

STATE OF WISCONSIN

CIRCUIT COURT

BROWN COUNTY

**ANTRELL THOMAS**, *et al.*, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

Case No. 2022-CV-1027

v.

Hon. Thomas J. Walsh

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

Defendants.

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**NOTICE OF MOTION AND  
MOTION FOR PARTICULARIZED DISCOVERY**

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PLEASE TAKE NOTICE that Plaintiffs move this Court to lift the statutory stay of discovery and permit particularized discovery into the scope and depth of the public defense crisis in Wisconsin.

As the Court considers the Parties' pending motions to dismiss and for class certification, respectively, Plaintiffs respectfully move this court to lift the current statutory stay of discovery in place pursuant to Wisconsin Statute § 802.06(1)(b) and permit particularized discovery into the scope and depth of Wisconsin's public defense crisis. Plaintiffs submit that there is good cause for this particularized discovery given Defendants' arguments in opposition to class certification, the public interest, and the ongoing debate about the scope of this ongoing constitutional crisis.<sup>1</sup>

Under Section 802.06(1)(b), discovery in civil cases is stayed upon the filing of a motion to dismiss for a period of 180 days "unless the court finds good cause upon the motion of any party that

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<sup>1</sup> See, e.g., Colton Molesky, *Opening the Case on Wisconsin's Public Defender Problem*, WMTV NBC15 (May 30, 2023) <https://www.nbc15.com/2023/05/31/opening-case-wisconsins-public-defender-problem/> ("The Joint Finance Committee unanimously approved a plan to bump the salary for public defenders to address shortages, a move some attorneys believe could be falling short of addressing the problem.").

particularized discovery is necessary.” Good cause exists for particularized discovery here because of Defendants’ position that class certification should be denied because of no formal discovery.

In their Opposition to Plaintiffs’ class certification motion, Defendants argued that this Court should ignore all the evidence and arguments that Plaintiffs have presented up to this point and deny class certification because Plaintiffs did not attach any “requests to admit, interrogatories, deposition transcripts, or affidavits.” Opp. at 2. As explained in Plaintiffs’ Reply, however, this argument is disingenuous at best. On September 30, 2022, a full four months prior to filing their Motion for Class Certification on February 1, 2023, Plaintiffs served written discovery requests on Defendants seeking all manner of information relevant to this case. Defendants refused to respond, citing the stay triggered by their Motion to Dismiss. *See* Reply at 15. Defendants should not now be permitted to point to the lack of discovery as a justification for denying Plaintiffs’ Motion for Class Certification.

To be clear, Plaintiffs believe that class discovery is unnecessary given the judicially noticeable evidence provided and the public record, and Plaintiffs believe that Defendants are merely challenging this case of critical importance at every turn (and with every logistical obstacle they can muster) to cause additional delay in addressing this ongoing constitutional crisis.

Given how the crisis continues to unfold, however, the sequence of discovery at this point is mere semantics. The fact remains that whether the parties engage in discovery now, after class certification, or after yet another amended complaint, indigent defendants across the state will continue to be deprived of counsel while Plaintiffs (and this Court) work through the procedural roadblocks set up by Defendants. Every day, additional people are arrested only to have their constitutional right to counsel violated by Defendants who fail to appoint counsel within a reasonable time. As explained in Plaintiffs’ Opposition to Defendants’ Motion to Dismiss, the right to counsel is a fundamental right protected by both the United States Constitution and Wisconsin Constitution, and whether Wisconsin is violating this right is an issue of great public importance. Pls.’ Opp. at 20. Thus, it would be prudent

to further develop the record as soon as possible. At the very least, there is good cause for targeted, particularized discovery into the underlying documents showing the numbers, policies, and procedures reflecting the scope and depth of the crisis so that this information can quickly be used in the next stage of litigation. This would prevent any further delays once the Court resolves the pending motions, and it would cause little to no prejudice to the State, as the requested discovery should be nothing more than business records and internal policies that are readily available to Defendants. Specifically, Plaintiffs submit discovery is warranted for the following request with the following reasoning:

<b>Request</b>	<b>Why Necessary</b>
All documents showing the number of Eligible Defendants who were not appointed a lawyer within 14 days of their Initial Appearance from August 23, 2019 until the present.	Clarifies the number of individuals who would meet the class definition, which would resolve any existing doubts about whether numerosity is satisfied.
All documents showing the Eligible Defendants who, as of the date of Defendants' response, still have not been appointed a lawyer within 14 days of their Initial Appearance.	Illustrates the scope of the constitutional problem, which tends to support Plaintiffs' argument that this is an issue of great public import that satisfies several mootness exceptions.
All documents showing the percentage of cases for which the State Public Defender appoints counsel to a qualified Eligible Defendant within the first 10 days of the Eligible Defendant's Initial Appearance.	Both illustrates the scope of the constitutional problem and supports a finding of numerosity.

All copies of all iterations of the State Public Defender's Policy and Procedure Manual or its equivalent.	Clarifies the policies and procedures governing the State Public Defender's actions, which would tend to support a finding of commonality
All the State Public Defender's written policies for appointing counsel to Eligible Defendants.	Clarifies the policies and procedures governing the State Public Defender's actions, which would tend to support a finding of commonality.
All Communications by and/or between Defendants relating to the appointment of counsel for Named Plaintiffs.	Shows the Defendants common practice of delaying appointment of counsel as applied to Named Plaintiffs, which would support the finding of typicality and commonality.
Requests to admit Defendants' public statements regarding the status of public defense in Wisconsin.	Shows the Defendants' awareness of the constitutional implications of the systemic problems within Wisconsin's public defense system.

As noted above, Plaintiffs included these requests, among others, in their September 30, 2022, discovery requests. As such, Defendants cannot credibly suggest that any of this is a surprise.

WHEREFORE, Plaintiffs respectfully request that the Court lift the current stay of discovery and permit particularized discovery into the scope and depth of the public defense crisis currently playing out across the state of Wisconsin.

Dated: June 27, 2023

By: /s/ Sean H. Suber

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## CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Plaintiffs' Notice of Motion and Motion for Particularized Discovery 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: June 27, 2023

Electronically signed by:

/s/ Sean H. Suber  
SEAN H. SUBER