STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY
BRANCH 2

ANTRELL THOMAS, *et al.*,

Plaintiffs,

v. Case No. 2022-CV-1027

ANTHONY S. EVERS, in his official capacity as the Governor of Wisconsin, *et al.*,

Defendants.

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

In their opposition brief, Plaintiffs set up and attempt to knock down strawmen arguments about justiciability, prejudice, exhaustion of remedies and other theories that Defendants did not raise. This Court should reject Plaintiffs' campaign to misstate Defendants' position and grant the motion to dismiss for five reasons.

First, this case is moot because Plaintiffs received and have appointed counsel, and there are no applicable mootness exceptions. Plaintiffs did not move for certification until after each Plaintiff received appointed counsel, so they cannot argue a federal mootness exception for a class action. No state-law exceptions apply.

Second, Plaintiffs failed to state a viable claim because there is no categorial rule requiring the appointment of counsel within 14 days of an initial appearance, or within any other time period. Under controlling U.S. Supreme Court precedent,

counsel must be appointed within a "reasonable" time, which is not amenable to a one-size-fits-all approach. Plaintiffs' constitutional claims fail as a matter of law.

Third, Plaintiffs are attempting an end-run around existing criminal-law procedures. Whether their right to counsel has been violated is appropriately addressed in their individual criminal cases, not in this case on a statewide basis.

Fourth, Plaintiffs acknowledge that they failed to timely serve legislative officials with a copy of their proceeding under Wis. Stat. § 806.04(11), but they ask this Court to excuse their excessive tardiness. Plaintiffs' initial complaint was filed on August 23, 2022, but it took them 169 days, until February 8, 2023, to satisfy the statutory requirement. This Court should dismiss the case for this reason alone.

Lastly, Governor Evers has no role in appointing counsel to indigent defendants. He does not belong in this case, and Plaintiffs' allegations in the amended complaint do not support a viable claim against him.

ARGUMENT

I. Plaintiffs' claims are moot, and there are no applicable mootness exceptions.

Plaintiffs concede that they received and now have appointed counsel. (Doc. 66:3–4; 78:16.) Because this Court cannot enter any meaningful declaratory or injunctive relief as to them, their claims are moot. (Doc. 58:9–10 (motion to dismiss brief, arguing mootness).) Plaintiffs' arguments about justiciable claims are of no matter, because that is not Defendants' point: they have not argued that Plaintiffs' claims are not "justiciable," only that they are moot. (Doc. 58:9–10; 78:16–18.)

Plaintiffs' claims are not subject to a mootness exception. Mootness exceptions may be available for: (1) an issue of great public importance; (2) a challenge to the constitutionality of a statute; (3) an issue that arises so often that a definitive decision is essential to guide the trial courts; (4) an issue likely to arise again and that should be resolved by the court to avoid uncertainty; or (5) an issue capable and likely of repetition that evades review because the appellate process usually cannot be completed and frequently cannot even be undertaken within a time that would result in a practical effect upon the parties. *Portage County v. J. W. K.*, 2019 WI 54, ¶ 29, 386 Wis. 2d 672, 927 N.W.2d 509.

Plaintiffs argue that exceptions (1) and (5) apply under state law. (Doc. 78:4, 18–21.) They also argue an "inherently transitory" exception under federal law, which is an exception that no Wisconsin court has recognized. (Doc. 78:4, 21–23.)

A. The "inherently transitory" exception does not apply.

The U.S. Supreme Court created a mootness exception for class-action claims that are "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980). This exception is inapplicable because Plaintiffs did not timely move for class certification prior to their individual claims being extinguished.

In *Holstein v. City of Chicago*, the Seventh Circuit explained that if the court "certified the class *before* the expiration of the plaintiff's claims, mootness is avoided." 29 F.3d 1145, 1147 (7th Cir. 1994) (emphasis added). But if the plaintiff "*did not even*

move for class certification prior to the evaporation of his personal stake," he "cannot claim the benefit of this exception to the mootness doctrine because the [trial] court did not certify the class." *Id.* (emphasis added); *Wiesmueller v. Kosobucki*, 513 F.3d 784, 786 (7th Cir. 2008) (if "the named plaintiff's claim becomes moot before the class is certified, the suit must be dismissed because no one besides the plaintiff has a legally protected interest in the litigation"); *Yeager v. Office of the State Appellate Defender*, No. 21-cv-245-SMY, 2021 WL 3710392, at *2 (S.D. Ill. Aug. 19, 2021) (class-action mootness exception is "premised upon the named plaintiff moving for class certification prior to the evaporation of his personal stake in the lawsuit.").

Here, Plaintiffs did not move for class certification and this Court did not certify a class "prior to the evaporation of [their] personal stake" in the case. *Holstein*, 29 F.3d at 1147. Specifically, Plaintiffs conceded that they all received appointed counsel prior to moving for certification on February 1, 2023. (Doc. 64; 65:3–4 (conceding that Plaintiffs received appointed counsel); 58:27–46 & 37:27–36 (appointment orders).) They cannot claim a mootness exception for a class action.

Lastly, in *Joseph W. Bender v. State of Wisconsin*, No. 2019CV2609 (Wis. Cir. Ct. Dane Cnty.), Judge David Conway declined to apply the "inherently transitory" exception in a case just like this one challenging as unconstitutional SPD's alleged delays in appointing counsel to qualified indigent defendants. (Affidavit of Clayton P. Kawski in Opposition to Class Certification, Ex. C:14, filed herewith.) This Court should also decline to apply this federal exception to mootness, which has not been recognized by a Wisconsin court.

B. The "capable and likely of repetition" exception does not apply.

Plaintiffs' claims are not subject to the "capable and likely of repetition" exception to mootness. *J. W. K.*, 386 Wis. 2d 672, ¶ 29 (citation omitted). For this exception, "the plaintiff must show that the claim is capable of repetition *as to the named plaintiff*." *Olson v. Brown*, 594 F.3d 577, 583 (7th Cir. 2010) (emphasis added); *see also J. W. K.*, 386 Wis. 2d 672, ¶ 30 ("a reasonable expectation that the same complaining party would be subjected to the same action again" (citation omitted)).

Plaintiffs argue that two Plaintiffs, William Lowe and Dwight Moore, had their initial appointed counsel withdraw and were then forced to wait until replacement counsel was appointed. (Doc. 78:20–21.) They argue that "[t]hese incidents of counsel withdrawing, leaving Plaintiffs to wait, unrepresented, for unknown periods of time until counsel is reappointed, show that the issue is capable of repetition between the parties." (Doc. 78:21.)

But Plaintiffs' claims in their amended complaint are not about indigent defendants whose counsel withdrew and had to be replaced. Plaintiffs alleged in their complaint that Defendants violated the U.S. and Wisconsin Constitutions by failing to appoint them counsel within 14 days of their initial appearances. (Doc. 48 ¶¶ 124–26, 131–33.) There are no allegations or claims regarding Plaintiffs for whom SPD's first appointed counsel withdrew and had to be replaced. That circumstance would present a different issue and analysis of whether SPD appointed within a "reasonable" time after the initial appearance. That claim is simply not part of the amended complaint, which focuses solely on initial counsel appointments by SPD.

Plaintiffs' argument misconstrues the "capable and likely of repetition" exception. The question for purposes of the exception here is whether an allegedly unconstitutional delay in SPD appointing counsel for Lowe and Moore, for example, is "capable and *likely* of repetition." *J. W. K.*, 386 Wis. 2d 672, ¶ 29 (citation omitted; emphasis added). For that claim to arise again, Lowe and Moore would have to commit new crimes, be charged with them, and qualify as eligible for SPD appointed counsel. All of those future events are speculative, at best, and Plaintiffs make no argument to explain how their constitutional claims are likely to recur as to any individual Plaintiff, which is what they must show. *Id.* ¶¶ 29–30.

C. The "great public importance" exception does not apply.

Lastly, the "great public importance" exception does not apply. *J. W. K.*, 386 Wis. 2d 672, ¶ 29. While the appointment of counsel in general is undoubtedly of great public importance and a fundamental constitutional right, the specific "issue" Plaintiffs identified in their amended complaint regarding the supposed existence of a categorical rule circumscribing the timing of SPD's appointments is not. *Id.*

Defendants believe that promptly appointing counsel is part of SPD's mission, which it works diligently and tirelessly towards. The parties therefore agree that prompt counsel appointments benefit all eligible criminal defendants. But that simply is not what Plaintiffs' claims are about. They are about creating an arbitrary, categorical rule that would be inflexible and out of touch with the reality and challenges that SPD faces every day in its Herculean efforts to appoint competent counsel to eligible defendants. There is no matter of "great public importance"

underlying Plaintiffs' claims for a 14-day rule (or a 30-, 60-, or 120-day rule). Their claims instead are a matter of preferred public policy that is better directed to the Legislature than a court. Accordingly, this Court should not apply the "great public importance" mootness exception.

II. Plaintiffs fail to state a viable claim because there is no categorial rule requiring the appointment of counsel within 14 days of an initial appearance, or within any other time period.

Plaintiffs fail to state a viable claim because there is no categorial rule requiring the appointment of counsel within 14 days of an initial appearance, or within any other specific time period. Under controlling U.S. Supreme Court precedent, counsel must be appointed within a "reasonable" time, which is not amenable to a one-size-fits-all approach. Thus, Plaintiffs' constitutional claims alleging that there is a categorical rule about the timing of counsel appointments fail as a matter of law. They have not stated a claim "upon which relief can be granted." Wis. Stat. § 802.06(2)(a)6.

Rothgery v. Gillespie County holds that "counsel must be appointed *within a reasonable time* after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." 554 U.S. 191, 212 (2008) (emphasis added). The case does not create a per se rule that counsel must be appointed within two weeks after the initial appearance, or within any other time period, such as 30, 60, or 120 days. (*See* Doc. 78:6, 18.) In other contexts, "reasonableness" is "a fact-intensive inquiry, measured in objective terms, by examining the totality of the circumstances." *State v. Crone*, 2021 WI App 29, ¶ 14, 398 Wis. 2d 244, 961 N.W.2d 97 (evaluating the

reasonableness of a Fourth Amendment detention). Plaintiffs offer no basis to analyze reasonableness differently in this case.

Consistent with *Rothgery*, no Wisconsin case endorses the categorical rule that Plaintiffs advocate. They argue several Wisconsin Supreme Court cases, including *Wolke*, *Jones*, and *Kaczmarek*, which criticized delays in appointing counsel. (Doc. 78:10–11.) But as Defendants argued in their motion to dismiss brief, these cases did not establish the categorical rule Plaintiffs allege is being violated. (Doc. 58:11–14.) With no cases to support their position, Plaintiffs are asking this Court to go out on a limb and fashion a new rule for what "reasonable" means in the counsel-appointment context.

Allowing Plaintiffs' claims for a categorical rule to proceed would toss out the window the particularized, case-specific inquiry for what is a "reasonable" time for a counsel appointment. As already argued, *State v. Lee*, 2021 WI App 12, 396 Wis. 2d 136, 955 N.W.2d 424, confirms that claims based on alleged delays in appointment of counsel require a fact-specific inquiry. (Doc. 58:14–16.) In *Lee*, the court of appeals catalogued case-specific circumstances that a court should consider in deciding whether to sua sponte delay a preliminary examination under Wis. Stat. § 970.03(2). 396 Wis. 2d 136, ¶¶ 53–58. Plaintiffs' approach would disregard all of these relevant factors in the "reasonableness" analysis in favor of a universal rule.

Plaintiffs argue that Defendants "incorrectly suggest that this Court's inquiry will turn on whether each Plaintiff can show actual prejudice when it is the *potential* for prejudice that is the proper inquiry." (Doc. 78:9.) They argue that "[i]t would be

error to require actual prejudice" to be shown. (Doc. 78:9.) They cite language from *Lee* about considering the "potential" for prejudice in the court's inquiry and rely upon *David v. Missouri*, which held that prejudice need not be shown "where counsel was absent at a critical stage of a criminal proceeding" in a challenge under article I, section 18(a) of the Missouri Constitution. (Doc. 78:9 (quoting *Lee*, 396 Wis. 2d 136, ¶ 58); 85:17, 27.) These arguments are unavailing.

First, Defendants have not argued that actual prejudice must be shown, so Plaintiffs' argument is irrelevant. (Doc. 58:14–16.) There may be some support for the argument, however, as the supreme court held in *Okrasinski v. State*, 51 Wis. 2d 210, 214, 186 N.W.2d 314 (1971), that the failure to meet the statutory mandate under Wis. Stat. § 970.02(6) that appointment of counsel for an indigent person take place at the initial appearance "will be considered harmless error unless there is evidence that the defendant was prejudiced by failure to appoint counsel."

Second, Plaintiffs' prejudice argument obfuscates the main problem with their claims: there is no categorical rule that counsel must be appointed within 14 days of the initial appearance (or some other time period), which means their claims fail as a matter of law and should be dismissed at the pleadings stage.

Third, this Court should not be persuaded by *David*, which is a non-precedential decision by a Missouri trial-level judge under the Missouri Constitution. It has no persuasive value.

Plaintiffs also rely upon *Farrow v. Lipetzky*, 637 Fed. App'x 986 (9th Cir. 2016), an unpublished, non-precedential memorandum decision. (Doc. 78:2, 7–9.) In *Farrow*,

the court reversed the dismissal of a Sixth Amendment claim at the pleadings stage, where the plaintiffs alleged that the Contra Costa Public Defender "arbitrarily withheld legal representation to indigent, in-custody, criminal defendants in felony [and misdemeanor] matters for a period of 5 to 13 days after their initial Court appearance, and sometimes longer, as a matter of policy." 637 Fed. App'x at 987. The Ninth Circuit held that the district court's dismissal was incorrect because the court "erroneously required the plaintiffs to allege actual prejudice." *Id.* at 988.

Here, Defendants have not argued that there is an "actual prejudice" requirement in the analysis, which is the primary reason the Ninth Circuit reversed. *Id.* Further, Plaintiffs, unlike the *Farrow* plaintiffs, have not alleged that "as a matter of policy" SPD customarily does not appoint counsel within 14 days of defendants' initial appearances. *Id.* at 987. *Farrow* is therefore distinguishable and does not support Plaintiffs' argument that they have stated a viable claim.

Like their misplaced reliance upon *David* and *Farrow*, Plaintiffs' reliance upon Judge Stadtmueller's screening order allowing a pro se complaint in *Strong v. Thompson*, No. 17CV981 (E.D. Wis.), to go forward is not on point. (Doc. 78:2, 7–8.) Judge Stadtmueller relied upon *Farrow* to conclude that plaintiff David Strong stated a viable Sixth Amendment claim. But as Paul Harvey used to say, then there is "the rest of the story."

After Judge Stadtmueller screened Strong's complaint and allowed him to proceed on a Sixth Amendment claim against State Public Defender Kelli Thompson, Thompson moved to dismiss the complaint for failure to state a claim upon which

relief could be granted under Federal Rule of Civil Procedure 12(b)(6), the equivalent rule to Wis. Stat. § 802.06(2)(a)6. (Kawski Aff. Ex. D:1.) Judge Stadtmueller granted the motion to dismiss with prejudice and entered judgment in State Public Defender Thompson's favor. (Kawski Aff. Exs. D:5, E.) Strong did not appeal.

In sum, whether considering a claim relating to delay of appointment under the U.S. Constitution, Wisconsin Constitution, or Wisconsin statutes, courts have declined to create a categorical rule and instead considered the facts and circumstances of each case. Plaintiffs' desire for a categorical rule runs against longstanding law. Their amended complaint thus fails to state a claim "upon which relief can be granted" as a matter of law. Wis. Stat. § 802.06(2)(a)6.

III. Plaintiffs are attempting an end-run around established criminal procedures to raise right-to-counsel claims.

Plaintiffs argue that a putative class-action is an appropriate, even "preferred," way to raise their claims for injunctive relief, which "are favored in civil rights cases and suited to address systemic issues within the criminal justice system." (Doc. 78:13.) They assert that there is no "authority requiring §1983 plaintiffs to exhaust all legal remedies in criminal court prior to suing" (Doc. 78:13), and cite precedents disfavoring exhaustion requirements in section 1983 lawsuits (Doc. 78:13–15).

Plaintiffs' exhaustion-of-remedies argument is irrelevant because Defendants did not argue that there is an exhaustion requirement for a section 1983 claim. (Doc. 58:17–19.) Plaintiffs create a strawman to avoid the fact that their individualized right-to-counsel claims belong in criminal court before the judges and court

commissioners who have access to the details of their cases and why delays in appointing counsel may have occurred.

Established procedures in criminal cases provide the mechanism to raise challenges based upon the constitutional right to counsel. As argued in Defendants' motion to dismiss brief, Wisconsin has robust criminal procedures for criminal defendants to assert constitutional violations and to appeal circuit court denials of constitutional challenges, along with collateral civil procedures to do the same. Wis. Stat. § 808.03 (right to seek a permissive appeal); Wis. Stat. §§ (Rule) 809.30(2), 974.02 (right of direct appeal or motion for postconviction relief); Wis. Stat. § 974.06 (civil process to raise constitutional or jurisdictional challenges after the expiration of a criminal appeal). (Doc. 58:17–18.) In addition, as addressed in *Lee*, a court has discretion to extend the time in which a preliminary examination must be commenced under Wis. Stat. § 970.03(2) if cause is shown. 396 Wis. 2d 136, ¶¶ 51–59.

Again rebutting an argument not made, Plaintiffs assert that "Defendants think *unrepresented* indigent defendants should be the parties singlehandedly attempting to vindicate their own rights in their own criminal proceedings." (Doc. 78:15.) Not true; Defendants did not argue that. (Doc. 58:17–19.) And as *Lee* aptly illustrates, counsel is best positioned to make arguments about the reasons for delays in the appointment of counsel and the impact on their clients' rights. 396 Wis. 2d 136, ¶ 18 (successfully moving to dismiss the criminal complaint).

Plaintiffs argue that their "claims would not require individualized determinations of fact" and that "there are no individualized determinations of fact

that could justify such delays [in appointing counsel]." (Doc. 78:15, 16.) The fact that Wisconsin has specialized criminal and appellate procedures, described above, to litigate alleged constitutional violations in individual cases belies Plaintiffs' unsupported contention that the facts underlying their claims do not matter. And as argued in Defendants' opposition to Plaintiffs' class-certification motion, filed today, a class action is neither a proper nor effective way to address such claims.

IV. Plaintiffs failed to serve legislative officials with a copy of their proceeding for 169 days, and not until after the deadline to file a motion to dismiss, warranting dismissal.

Plaintiffs acknowledge that they failed to promptly serve legislative officials with a copy of their proceeding under Wis. Stat. § 806.04(11), but they ask this Court to excuse their excessive tardiness. (Doc. 78:4, 23–25.) This Court should not and should instead dismiss this case.

The legislative-notice statute must "be strictly complied with." *Bollhoffer v. Wolke*, 66 Wis. 2d 141, 144, 223 N.W.2d 902 (1974) (interpreting Wis. Stat. § 269.56(11), the predecessor to section 806.04(11)). "In a declaratory [judgment] action the failure to give the notice required by sec. 806.04(11) is fatal to the jurisdiction of the court." *William B. Tanner Co. v. Estate of Fessler*, 100 Wis. 2d 437, 444, 302 N.W.2d 414 (1981), *abrogated on other grounds by Sears, Roebuck & Co. v. Plath*, 161 Wis. 2d 587, 468 N.W.2d 689 (1991).

First, Plaintiffs understate by 115 days their delay in complying with Wis. Stat. § 806.04(11), arguing that it was "a mere 54 days" of delay. (Doc. 78:25.) Plaintiffs' initial complaint was filed on August 23, 2022, and it took them 169 days,

until February 8, 2023, to satisfy the legislative-notice requirement. (Doc. 74 (proof of service).) The fact that they filed an amended complaint in December should not excuse the unexplained neglect that they engaged in since August.

Second, in support of their argument for a free pass, Plaintiffs inappropriately cite an unpublished, unauthored, summary disposition in *Bernegger v. Thompson*, No. 2015AP2546, 2016 WL 8607446 (Wis. Ct. App. July 21, 2016) (unpublished). (Doc. 78:24.) Unpublished opinions of the Wisconsin court of appeals may not be cited as precedent or authority. *See* Wis. Stat. § (Rule) 809.23(3)(a) ("unpublished opinion[s] may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case, and except as provided in par. (b).").

Third, Plaintiffs rely upon footnote 2 from *Tomczak v. Bailey*, 218 Wis. 2d 245, 578 N.W.2d 166 (1988), but the case is inapposite. (Doc. 78:24–25.) While late service of the proceeding on the Attorney General "cured" the failure to comply with the notification requirement, 218 Wis. 2d at 249 n.2, the *Tomczak* court did not address how much time is considered excessive.

Here, Plaintiffs failed to serve legislative officials with a copy of their proceeding until one week *after* the January 30, 2023, deadline for Defendants to move to dismiss the amended complaint. (Doc. 74.) They did not serve legislative officials with a copy of their proceeding from August 23 to December 15, 2022, when the initial complaint was pending. Thus, the Legislature was not provided notice of the proceeding to formulate a strategy whether to participate in this case at the

dismissal-motion stage. Plaintiffs' failure to timely provide legislative officials with notice of their proceeding was not the required "strict[] compl[iance] with" Wis. Stat. § 806.04(11). *Bollhoffer*, 66 Wis. 2d at 144.

This Court should enforce Wis. Stat. § 806.04(11) and dismiss this case for Plaintiffs' excessive 169-day delay in complying with the statute.

V. Governor Evers has no role in appointing counsel to indigent criminal defendants, so he should be dismissed.

Lastly, Governor Evers has no role in appointing counsel to indigent criminal defendants, so he should be dismissed from this case. The State Public Defender appoints counsel to eligible defendants, not the Governor. Wis. Stat. § 977.08. Why Plaintiffs would like the Governor to remain a party to this case is a mystery, as no relief this Court could order as to the Governor would remedy any alleged harm to Plaintiffs or the putative class members.

Plaintiffs press two points for keeping the Governor in this case: (1) "he is responsible for appointing members to the Wisconsin Public Defender Board," and (2) "he is empowered to modify the SPD's proposed budget before submitting it to the Wisconsin legislature." (Doc. 78:12 (citing Am. Compl. ¶¶ 55–63, 77–78).) Neither of these reasons shows that the amended complaint contains allegations sufficient to establish that the Governor's actions caused or could cause Plaintiffs any injury.

Regarding the Governor's appointing members of the Public Defender Board, that action is attenuated from the gravamen of Plaintiffs' claim: that there are unreasonable delays in SPD appointing counsel. Public Defender Board members have nothing to do with making the appointments of counsel; that work is done by

the State Public Defender and her staff. The Governor's appointing members of a board that *itself* has little to do with the complained-of actions does not state a viable claim against the Governor.

Regarding the Governor's role in proposing a budget for SPD, it too does not establish that the Governor's alleged actions cause Plaintiffs any injury. Proposing a budget is only one step in the legislative process. The Legislature must vote to enact a law that establishes a budget for SPD. Merely *proposing* a budget for SPD does not mean it will become the law. Thus, the Governor's proposing or modifying a budget proposal is also insufficient to state a viable claim against him relating to SPD's appointment of counsel to indigent defendants.

CONCLUSION

The Court should grant Defendants' motion and dismiss the amended complaint with prejudice.

Dated this 29th day of March 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed a Reply Brief in Support of Motion to Dismiss Amended Complaint 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.

Dated this 29th day of March 2023.

Electronically signed by:

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