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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.,

Case No. 22CV1027

Defendants.

DECISION AND ORDER

Before the Court is a motion from 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 (collectively referred to as “Plaintiffs”) requesting the Court for class certification. For the following reasons, the Plaintiffs’ motion will be **DENIED**.

STANDARD

Wisconsin Statutes section 803.08 governs class actions. *See* WIS. STAT. § 803.08 (2021–22).¹ A court may certify a class if the plaintiff meets the requirements in section 803.08(1) and

¹ All subsequent references to the Wisconsin Statutes are to the 2021–22 version unless otherwise indicated.

one of the requirements in section 803.08(2). *See id.* Under section 803.08(1), a plaintiff must first show that:

- (a) The class is so numerous that joinder of all members is impracticable.
- (b) There are questions of law or fact common to the class.
- (c) The claims or defenses of the representative parties are typical of the claims or defenses of the class.
- (d) The representative parties will fairly and adequately protect the interests of the class.

§ 803.08(1)(a)-(d). These requirements are referred to as numerosity, commonality, typicality, and adequacy of representation. *See Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶ 23, 388 Wis. 2d 546, 933 N.W.2d 654.

Once the plaintiff satisfies the requirements in section 803.08(1), the plaintiff must next show that one of the requirements in section 803.08(2) is met. *See* § 803.08(2). Here, the Plaintiffs seek to maintain their class action under section 803.08(2)(b). Under section 803.08(2)(b), the plaintiff must show that “[t]he party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” § 803.08(2)(b). This section applies “only when a single injunction or declaratory judgment would provide relief to each member of the class.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). It does not, however, allow certification “when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant.” *Id.* at 360.

The plaintiff seeking class certification has “the burden of showing by a preponderance of the evidence that certification is proper.” *Orr v. Shicker*, 953 F.3d 490, 497 (7th Cir. 2020).² A failure to satisfy the requirements in sections 803.08(1) and (2) precludes class certification. *See id.* at 497. If the court certifies the class, it “shall certify the action accordingly on the basis of a

² Wisconsin courts look to federal case law for guidance on class actions. *See Harwood*, 388 Wis. 2d 546, ¶ 5.

written decision setting forth all reasons why the action may be maintained and describing all evidence in support of the determination.” § 803.08(11)(a). Whether to “grant or deny a motion for class certification is committed to the trial court’s discretion.” *Harwood*, 388 Wis. 2d 546, ¶ 41. If the court certifies the class, the order “must define the class and the class claims, issues, or defenses, and must appoint class counsel under sub. (12).” § 803.08(3)(b). “When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.” § 803.08(7).

ANALYSIS

The Plaintiffs seek to certify a class that includes past, current, and future defendants who, on or after January 1, 2019, requested and were found eligible for appointed counsel but did not receive appointed counsel within fourteen days of their initial appearance. Alternatively, the Plaintiffs propose three subclasses that include a similar class of defendants who did not receive counsel within either thirty, sixty, or 120 days of their initial appearance. The factual background is the same as the factual background in this Court’s decision on the Defendants’ motion to dismiss. That factual background is incorporated into this decision. Additional facts from the parties’ exhibits will be referred to within this decision.

I. Numerosity

Numerosity requires the plaintiff to show that “[t]he class is so numerous that joinder of all members is impracticable.” § 803.08(1)(a). The class representative must show that joinder of all members of the class is extremely difficult or inconvenient. *Anderson v. Weinert Enters., Inc.*, 986 F.3d 773, 777 (7th Cir. 2021). A class may be certified without determining its size as long as it is “reasonable to believe it large enough to make joinder impracticable and thus justify a class action suit.” *Orr*, 953 F.3d at 497 (quoting *Chapman v. Wagener Equities, Inc.*, 747 F.3d 489, 492 (7th Cir. 2014)). While no specific number for class size applies to every case, “a forty-member

class is often regarded as sufficient to meet the numerosity requirement.” *Id.* at 498 (quoting *Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017)).

In support of numerosity, the Plaintiffs provide the March 17, 2021 meeting minutes of the Brown County Board of Supervisors, a press release from the Office of Governor Tony Evers, and several newspaper articles describing the public defender shortage and its impact on indigent defendants. (Suber Decl. Exs. A-C, E-H.) The meeting minutes note that as of March 17, 2021, the Office of the State Public Defender (“SPD”) needed to appoint attorneys in 350 cases in Brown County and fifty cases in Outagamie County. (*Id.* Ex. A.) The minutes also note that seventeen defendants had been in custody for more than 100 days and about twenty-seven defendants had been in custody between thirty and 100 days. (*Id.*)

The press release from the governor’s office provides that the governor announced funding “to help alleviate the pandemic-related backlog of criminal cases through additional public defender and assistant district attorney support.” (*Id.* Ex. B.) The newspaper articles describe the public defender shortage, the problem with finding a lawyer from the private bar who is willing to take a case, the amount of time defendants in custody in Marathon and Racine County have been waiting to receive appointed counsel, and the backlog of cases the SPD faces for several different reasons. (*Id.* Exs. C, E-H.) The Plaintiffs assert that based on the evidence provided, “the proposed class numbers in the thousands, if not the tens of thousands.” (Pls.’ Br. Supp. Class Cert. 6.)

The Plaintiffs’ supporting documents do not support a finding of numerosity. First, the Plaintiffs provide no evidence of any indigent defendants in 2019 or 2020 who have not received appointed counsel within fourteen days of their initial appearance. The Plaintiffs here had their initial appearance in 2021 or 2022. Thus, the indigent defendants from 2019 and 2020 cannot be included in the numerosity determination. Nor can they be members of the class. Second, the

Plaintiffs provide some evidence of defendants waiting to receive appointed counsel in Brown, Outagamie, Marathon, and Racine counties, but seek to include every current and future indigent defendant in the state of Wisconsin that has not or will not receive appointed counsel within fourteen days after their initial appearance. The number of class members that fall into this category would certainly fall in the thousands but without more evidence of class members in other counties in the state that have been waiting to receive appointed counsel, the Court cannot find that the Plaintiffs satisfy the numerosity requirement.

II. Commonality

Commonality requires the plaintiff to show “[t]here are questions of law or fact common to the class.” § 803.08(1)(b). The commonality requirement is met when the plaintiff shows the class members suffered the same injury. *Dukes*, 564 U.S. at 349-50. This, however, “does not mean merely that they have all suffered a violation of the same provision of law.” *Id.* at 350. Instead, the claim must depend on a common contention. *Id.* The common contention “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” *Id.* What matters is “the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.” *Id.* (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

Here, the Plaintiffs cannot satisfy the commonality requirement because the proposed class members’ claims will not generate a common answer to whether the delays they experienced in receiving appointed counsel were unreasonable. The Plaintiffs and the proposed class members have experienced delays in receiving appointed counsel and allege those delays deprived them of

their sixth amendment right to counsel. The central question to the Plaintiffs' and each proposed class members' claim is whether the delay they experienced was unreasonable. The answer to this question, however, may not generate a common answer as the delays in some cases may be reasonable while delays in other cases may be unreasonable. Each Plaintiff and each proposed class member has their own set of facts that will determine the reasonableness of the delay in receiving appointed counsel. Thus, each Plaintiff and class member's set of facts will provide different answers to whether the delay they experienced in receiving appointed counsel was unreasonable. Because their claims will result in different answers, the Plaintiffs and proposed class members' claims do not depend on a common contention that can be resolved "in one stroke." Therefore, the Plaintiffs have not satisfied the commonality requirement.

III. Typicality

Typicality requires the plaintiff to show that "[t]he claims or defenses of the representative parties are typical of the claims or defenses of the class." § 803.08(1)(c). The typicality requirement is met if the claims arise from the same practice or course of conduct that gave rise to the claims of other class members, the claims are based on the same legal theory, and the claims "have the same essential characteristics as the claims of the class at large." *See Hammett v. Verisma Sys., Inc.*, 2021 WI App 53, ¶ 20, 399 Wis. 2d 211, 963 N.W.2d 874. In other words, there must be "enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Orr*, 953 F.3d at 500 (quoting *Spano v. Boeing Co.*, 633 F.3d 574, 586 (7th Cir. 2011)).

Here, the Plaintiffs satisfy the typicality requirement because, even though the Plaintiffs have received appointed counsel, their claims remain the same as the rest of the proposed class members. The Plaintiffs and the proposed class members' claims are that they did not receive

appointed counsel within a reasonable time after their initial appearance. The claims are based on the sixth amendment right to counsel and brought under 42 U.S.C. § 1983. Each Plaintiff and each class member has experienced or is experiencing a delay in receiving appointed counsel. While the facts and circumstances of each claim may vary, the characteristics are essentially the same. That is, the Plaintiffs and the proposed class members have waited a certain amount of time to receive appointed counsel after their initial appearance and they allege the amount of time they have waited is unreasonable. Thus, there is sufficient congruence between the Plaintiffs' claims and the claims of the proposed class that justifies allowing the Plaintiffs to litigate on behalf of the group. Therefore, the typicality requirement is satisfied.

IV. Adequacy of Representation

Adequacy of representation requires the plaintiff to show that “[t]he representative parties will fairly and adequately protect the interests of the class.” § 803.08(1)(d). The adequacy requirement is met if the class representative is part of the class, possesses the same interest as the other class members, and suffers the same injury as the other class members. *See Orr*, 953 F.3d at 499. The primary criteria used to determine adequacy of representation are: “(1) whether the plaintiffs or counsel have interests antagonistic to those of absent class members; and (2) whether class counsel are qualified, experienced and generally able to conduct the proposed litigation.” *Cruz v. All Saints Healthcare Sys., Inc.*, 2001 WI App 67, ¶ 18, 242 Wis. 2d 432, 625 N.W.2d 344.

Here, the Plaintiffs represent the interests of the proposed class members because they were eligible for representation by appointed counsel, experienced delays in receiving appointed counsel, and allege they did not receive appointed counsel within a reasonable time after their initial appearance. Even though the Plaintiffs have now received appointed counsel, they still are part of the class because the alleged injury suffered is the unreasonable delay in receiving

appointed counsel. Thus, the Plaintiffs do not have interests antagonistic to those of the proposed class members.

Additionally, the Plaintiffs' proposed class counsel are qualified and experienced counsel that are capable of conducting the action. Class counsel consists of a group of attorneys from Winston & Strawn LLP, Birdsall Obear & Associates, Schultz Law Office, the National Association of Criminal Defense Lawyers, and the Center on Race, Inequality, and the Law, New York University School of Law. (*See* Suber Decl. ¶¶ 2-7.) The attorneys from each of these firms and groups have experience in litigating class actions regarding civil rights, experience in criminal defense litigation at the trial and appellate level, experience in the management of SPD appointments and cases, and experience in challenging the constitutionality of public defense systems in other states. (*See id.*) The Plaintiffs provide class counsel's qualifications and experience in the Declaration of Sean Suber supporting the Plaintiffs' reply brief. Thus, class counsel are qualified, experienced, and able to conduct the proposed litigation.

Nevertheless, the Plaintiffs cannot satisfy two of the four requirements for class certification under section 803.08(1). Specifically, numerosity and commonality. Thus, the Plaintiffs' motion for class certification will be denied.

CONCLUSION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that the Plaintiffs' motion for class certification is **DENIED**.