top of other job responsibilities.

48. There are no formal policies indicating how these personnel are to go about the task of finding and recruiting private attorneys.

49. In some jurisdictions, these personnel rely heavily on blast emails each week to the private bar with lists of available cases to take. Other jurisdictions engage in more outreach by phone. SPD does not provide formal guidance on how to approach recruitment and appointment of assigned-counsel lawyers.

50. SPD created the CAP Unit in 2021 to focus on finding attorneys to take cases in counties that lacked attorneys. That unit has full-time staff trying to find and appoint attorneys, but it is a small unit that only works on getting counsel in a limited number of counties. Even with the CAP unit, delays in appointment persist.

51. Currently there are between 800 and 900 certified attorneys on SPD's assigned-counsel roster. Some of those attorneys are certified but are not available to take state cases.

52. SPD's assigned-counsel division does not monitor whether there are shortages of attorneys in any county and it does not monitor how many people are currently waiting to be appointed counsel.

53. There are no official reports generated statewide to indicate how many cases are waiting for appointed counsel or how long individuals have been waiting. Each county is supposed to track its own cases.

54. SPD provides no formal guidance to local offices on how to prioritize the appointment process in outstanding cases – whether to focus on the length of delay, the severity of the charges, or something else when attempting to recruit counsel.

55. There is no system for determining when a county office should reach out to the state administrative office for assistance in recruiting or appointing counsel. That is done on an ad hoc basis.

56. The members of the Wisconsin State Public Defender Board do not know how many cases are awaiting appointment of counsel and are not given numbers or reports on those numbers. They do not track or know how many indigent defendants are waiting for appointment of counsel.

57. SPD does not currently provide training to its staff attorneys or assigned-counsel attorneys about potential state and federal right-to-counsel violations that may result from the delays in appointment. SPD does provide letters to the courts indicating its efforts to locate counsel for each defendant, and those letters are used to support continuances in indigent criminal defendants' cases.

II. Constitutional Violations

58. Throughout Wisconsin, indigent criminal defendants who are constitutionally entitled to the effective assistance of trial counsel at all critical stages of their criminal prosecutions are routinely being told at their first formal hearings that there are no available lawyers to represent them.

59. Indigent criminal defendants who are being detained in jail pre-trial are being held for weeks (and even months) in Wisconsin without having attorneys appointed to represent them. Those who are not detained pre-trial are often waiting even longer to have criminal defense attorneys appointed in their cases. Their initial appearances are being adjourned indefinitely as their cases get continued again and again, because SPD is unable to locate criminal defense attorneys willing to represent them.

60. 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; preserve evanescent or technological evidence; conduct factual investigations while witnesses' memories are still fresh; make discovery demands; prepare for preliminary hearings to test the validity of the charges; research, prepare, and file pre-trial motions; navigate complicated competency issues; make speedy trial demands; engage in plea negotiations; or prepare for trial.

61. The State of Wisconsin is constitutionally responsible for the provision of adequate indigent defense delivery services to its residents. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), (noting that lawyers are "necessities, not luxuries" and imposing on the states an obligation to provide appointed counsel to indigent criminal defendants); *see also* American Bar Association's *Ten Principles of a Public Defense Delivery System*, Principle 2 (2023) ("For state criminal charges, the responsibility to provide public defense representation rests with the state.").

62. The State of Wisconsin is violating its residents' constitutional rights to effective counsel under both the Sixth Amendment of the U.S. Constitution and Article I, Section 7 of the Wisconsin Constitution in four ways: (a) by failing to provide counsel within a reasonable period of time after the right to counsel has attached; (b) by failing to provide counsel during the critical

pre-trial investigation period; (c) by failing to provide counsel for the critical preliminary hearing stage; and (d) by failing to provide counsel for the critical bond review hearing stage.

63. When indigent criminal defendants face potential incarceration and have had their first formal hearings, their Sixth Amendment rights to counsel have been triggered, which means that they are entitled to the effective assistance of counsel at all critical stages of their prosecutions. *See Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (holding that the Sixth Amendment right to counsel attaches when judicial proceedings have been initiated—whether by indictment, arraignment, information, preliminary hearing, or other mechanism – and that the Sixth Amendment entitles indigent criminal defendants to counsel at all critical stages after attachment).

64. The Sixth Amendment right to counsel requires not only the presence of counsel at all critical stages, but also the appointment of counsel "within a reasonable time" after the right attaches so counsel can prepare for and advance to critical stages. *Rothgery*, 554 U.S. at 212; *Betschart v. Oregon*, 103 F.4th 607, 620 (9th Cir. 2024) ("The Sixth Amendment requires not just that counsel show up on the day of a critical stage but prepare for it too."). The "right to counsel encompasses myriad attorney duties beyond mere presence at certain pretrial hearings. It is a continuous right to competent and zealous advocacy outside of the courtroom." *Betschart*, 103 F.4th at 620. In short, "a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Rothgery*, 554 U.S. at 210.

65. Wisconsin is not appointing counsel within a reasonable period of time after the initial appearance that triggers application of defendants' constitutional rights to counsel.

66. Wisconsin itself recognizes the importance of early appointment of counsel. The State Public Defender's Operations Manual notes that "[a]ppointments should generally occur

within 3 business days of the initial determination of eligibility." That timing is consistent with the following time frames in Wisconsin's criminal procedure statutes:

- Wis. Stat. § 969.035: A defendant who is denied release from custody under this section is entitled a full pretrial detention hearing within ten days with a right to counsel and rights to call witnesses and cross examine witnesses.
- Wis. Stat. § 970.03(2): The preliminary hearing has to be held within ten days of the initial appearance if the defendant is in custody being held on a bail of more than $500 and within twenty days if the defendant has been released from custody.
- Wis. Stat. § 971.31(5): Motions must be served and filed within ten days after the initial appearance in misdemeanors and objections based on the insufficiency of the complaint in felony cases must be made prior to the preliminary examination or the waiver of the preliminary examination.
- Wis. Stat. § 971.23: A defendant must give notice of an alibi defense at least 30 days before trial.
- Wis. Stat. § 971.10: Trials shall commence within 60 days from initial appearance for misdemeanors and 90 days from date of trial demand in felony cases.

67. Under Wisconsin's own procedures, counsel must be appointed to the criminal defendant within days to enable the appointed attorney to prepare for a pretrial detention hearing, a preliminary hearing, and to research, write, and file pretrial motions – all of which must typically be done within ten days. And defense counsel has to be able to track down and interview any potential alibi witnesses quickly to meet the notice requirements – within thirty days in misdemeanor cases. 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.

68. Independent of Wisconsin's criminal procedures, delays of thirty or more days are per se constitutionally unreasonable. Courts around the country recognize that delays in appointment like those faced by Plaintiffs and the class here are constitutional violations. *See, e.g.*, *Betschart v. Oregon*, 103 F.4th 607 (9th Cir. 2024) (upholding a federal district court injunction that required counsel be appointed within seven days of each defendant's initial appearance to

satisfy the Constitution); *Lavalle v. Justices in Hampden Superior Court*, 812 N.E.2d 895, 901 & 907 (Mass. 2004) (noting that individuals "cannot be required to wait on their right to counsel while the State solves its administrative problems" and holding that, "on a showing that no counsel is available to represent a particular indigent defendant despite good faith efforts, such a defendant may not be held more than seven days…."); *Robbins v. Billings*, No. CV-22-054, at 15, 19, 25, & 39 (Kennebec County Court, State of Maine, January 3, 2025) (Combined Order on Partially Dispositive Motions) (finding that the Sixth Amendment guarantees indigent criminal defendants in Maine "continuous representation once the right to counsel attaches at their initial appearance or arraignment," emphasizing that "[t]he pretrial period is a critical stage *because* it is when the defendant's counsel is preparing to try the case," noting that "[a] bail hearing is a critical stage," and holding that Maine's failure to provide timely appointment of counsel to indigent criminal defendants has "deprived [them] of their Sixth Amendment right to representation at critical stages" and "prejudice will be presumed"); *David v. Missouri*, Case No. 20AC-CC00093, at 18 (Feb. 6, 2023) (holding that a two-week delay between the triggering of the right to counsel and appointment violates the right to counsel because "such a failure falls below the minimal obligation placed upon the State to appoint counsel within a reasonable time after attachment"). These courts recognize that the delay in appointment of counsel interferes with criminal defendants' progression to critical stages by delaying those stages while also preventing meaningful defense advocacy due to an inability to investigate and research the case and consult with the client.

69. Late-appointed counsel is unable to interview the client and witnesses while their memories are fresh before important details are forgotten; they are unable to take photographs of the crime scene as it looked at the time of the alleged crime; and they are not there to ensure the

preservation of technological and evanescent evidence – all of which could lead to irreparable harm in a criminal defendant's case.

70. Unrepresented individuals are not equipped to conduct pretrial investigations, prepare defenses, interview witnesses, hire experts, hire investigators, review discovery, or request preservation of evidence.

71. Unrepresented individuals are unable to negotiate with the prosecution without waiving their constitutional rights.

72. Unrepresented individuals are unable to make legally-counseled arguments to the court, whether orally or in writing.

73. According to the United States Supreme Court, prevailing norms of practice in professional standards – like those in the ABA Principles – are guides for determining what is constitutionally reasonable to expect of defense counsel under the Sixth Amendment. *See, e.g.*, *Missouri v. Frye*, 566 U.S. 134, 145-46 (2012) (noting that professional standards are "important guides"); *Padilla v. Kentucky*, 559 U.S. 356, 367-69 (2010); *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (per curiam); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003); *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

74. Wisconsin is violating one of the most widely-accepted professional standards for evaluating whether indigent defense delivery systems are living up to their constitutional and ethical responsibilities: The American Bar Association's *Ten Principles of a Public Defense Delivery System* ["ABA Principles"]. According to ABA Principle 6, "[c]ounsel should be appointed immediately after arrest, detention, or upon request. Prior to a client's first court appearance, counsel should confer with the client and prepare to address pretrial release and, if possible, probable cause." Wisconsin is not appointing counsel immediately, and counsel are not

required to confer with and prepare to address pretrial release and probable cause within a reasonable time.

75. In addition to violating defendants' constitutional rights under *Rothgery* to appointment of counsel within a reasonable time after the first formal hearing, Wisconsin is also failing to provide counsel during multiple critical stages of the criminal prosecution.

76. The United States Supreme Court has recognized that the time between the filing and advisement of formal charges and the trial date is "perhaps the most critical period of the proceedings … when consultation, thorough-going investigation and preparation [a]re vitally important." *Powell v. Alabama*, 287 U.S. 45, 57 (1932); *see also Hurrell-Harring v. State of New York*, 904 N.Y.S.2d 296, 930 N.E.2d 217, 224 (N.Y. 2010) ("Also 'critical' for Sixth Amendment purposes is the period between arraignment and trial when a case must be factually developed and researched, decisions respecting grand jury testimony made, plea negotiations conducted, and pretrial motions filed. Indeed, it is clear that 'to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.'").

77. This stage is particularly critical in the first month after a criminal defendant's initial appearance as that is the time period when witnesses' memories are still fresh and evidence is still available. Late investigation is compromised by the disappearance of witnesses, the deterioration of witness memories and crime scenes, and the destruction and/or degradation of physical and technological evidence. In addition the first month is critical for advocating for the release of the defendant pretrial, which research shows has significant downstream effects on trial and sentencing outcomes. Finally, the first month is critical for investigating the mental state of a criminal defendant at the time of alleged offense, both to determine whether insanity defenses might apply and to assess the defendants' competency to stand trial.

78. A large number of indigent criminal defendants in Wisconsin are being denied access to counsel during this critical pre-trial investigative period in violation of their Sixth Amendment rights and their rights under the Wisconsin Constitution.

79. The right to counsel would be largely meaningless if states were only required to make sure that defendants have a lawyer when they are standing in a courtroom in front of a judge. Most of what happens to prepare a criminal defense happens outside of the courtroom during that critical, pre-trial investigative period.

80. 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. The lack of available counsel increases the pressure on them 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.

81. This extended delay may also lead to the disappearance of evidence and the deterioration of witness memories.

82. When counsel is not appointed within ten days of the first formal hearing, the defendant also may lose the ability to file motions in misdemeanor cases and lose the ability to object to the insufficiency of the complaint in felony cases under Wisconsin law.

83. Unrepresented defendants may also fail to make speedy trial and discovery demands, compromising their access to critical information and their ability to assert rights later.

84. The United States Supreme Court has defined critical stages when a criminal defendant is constitutionally entitled to the assistance of counsel under the Sixth Amendment as moments when "available defenses may be irretrievably lost, if not then and there asserted,"

Hamilton v. Alabama, 368 U.S. 52, 54 (1961); moments when "rights are preserved or lost," *White v. Maryland*, 373 U.S. 59, 60 (1963); moments when "potential substantial prejudice to defendant's rights inheres in the confrontation and ability of counsel to help avoid that prejudice," *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); moments that hold "significant consequences for the accused," *Bell v. Cone*, 535 U.S. 685, 695-96 (2002); and "proceedings in which defendants cannot be presumed to make critical decisions without counsel's advice," *Lafler v. Cooper*, 566 U.S. 156, 165 (2012).

85. The preliminary hearing is a critical stage in Wisconsin. *See Coleman v. Alabama*, 399 U.S. 1 (1970); *State v. Schaefer*, 746 N.W.2d 457 (Wis. 2008) (recognizing the preliminary hearing as a critical stage). The preliminary hearing is critical precisely because it is a screening mechanism designed at an early stage in the litigation process to weed out frivolous prosecutions that are unsupported by probable cause. It is an adversarial hearing at which counsel is essential to ensure that the criminal defendants' rights are adequately protected.

86. Wisconsin is preventing indigent criminal defendants from having timely preliminary hearings with counsel present. For many defendants, their preliminary hearings are being continued indefinitely and far beyond the statutory time frames provided in Wis. Stat. § 970.03(2). Given that the purpose of the preliminary hearing is to provide an early check against frivolous prosecutions, the state's failure to conduct these hearings at early stages thwarts the purpose of the hearing and permanently prejudices criminal defendants who are entitled to be presented with the evidence against them early while memories are fresh and evidence still exists. As the Wisconsin Court of Appeals has noted, "the legislature has expressly limited the default deadline to ten days, such that extensions of time that are much longer than that time period appear

to run afoul of the legislature's intent." *State v. Lee*, 955 N.W.2d 434, 439 n.19 (Wis. Ct. App. 2021).

87. I observed proceedings in multiple courts in Wisconsin where judges were continuing indigent defendants' cases far beyond Wisconsin's statutory time limits without making any findings of good cause to do so (beyond simply noting that SPD was having trouble finding them counsel) and without obtaining knowing, intelligent, and voluntary waivers of the defendants' rights to have their preliminary hearings in a timely fashion. *See Lee*, 955 N.W.2d 434 (noting that courts lose personal jurisdiction over a defendant when they hold the hearing outside of the statutory time frame without a proper finding of good cause).

88. A number of indigent criminal defendants get worn down by the constant delays and wind up waiving their right to counsel at the preliminary hearing, opting to represent themselves solely because they do not want to wait in limbo any longer. These individuals are deprived of counsel at the preliminary hearing not because they did not want to have counsel, but because the State failed to provide them counsel in a timely fashion.

89. Wisconsin is also violating indigent defendants' constitutional rights to counsel by failing to ensure that they have counsel at critical pretrial release hearings. Bond determinations are made at both the initial appearance and at the subsequent status hearings when defendants' cases are continued due to the inability to find counsel for them. These are critical stages both because they are adversarial hearings where defendants would benefit from counsel to help them meet the adversary and because they are moments in the criminal process that can meaningfully affect later trial outcomes.

90. First, pretrial release hearings are adversarial hearings where the prosecutor argues for certain conditions and the defendant would benefit from the assistance of counsel to argue for

alternatives. In fact, if the court denies release to a person under Wis. Stat. § 969.035, it must hold a full-blown pretrial detention hearing within 10 days and that hearing involves the presentation of evidence in open court with application of the rules of evidence, the right of confrontation, the right to call witnesses, the right to cross-examination, and the right to representation by counsel. That is certainly a trial-like confrontation where counsel is essential. Even an individual who is not detained under § 969.035 still needs the critical assistance of an attorney. Under Wis. Stat. § 969.08, any defendant who continues to be detained 72 hours after the initial appearance due to a failure to meet conditions of release can ask to have his bond conditions reviewed and will be brought before the judge for a determination. That is still an adversarial hearing and it carries significant consequences for the accused.

91. Empirical studies have found that defendants who are detained pretrial are significantly more likely to be convicted than those who are released pretrial, because (a) they are more likely to plead guilty to time served pleas to get out of jail, and (b) they face greater obstacles to communicating with counsel and mounting a strong defense from within jail. *See, e.g.*, Dobbie, Goldin, & Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 2, 212-214 (2018). Even innocent individuals will plead guilty just to get out of jail. *See* Stephanos Bibas, *Plea Bargaining and Wrongful Convictions*, *in* Examining Wrongful Convictions: Stepping Back, Moving Forward (Allison D. Redlich, James R. Acker, Robert J. Norris, & Catherine L. Bonventre, eds. 2014); Ram Subramanian, Leon Digard, Melvin Washington II, and Stephanie Sorage, *In the Shadows: A Review of the Research on Plea Bargaining* (Vera Institute of Justice, September 2020). Defendants who are detained pretrial and who do not receive timely access to counsel are even more likely to plead guilty. *See* Douglas L. Colbert, *Prosecution Without Representation*, 59 Buff.

L. Rev. 333, 387-88 (2011) ("[T]he longer the delay before counsel appears …, the greater the client's reasonable anxiety about the assigned lawyer's competence and commitment to defend. Many defendants, particularly those in custody, ultimately lose the will to fight and opt to plead guilty because they lack confidence in the late arriving, appointed lawyer.").

92. Research also shows that being detained pretrial affects sentencing outcomes. In both state and federal court, individuals who are detained pretrial get longer sentences than their similarly-situated counterparts who were released pretrial. *See, e.g.*, Joseph A. DaGrossa & Jonathan P. Muller, *Pretrial Detention and the Sentencing Variance: An Analysis of Fixed Effects Across U.S. District Courts*, 85 Federal Probation 27 (Dec. 2021). An individual who is released pretrial has an opportunity to get a job, do things in the community, participate in programming, provide support to family members – all things that set that person up to appear more favorably at a later sentencing hearing. In contrast, a person incarcerated pretrial starts from the baseline of being incarcerated without the ability to get on a better track pretrial.

93. Because pretrial release hearings are adversarial hearings that carry "significant consequences for the accused," where "potential substantial prejudice to defendant's rights inheres in the confrontation" and counsel would have the ability "to help avoid that prejudice," they are critical stages. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *Bell v. Cone*, 535 U.S. 685, 695-96 (2002); *see also Higazy v. Templeton*, 505 F.3d 161, 170-172 (2d Cir. 2007) (holding that a bail hearing implicates a defendant's *Fifth Amendment* right against self-incrimination and is a critical stage of the State's criminal process); *Booth v. Galveston County*, 352 F. Supp. 3d 718, 738-39 (S.D. Tex. 2019) ("There can really be no question that an initial bail hearing should be considered a critical stage of trial."); *Smith v. Lockhart*, 923 F.2d 1314, 1319 (8th Cir. 1991) (holding that hearing on bail reduction motion was a critical stage of proceeding requiring representation by

counsel); *State v. Charlton*, 515 P.3d 537, 540 & 546 (Wash. Ct. App. 2022) (holding that the bail hearing after defendant has been formally charged is a critical stage); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (same).

94. In Wisconsin, criminal defendants in many parts of the state appear at initial appearances and later status hearings without counsel to help them make critical pretrial release arguments.

95. In some parts of the state, SPD attorneys will appear specially solely to represent individuals for the purpose of the initial appearance, but this is insufficient to satisfy the constitutional requirement that defendants be afforded effective assistance of counsel at all critical stages.

96. There is no way to separate the right to counsel from the right to effective counsel.

97. The United States and Wisconsin Constitutions guarantee the right to the "assistance" of counsel, not merely the right to have a person with a law degree stand next to the defendant. The United States Supreme Court has been clear that "[t]he Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (footnote omitted); *see also Strickland v. Washington*, 466 U.S. 668, 685 (1984) ("That a person who happens to be a lawyer is present . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.").

98. SPD attorneys who appear specially for the purpose of initial appearances often meet their clients for the first time in the courtroom and have had little or no time to conduct a client interview or do any investigation into matters affecting bail.

99. They do not have the ability to obtain a full mitigation and family history, let alone to ask for relevant information about the alleged offense. They do not have the time to interview clients adequately to probe their memories of the events, nor do they have time to talk to fact witnesses while their memories are fresh. They simply cannot effectively advocate for pretrial release without sufficient time to talk to their clients and conduct even a preliminary investigation into the factors relevant to the bail determination, which include case- and charge-specific facts as well as the defendant's ties to the community, criminal history, and life history.

100. And even in jurisdictions where SPD attorneys appear at the first hearing, they do not then appear at the later status hearings where defendants' cases are repeatedly continued and their bond determinations are revisited and/or continued.

III. Comparison with Indigent Defense Delivery Systems

101. Both federal defender offices and institutional state public defender offices in other states are able to provide court-appointed counsel faster than Wisconsin currently does. In the federal system, court-appointed counsel is typically appointed the same day as the initial appearance or within a few days. Offices in Alaska, California, Colorado, Indiana, Michigan, New York, and Washington report appointments the same day or within a week of the defendant's initial appearance.

102. Wisconsin appears to rely on the private bar for a more significant percentage of the indigent defense caseload than many of its peer states with statewide institutional public defender offices. For example, Colorado, Connecticut, Delaware, Hawaii, Kentucky, Maryland,

Montana, New Hampshire, and Wyoming all have statewide public defender agencies with fewer than 25% of the caseload handled by assigned-counsel. Wisconsin's near 40% reliance on the private bar lies at the higher end with states like Iowa, Maine, Massachusetts, and Vermont. Massachusetts's substantial reliance on the private bar for indigent defense delivery led to a similar appointment crisis, which the state resolved by establishing a protocol under which indigent defendants awaiting appointment were presumptively released after seven days in custody and their cases were dismissed without prejudice after forty-five days if counsel had not been appointed. *See Lavalle v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004); *Carrasquillo v. Hampden County District Courts*, 142 N.E.3d 28 (2020); *see also Robbins v. Billings*, No. CV-22-054, at 15, 19, 25, & 39 (Kennebec County Court, State of Maine, January 3, 2025) (Combined Order on Partially Dispositive Motions) (finding systemic violations of defendants' Sixth Amendment guarantees to "continuous representation once the right to counsel attaches at their initial appearance or arraignment" in the State of Maine, which also relies heavily on the private bar for indigent defense representation and is facing similar problems with delays in appointment).

103. Some states – like Alaska and Colorado – have created both a defender office and a conflict defender office, each with full-time attorney employees. This enables these states to address conflicts of interest in co-defendant cases in ways that provide for more representation through full-time public defenders with less reliance on assigned-counsel and contract systems.

104. The federal defender system relies on the private defense bar for a similar proportion of its indigent defense caseload as Wisconsin, but attorneys who take indigent defense cases in the federal system earn significantly more per hour than they do in Wisconsin. The federal system does not face the same appointment delays that exist in Wisconsin.

IV. Empirical Research on the Effects of Relying Heavily on Assigned-Counsel Systems

105. Relying extensively on assigned-counsel systems has downstream effects on the quality and costs of indigent defense delivery in the state.

106. Empirical research shows that (a) assigned-counsel systems are more expensive in the long term than institutional public defender offices; (b) the lawyers who work in assigned-counsel systems put less time on average into indigent defense representation than their public defender counterparts; and (c) assigned counsel obtain poorer outcomes for their clients on average than institutional public defenders. *See* Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 Mich. L. Rev. 207 (2023).

107. The economies of scale that flow from institutional public defender offices' group structure and the savings associated with not having to collect and process billing statements translate into overall savings to the system. Additionally, institutional public defenders obtain, on average, lower conviction rates and shorter sentences for their clients when compared to assigned-counsel and contract systems. This too results in overall savings to the system from reduced incarceration costs. *See id.* at 249-254.

108. Studies in Texas document that public defender offices cost 23% to 31% less per misdemeanor and 8% to 22% less per felony than cases handled by assigned-counsel systems, which would result in annual statewide savings of $13.7 million if public defenders handled all of the cases. Similar studies in New York and Iowa project cost savings of between $125 and $200 per case. In 2020, Kansas assigned counsel cost the state $175 more per case on average than the public defender. If the Kansas public defender took half the assigned-counsel caseload that year, it would have saved the state over $1.3 million. *See id.* at 250-251.

109. Lawyers working in assigned-counsel and contract systems put less time on average into indigent defense representation than their public defender counterparts, which results in poorer outcomes for their clients than institutional public defenders. *See id.* at 240-249. Consistent with this national research, a 2015 survey of Wisconsin appointed counsel showed that Wisconsin attorneys spent, on average, about 13% less time working on their appointed cases than on similar retained cases and spent 37% less time, on average, meeting with their appointed clients than they did with their retained clients. *See* The Sixth Amendment Center, *Justice Shortchanged: Assigned Counsel Compensation in Wisconsin*, at 16 (2015).

110. The decision to allocate less time to appointed cases is financially rational for many assigned counsel and contract lawyers. Most attorneys on the assigned-counsel roster must handle a mixture of private and indigent defense cases or a combination of civil and criminal cases to make ends meet given the low financial compensation offered by SPD appointments. This creates inherent conflicts of interest between the attorneys' financial interests and their clients' interests in zealous advocacy. Rule 1.7 of Wisconsin's Rules of Professional Conduct for Attorneys prohibits attorneys from taking on representation of a client if it will create a conflict of interest for the attorney. SCT Chapter 20, Rule 1.7; *see also Mickens v. Taylor*, 535 U.S. 162 (2002) (prohibiting conflicts of interest). Ethically, a lawyer's own interests should not be permitted to have an adverse effect on representation of a client, but that is unavoidable when attorneys face financial incentives to give short shrift to their indigent defense cases to prioritize paying clients or federal cases where they can make more money. Full-time, institutional public defenders do not face the same financial conflicts of interest.

111. Many of the attorneys participating in Wisconsin's system want to effectively advocate for their clients. Because of the shortage of attorneys and the historically low

compensation rates, attorneys who were participating in the system quickly got overwhelmed, worn down, and burned out. Many left the assigned counsel rosters as a result. And those who stayed were affected adversely by the volume of cases they were asked to handle. When criminal defense attorneys are worn down and burned out from overload, they quickly come to understand that they cannot do their jobs well given resource and time constraints, so many of them give up trying and leave the assigned-counsel rosters.

Conclusion

112. Many courts in Wisconsin recognize that there is a constitutional crisis with respect to indigent defense in the state.

113. The structure of Wisconsin's indigent defense delivery system has led to systemic violations of criminal defendants' rights under the United States and Wisconsin Constitutions, because indigent defendants are not provided with effective trial counsel within a reasonable time after the right to counsel attaches and at all critical stages of the proceedings. Without a structural change, Wisconsin will continue to violate indigent criminal defendants' rights to counsel in violation of both the U.S. and Wisconsin Constitutions.

Eve Brensike Primus

Dated: January 10, 2025