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Clerk of Circuit Court
Brown County, WI
2022CV001027

BY THE COURT:

DATE SIGNED: September 20, 2023

Electronically signed by Thomas J. Walsh
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH II BROWN COUNTY

ANTRELL THOMAS, et al.,

Plaintiffs,

v.

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

Defendants.

Case No. 22CV1027

DECISION AND ORDER

Before the Court is a motion from Defendants Anthony Evers, in his official capacity as the Governor of Wisconsin, Kelli Thompson, in her official capacity as the Wisconsin State Public Defender, James Brennan, John Hogan, Ellen Thorn, Anthony Cooper, Sr., Regina Dunkin, Patrick Fiedler, Ingrid Jagers, Joseph Miotke, and Mai Neng Xiong[1], all in their official capacity as members of the Wisconsin State Public Defender Board (collectively referred to as "Defendants") requesting the Court dismiss all of Plaintiffs Antrell Thomas, Melvin Clemons, Christian Pittman, Chance Kratochvil, Kelsie McGeshick, Jerome Brost, Dwight Moore, Sebastian Popovich, Melinda Meshigaud, Elmore Anderson, Cashun Drake, Terry Johnson, Timothy Williams, William Lowe, Tivon Wells, Davadae Bobbitt, Donald Jueck, and Cory Hansen's (collectively

[1] The members of the State Public Defender Board will be collectively referred to as the "SPD Board."

referred to as "Plaintiffs") claims with prejudice. For the following reasons, Defendants' motion will be **GRANTED in part** and **DENIED in part**.

FACTUAL BACKGROUND

The Plaintiffs are criminal defendants charged with offenses punishable by a term of imprisonment. (Pls.' Am. Compl. ¶ 26.) The Plaintiffs were found eligible for counsel at or after their initial appearance. (*Id.*) Despite being eligible for counsel, the Plaintiffs have experienced long delays to receive appointed counsel. (*See id.* ¶¶ 35-52.) The Plaintiffs have waited from twenty days after their initial appearance to four hundred days after their initial appearance to receive appointed counsel. (*See id.*) Because the Plaintiffs have waited from twenty to four hundred days after their initial appearance to receive appointed counsel, they allege the delays they experienced are unreasonable. (*See id.* ¶ 72.) Because of these unreasonable delays, the Plaintiffs allege their right to counsel has been violated. (*See id.* ¶¶ 71-72.)

The Office of the State Public Defender (the "SPD") is the agency that provides counsel to indigent defendants. (*Id.* ¶ 74.) Chapter 977 of the Wisconsin Statutes governs the SPD's actions. (*Id.* ¶ 75.) Under chapter 977, the SPD assigns counsel to a defendant when a case is referred to the SPD. (*Id.* ¶ 76.) The SPD assigns the case to either its staff attorneys or a private attorney. (*Id.*) Private attorneys are paid at a statutory rate of $70 per hour. (*Id.*) The State Public Defender and the SPD Board "are primarily responsible for administering Wisconsin's public defense system" under chapter 977. (*See id.* ¶ 79.)

The SPD is funded through biennial budget bills passed by the Wisconsin State Legislature. (*Id.* ¶ 77.) The SPD Board, whose members are appointed by the governor, submits a proposed budget to the governor. (*Id.* ¶¶ 55-63, 77.) The governor may modify the proposed budget. (*Id.* ¶ 78.) The proposed budget is then incorporated into the biennial budget bill and submitted to the

Legislature. (*Id.* ¶ 78.) The bill then moves through the legislative process and, if enacted, is signed into law by the governor. (*Id.*)

While several criminal defendants have been found eligible for appointed counsel, a vast number of those criminal defendants are experiencing, or have experienced, lengthy delays in receiving appointed counsel. (*Id.* ¶ 80.) The Plaintiffs allege that more than 11,000 criminal defendants have experienced delays in receiving appointed counsel. (*Id.* ¶ 81.) These criminal defendants have been without appointed counsel for more than fourteen, thirty, sixty, or 120 days. (*Id.*; *see also* Pls.' Am. Compl. Ex. A.) Other criminal defendants have experienced similar delays but have now received appointed counsel. (Pls.' Am. Compl. ¶ 81.) In April 2022, the SPD acknowledged it faced a backlog of more than 35,000 cases. (*Id.* ¶ 87.)

Because they are not represented, these criminal defendants suffer severe legal consequences. (*Id.* ¶ 82.) First, these unrepresented criminal defendants have difficulty obtaining pre-trial release. (*Id.*) While they may be able to obtain pre-trial release, "without an attorney's assistance, they lack the knowledge of how to go about seeking it and the legal skill to effectively prepare and present their arguments for release." (*Id.*) Second, the unrepresented criminal defendant's ability to prepare a defense is impeded without an attorney at the start of a criminal case. (*Id.* ¶ 83.) For example, an unrepresented criminal defendant may miss exculpatory evidence or a key witness that may have been overlooked. (*Id.*) By the time the unrepresented criminal defendant receives appointed counsel, that evidence may have deteriorated or the witness may have become unavailable. (*Id.*)

Third, the unrepresented criminal defendants "cannot meaningfully engage in plea negotiations." (*Id.* ¶ 84.) The State cannot engage in plea negotiations unless the defendant has waived his or her right to counsel. (*Id.*) Consequently, if an unrepresented criminal defendant

wants to engage in plea negotiations with the State, he or she must either waive his or her right to counsel or wait an unknown amount of days for appointed counsel. (*Id.*) If the unrepresented criminal defendant chooses to engage in plea negotiations without counsel, that defendant will likely not "be able to properly evaluate a plea offer or fully understand the consequences of pleading guilty." (*Id.*)

These unrepresented criminal defendants also suffer personal consequences. (*Id.* ¶ 85.) For those in custody, their criminal case is on hold until they receive appointed counsel. (*Id.*) Such defendants "may lose their jobs, lose opportunities for future employment, and be separated from their families and loved ones while their criminal cases are paused indefinitely." (*Id.*) The delays also impact the defendants' families because the defendants are not at home with their family. (*Id.*) For unrepresented criminal defendants not in custody, they are burdened with the stigma of criminal prosecution for an unknown amount of time "without the ability to defend themselves." (*Id.*)

The Plaintiffs allege the delays experienced by themselves and the unrepresented criminal defendants are caused by a severe shortage of public defense attorneys. (*See id.* ¶ 88.) The shortage is of both SPD staff attorneys and private attorneys. (*Id.* ¶ 89.) The Plaintiffs allege the SPD cannot employ enough attorneys to represent defendants that are eligible for appointed counsel "because it cannot offer even remotely competitive salaries." (*Id.* ¶¶ 88-89.) The Plaintiffs also allege that the number of private attorneys willing to accept cases from the SPD is low because the statutory pay rate is low. (*See id.* ¶¶ 93-95.)

The Plaintiffs allege that the severe shortage of public defense attorneys has resulted in a constitutional crisis. (*Id.* ¶ 6.) They further allege that the efforts to address this alleged crisis are ineffective. (*Id.* ¶ 99.) These efforts, specifically rate increases for private attorneys assigned by

the SPD, "have not meaningfully protected the constitutional rights of criminal defendants in Wisconsin." (*Id.* ¶ 104.) Thus, the Plaintiffs allege "judicial intervention is necessary to safeguard the fundamental constitutional rights of criminal defendants across the state." (*Id.* ¶ 105.)

On August 23, 2022, the Plaintiffs filed a complaint against the Defendants seeking, among other things, declarations that Defendants must appoint counsel to indigent defendants within fourteen days of an indigent defendant's initial appearance and that the Defendants are violating the constitutional rights of indigent defendants who have not received appointed counsel within fourteen days of their initial appearance.

On December 16, 2022, the Plaintiffs filed an amended complaint against the Defendants. In their amended complaint, the Plaintiffs allege a violation of their right to counsel under the Sixth Amendment of the United States Constitution under 42 U.S.C. § 1983. They allege the Defendants administer Wisconsin's public defense system. Because the Defendants administer the public defense system, the Plaintiffs allege the Defendants act in their official capacities and under color of state law when they administer the system. Because the Defendants administer the public defense system, the Plaintiffs allege the Defendants deprived the Plaintiffs of their right to counsel. As relief, the Plaintiffs seek, among other things, declarations that the delays they experienced in receiving appointed counsel are unreasonable, that the Defendants violated the Plaintiffs' right to counsel under the United States and Wisconsin Constitutions, and that Wisconsin's public defense system is unconstitutional as to Plaintiffs.

On January 30, 2023, the Defendants filed this motion seeking to dismiss the Plaintiffs' amended complaint. The Defendants argue that the Plaintiffs fail to state a claim, that the Plaintiffs' claims are moot, that the Plaintiffs should seek relief in their criminal proceedings instead of a

section 1983 action, that the Plaintiffs did not serve the legislative officers as required under section 806.04(11), and that the Plaintiffs fail to state a claim against Defendant Evers.

STANDARD

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, ¶ 31, 565 N.W.2d 94 (1997). When analyzing a motion to dismiss, the court accepts as true "all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693. The court cannot, however, "add facts in the process of construing a complaint." *Id.* Additionally, legal conclusions pled in the complaint are not accepted as true and "are insufficient to enable a complaint to withstand a motion to dismiss." *Id.* The complaint "must plead facts, which if true, would entitle the plaintiff to relief." *Id.* ¶ 21.

The sufficiency of the facts alleged "control the determination of whether a claim for relief is properly plead." *Strid v. Converse*, 111 Wis. 2d 418, 422–23, 331 N.W.2d 350 (1983). The complaint's sufficiency "depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled." *Data Key Partners*, 356 Wis. 2d 665, ¶ 31. The complaint is liberally construed and "should be dismissed as legally insufficient only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiff can prove in support of her allegations." *Strid*, 111 Wis. 2d at 422.

ANALYSIS

I. Failure to State a Claim

Section 1983 provides:

> Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

> secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2018). Section 1983 does not by itself create any substantive constitutional rights. *Penterman v. Wis. Elec. Power Co.*, 211 Wis. 2d 458, 472, 565 N.W.2d 521 (1997). Instead, section 1983 "provides a remedy against 'any person' who, under color of state law, deprives another of rights protected by the Constitution." *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). Thus, in a section 1983 action, the plaintiff "must allege that a person acting under the color of state law deprived the plaintiff of a right under federal law or the federal constitution." *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 20, 235 Wis. 2d 610, 612 N.W.2d 59.

In order to state a claim under section 1983, the plaintiff must allege: "(1) that a person acting under the color of state law committed the alleged conduct; and (2) that this conduct deprived the party of the rights, privileges, or immunities protected by the Constitution or laws of the United States." *Penterman*, 211 Wis. 2d at 472. The phrase "under the color of state law" means a "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Weber v. City of Cedarburg*, 129 Wis. 2d 57, 65 n.3, 384 N.W.2d 333 (1986) (quoting *Monroe v. Pape*, 365 U.S. 167, 184 (1961), *overruled on other grounds by Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)).

Here, the Plaintiffs have sufficiently alleged that the Defendants, acting under chapter 977, deprived the Plaintiffs of their right to counsel under the Sixth Amendment of the United States Constitution by failing to appoint counsel within a reasonable time after the initial appearance. The Plaintiffs allege that the Defendants acted under color of state law because the Defendants administer the public defense system under chapter 977. They allege that chapter 977 governs the SPD's actions and that the SPD is the agency that provides counsel for indigent defendants.

Under chapter 977, the State Public Defender Board appoints the State Public Defender, establishes the "rules regarding eligibility for legal services under [chapter 977]," and establishes "rules regarding the determination of indigency of persons entitled to be represented by counsel." *See* WIS. STAT. § 977.02(1), (2m)-(3) (2021–22).[2] The State Public Defender supervises "the operation, activities, policies and procedures of the office of the state public defender." § 977.05(4)(a). The State Public Defender also "compiles a list of attorneys in each county willing to represent SPD-eligible clients" and "may assign cases to either staff attorneys or private local attorneys." *State v. Lee*, 2021 WI App 12, ¶ 29, 396 Wis. 2d 136, 955 N.W.2d 424 (citing § 977.08(2)-(3)).

Here, the Defendants are the SPD Board, Kelli Thompson ("Thompson"), the State Public Defender, and Anthony Evers ("Governor Evers"), the Governor of Wisconsin. Under chapter 977, Thompson and the SPD Board have significant involvement in providing appointed counsel to indigent defendants. Consequently, chapter 977 provides Thompson and the SPD Board the authority to administer the SPD given they establish rules for providing counsel to indigent defendants and supervise the SPD. Because Thompson and the SPD Board have authority to administer the SPD under chapter 977, Thompson and the SPD Board act under color of state law in allegedly depriving the Plaintiffs of their right to counsel.

Governor Evers, however, is not involved in administering the public defense system and the Plaintiffs have provided insufficient allegations that state a claim against him. In the amended complaint, the Plaintiffs allege that Governor Evers appoints members to the SPD Board, may modify the SPD Board's proposed budget, submits the proposed budget to the legislature, and signs the budget into law if enacted by the legislature. These allegations are insufficient to establish

[2] All subsequent references to the Wisconsin Statutes are to the 2021–22 version unless otherwise indicated.

that Governor Evers has any role or authority in administering the SPD or in appointing counsel for indigent defendants. The governor simply appoints members to the SPD Board and may modify a proposed budget submitted by the board. These allegations have nothing to do with appointing counsel within a reasonable time. Nor do these allegations suggest that in appointing members to the board or modifying the budget, Governor Evers is acting under color of state law to deprive the Plaintiffs of their right to counsel. Thus, Governor Evers will be dismissed from this action.

The Plaintiffs have also sufficiently alleged that Thompson and the SPD Board deprived the Plaintiffs of their right to counsel under the Sixth Amendment to the United States Constitution. The Plaintiffs allege Thompson and the SPD Board did so because they failed to appoint counsel for the Plaintiffs within a reasonable time after their initial appearance. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.[3] Similarly, article I, section 7 of the Wisconsin Constitution provides that "[i]n all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel." WIS. CONST. art. I, § 7.[4] The right to counsel under both the United States and Wisconsin Constitutions attaches once adversary judicial proceedings have been commenced against a defendant. *State v. Arrington*, 2022 WI 53, ¶ 35, 402 Wis. 2d 675, 976 N.W.2d 453. The commencement of adversary judicial proceedings is when the defendant initially appears before a judicial officer, learns of the charges against him or her, and his or her liberty is subject to restriction. *See Rothgery v. Gillespie Cty.*, 554 U.S. 191, 213 (2008).

After the right to counsel attaches, the defendant "at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Id.* at 212. A

[3] The Sixth Amendment right to counsel applies to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Arrington*, 2022 WI 53, ¶ 35 n.8, 402 Wis. 2d 675, 976 N.W.2d 453.

[4] The interpretation of the right to counsel in the Wisconsin Constitution is "coextensive with the right under the federal constitution." *State v. Delebreau*, 2015 WI 55, ¶ 56, 362 Wis. 2d 542, 864 N.W.2d 852.

critical stage is a proceeding between a defendant and State agents "that amount[s] to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary.'" *Id.* at 212 n.16 (quoting *United States v. Ash*, 413 U.S. 300, 312-13 (1973)). As a result, "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." *Id.* at 212.

In Wisconsin, counsel must be appointed within a reasonable time after the initial appearance. *See id.*; *see also* §§ 970.01-970.02. At an initial appearance, a defendant is brought before a judge, is informed of the charges against him or her, and a bail determination is made. *See* §§ 970.01(1), 970.02(1)-(2). A defendant must also be informed of his or her right to counsel "and, in any case required by the U.S. or Wisconsin constitution, that an attorney will be appointed to represent him or her if he or she is financially unable to employ counsel." § 970.02(1)(b). The Wisconsin Supreme Court has noted the importance of a defendant receiving appointed counsel at or after that defendant's initial appearance and that delays in appointing counsel should be minimized. *See Kaczmarek v. State*, 38 Wis. 2d 71, 79, 155 N.W.2d 813 (1968) ("This rule requiring earlier appointment of counsel should, even though it does not apply in this case, being of prospective application only, make this the last of the cases in which lengthy time lags between initial appearance in court and appointment of counsel need be explained or excused."); *Jones v. State*, 37 Wis. 2d 56, 62, 69, 154 N.W.2d 278 (1967) ("We are greatly disturbed, however, by the fact that there was such a long interval [thirty-two days] here between arrest and the appointment of counsel. . . . Certainly these delays should be minimized in our criminal justice system."); *Wolke v. Rudd*, 32 Wis. 2d 516, 520, 145 N.W.2d 786 (1966) (noting that the eleven-day delay before counsel was appointed "is regrettable and should be avoided in a properly administered system of justice."). Thus, while the court has not gone so far as holding that lengthy delays violate a

defendant's right to counsel, the court's disapproval of the delays suggests such delays may be unreasonable.

Here, the Plaintiffs allege they were found eligible to receive appointed counsel at or after their initial appearance. Yet, the Plaintiffs have experienced long delays to receive appointed counsel. These delays range from twenty days after the initial appearance to four hundred days after the initial appearance. Because of these delays, the Plaintiffs allege they have not received appointed counsel within a reasonable time after their initial appearance. Because they have not received appointed counsel within a reasonable time after the initial appearance, the Plaintiffs allege they have been deprived of their Sixth Amendment right to counsel under the United States Constitution.

The Plaintiffs also allege that other criminal defendants have experienced similar delays in receiving appointed counsel. While several reasons may exist for such delays in receiving appointed counsel, the number of days the Plaintiffs and other criminal defendants have had to wait to receive appointed counsel is high. With numbers ranging from twenty days after the initial appearance to four hundred days after the initial appearance, the Plaintiffs have provided enough to state a claim that they have not received appointed counsel within a reasonable time after their initial appearance. This may amount to a deprivation of their right to counsel. Because the Plaintiffs have experienced delays in receiving appointed counsel and because the Plaintiffs allege they have not received appointed counsel within a reasonable time after their initial appearance, the Plaintiffs have sufficiently stated a claim that they have been deprived of their right to counsel protected by the Sixth Amendment of the United States Constitution.

In short, the Plaintiffs have sufficiently stated a claim under section 1983 alleging that the Defendants deprived them of their right to counsel under the Sixth Amendment of the United States

Constitution. Whether the Plaintiffs used the correct procedural avenue to seek relief and whether they are entitled to that relief is not the question at this stage. The Plaintiffs have sufficiently stated a claim under section 1983, which is enough to survive the motion to dismiss.

II. Mootness

When a court dismisses a case as moot, it "is an act of judicial restraint rather than a jurisdictional requirement." *Sauk Cty. v. S.A.M.*, 2022 WI 46, ¶ 19, 402 Wis. 2d 379, 975 N.W.2d 162. A case is moot when resolution of the issue "will have no practical effect on the underlying controversy." *Id.* Yet, a court may still decide a moot case if it falls under an exception to mootness. *See Portage Cty. v. J.W.K.*, 2019 WI 54, ¶ 12, 386 Wis. 2d 672, 927 N.W.2d 509. An exception to mootness applies when: (1) the issue is of great public importance; (2) the issue involves the constitutionality of a statute; (3) the issue "arises so often 'a definitive decision is essential to guide the trial courts;' (4) 'the issue is likely to arise again and should be resolved by the court to avoid uncertainty;' or (5) the issue is 'capable and likely of repetition and yet evades review.'" *Id.* (quoting *G.S. v. State*, 118 Wis. 2d 803, 805, 348 N.W.2d 181 (1984)).

The Defendants argue that the Plaintiffs' claims are moot because the Plaintiffs have now received appointed counsel. Because the Plaintiffs have received appointed counsel, the Defendants conclude there is no longer an underlying controversy. The Plaintiffs concede they received appointed counsel, but argue that the underlying controversy has not been resolved. Namely, that the delays the Plaintiffs experienced in receiving appointed counsel are unreasonable, that the Defendants violated the Plaintiffs' right to counsel under the United States and Wisconsin Constitutions, and that Wisconsin's public defense system is unconstitutional.

Even if the Plaintiffs' claims are moot, the Plaintiffs argue that mootness exceptions apply. They assert that the mootness exceptions that apply are: (1) the issue is of great public importance

and (2) the issue is capable of repetition yet evading review. The Defendants respond that neither of the two exceptions apply. First, the Defendants assert that the capable of repetition yet evading review exception does not apply because the issue of a delay in receiving appointed counsel cannot arise again as to the named Plaintiffs unless the Plaintiffs commit another crime. Second, the Defendants concede that the issue of the appointment of counsel in general is of great public importance but that the issue the Plaintiffs raise is the imposition of a fourteen-day categorical rule for appointing counsel after the initial appearance, which is not an issue of great public importance.

Here, the Plaintiffs' claims are moot because they received appointed counsel and no longer experienced delays in receiving appointed counsel. Nevertheless, the great public importance exception applies to the Plaintiffs' moot claims. The issue is not the alleged categorical fourteen-day rule. Rather, the issue is whether the delays the Plaintiffs experienced in receiving appointed counsel are unreasonable and whether those delays violated the Plaintiffs' right to counsel. As the Plaintiffs point out in their amended complaint, their case cannot move forward without appointed counsel. Indigent defendants without counsel cannot successfully argue bail modification motions in order to obtain pretrial release, cannot begin to prepare a defense, and cannot engage in plea negotiations. Their cases remain in a state of uncertainty. Not only does this affect the indigent defendant, but also affects any victim of an alleged crime who also seeks a prompt resolution of the case.

Furthermore, as the State notes, the appointment of counsel is of great public importance and "a fundamental constitutional right." The Plaintiffs here do not seek to establish a categorical rule that counsel must be appointed within fourteen days of an initial appearance. Instead, a broad reading of the Plaintiffs' amended complaint shows they seek a declaration that the delays they experienced in receiving appointed counsel are unreasonable and violate their right to counsel.

Thus, while the Plaintiffs' claims are now moot, the great public importance exception applies because the right to counsel is a fundamental constitutional right and the timely appointment of counsel related to that right is an issue of great public importance.

III. Section 806.04(11)

Finally, the Defendants argue that the Plaintiffs did not strictly comply with section 806.04(11) because they did not serve the required legislative officers in section 806.04(11). The Plaintiffs assert they served the required legislative officers on February 8, 2023. (*See* Doc. 74.) The Defendants respond that the time it took for the Plaintiffs to serve the legislative officers was excessive because the legislative officers were not served until 169 days after the initial complaint was filed.

When a party alleges a statute is unconstitutional or that the statute violates federal law, "the speaker of the assembly, the president of the senate, and the senate majority leader shall also be served with a copy of the proceeding, and the assembly, the senate, and the state legislature are entitled to be heard." § 806.04(11). Similarly, "the attorney general shall also be served with a copy of the proceeding and be entitled to be heard." *Id.* The purpose of the statute is to give the parties an opportunity to be heard. *See Town of Walworth v. Village of Fontana-on-Geneva Lake*, 85 Wis. 2d 432, 436, 270 N.W.2d 442 (1978). The requirement that must be satisfied is that the parties be served "in time to be heard prior to any determination on the merits of the constitutional claim." *See id.* at 437. If a party does not give notice to the required parties in section 806.04, the circuit court has no authority "to adjudicate a declaratory action" and must dismiss the action. *See S.R. v. Circuit Court for Winnebago Cty*, 2015 WI App 98, ¶ 10 n.7, 366 Wis. 2d 134, 876 N.W.2d 147.

Here, the Plaintiffs' initial complaint was filed on August 23, 2022, but they did not seek a declaration that a statute was unconstitutional. Thus, the Plaintiffs were not required to serve the legislative officers in section 806.04(11). On December 16, 2022, however, the Plaintiffs filed their amended complaint where they did seek a declaration that the public defense system is unconstitutional. On January 30, 2023, the Defendants filed their motion to dismiss the amended complaint. The Plaintiffs did not serve the legislative officers in section 806.04(11) until February 8, 2023. While some time elapsed since the filing of the Plaintiffs' amended complaint, the Plaintiffs have satisfied the requirement in section 806.04 given the legislative officers have received notice and now have the opportunity to be heard. Further, no determination on the merits of the constitutional claim has yet been made. Thus, the legislative officers were served in time to be heard on the Plaintiffs' constitutional claim. Because the Plaintiffs served the legislative officers in section 806.04(11), the Plaintiffs satisfied the service requirements and their amended complaint need not be dismissed.

In sum, the Plaintiffs have stated a claim under section 1983 but have failed to state a claim against Governor Evers. Thus, Governor Evers will be dismissed from this action with prejudice and the rest of the Defendants' motion to dismiss will be denied.

CONCLUSION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that Defendants' motion to dismiss is **GRANTED in part** and **DENIED in part**.