

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2026AP244

ANTRELL THOMAS, MELVIN CLEMONS, CHRISTIAN PITTMAN,
CHANCE KRATOCHVIL, KELSIE McGESHICK, LOGAN AR-
SENYEVICTZ, JEROME BROST and DWIGHT MOORE,

Petitioners-Appellants,

v.

ANTHONY S. EVERS,

Respondent

JENNIFER BIAS, JAMES M. BRENNAN, JOHN J. HOGAN, ELLEN
THORN, ANTHONY COOPER, SR., REGINA DUNKIN, PATRICK J.
FIEDLER, INGRID JAGERS, JOSEPH MIOTKE, and MAI NENG
XIONG,

Respondents-Respondents.

Appeal from an Order Denying Class Action Certification of the Circuit
Court of Brown County, the Honorable Thomas J. Walsh Presiding,
Circuit Court Case No. 2022CV001027

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STATEMENT OF THE ISSUES

1. Whether Plaintiffs established that there is at least one “question of law or fact common to the [proposed] class.” Wis. Stat. § 803.08(1)(b).

The circuit court answered no.

2. Whether Plaintiffs established that Defendants “ha[ve] acted or refused to act on grounds that apply generally to the [proposed] class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Wis. Stat. § 803.08(2)(b).

The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Given the importance of the subject matter and complexity of the issues, Plaintiffs request oral argument for this appeal. Plaintiffs request that the Court's decision be published.

INTRODUCTION

There is no dispute that, for the last decade, the State of Wisconsin has brought felony charges against thousands of Wisconsinites who were too poor to afford legal representation but failed to appoint attorneys on their behalf for weeks, months, and—in some cases—*more than a year*. There is no dispute these lengthy appointment delays stem from myriad, chronic deficiencies in Wisconsin’s public defense system. And there is no dispute that extended periods without counsel at the initial stage of a prosecution jeopardize the adequacy of these individuals’ defenses. Indeed, the only dispute here is whether the Wisconsin judiciary can do anything to systematically address this public defense crisis.¹

According to the Brown County circuit court, the answer is “no”: Despite the fact that these individuals suffered a common injury at the hands of the State, the circuit court concluded that they cannot litigate their right-to-counsel claims on a classwide basis. The upshot of the circuit court’s decision is that each of these defendants must individually raise and litigate their own constitutional claim—and that they must either do so without an attorney’s assistance or wait to do so until the State finally appoints counsel on their behalf.

The circuit court is wrong, however, and this Court should reverse the circuit court’s denial of class certification for two reasons.

First, the circuit court erred by concluding Plaintiffs had not satisfied Section 803.08(1)(b)’s commonality requirement. Specifically, the circuit court completely failed to consider Plaintiffs’ first common question—whether the first 30 days of a criminal prosecution is a critical

¹ R.180:7–8 (KELLI THOMPSON: “[I]t is absolutely a crisis.”).

stage of the proceedings—an erroneous exercise of discretion. As to Plaintiffs’ second common question—whether a 30-day appointment delay is per se unreasonable—the court misapplied the law in finding that this question was not common to the class. *Second*, the circuit court erred by concluding Plaintiffs had not satisfied Section 803.08(2)’s “common relief” requirement. The court failed to consider one of the forms of equitable relief sought—a declaratory judgment—and misapplied the law in concluding that Plaintiff’s requested injunction would not provide class-wide relief.

STATEMENT OF THE CASE

I. Nature of the Case

Plaintiffs filed this putative class action on behalf of themselves and other Wisconsinites who did not receive public defense counsel within 30 days after their initial appearances solely because the State failed to provide them with an attorney. On behalf of themselves and the putative class, Plaintiffs raise right-to-counsel claims under the Sixth Amendment and Wisconsin Constitution and seek classwide equitable relief, including a declaratory judgment establishing that their constitutional rights have been violated. Because the State purports to comply with its right-to-counsel obligations through the Office of the State Public Defender (“SPD”), Plaintiffs named the public officials responsible for managing the SPD as Defendants, including the State Public Defender and members of the State Public Defender Board (the “SPD Board”). Plaintiffs’ claims rest on two theories:

1. **Plaintiffs’ Critical Stage Theory:** The first 30 days of a prosecution is a “critical stage” of the proceedings such that denial of counsel during this period violates the right to counsel; and
2. **Plaintiffs’ Unreasonable Delay Theory:** A greater-than-30-day delay in the appointment of counsel caused solely by the State’s failure to provide an attorney is unreasonable and therefore violates the right to counsel.

In Wisconsin, as in most jurisdictions, a plaintiff seeking class certification must establish four prerequisites: numerosity, commonality, typicality, and adequacy of representation. Wis. Stat. § 803.08(1). The only one of these four prerequisites at issue in this appeal is “commonality”—whether “there are questions of law or fact common to the class.”

Id. § 803.08(1)(b). For a plaintiff seeking certification under Section 803.08(2), as Plaintiffs are here, the plaintiff must also establish that the defendant “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.” *Id.* § 803.08(2). Both the “commonality” requirement and the “common relief” requirement ensure that the class is cohesive enough for its members’ claims to be adjudicated collectively. These requirements are satisfied when the defendants have treated each proposed class member in a similar manner, and each proposed class member has suffered a similar harm as a result—common treatment and common injury.

Like other civil rights cases addressing systemic constitutional violations by state officials, this case involves common treatment and common injury:

Common Treatment. Defendants failed to secure legal representation for each class member within 30 days of their initial appearances. These identical failures—which are effectively denials of counsel—constitute common treatment of the class. Moreover, Plaintiffs have established that the SPD’s appointment policies and practices apply similarly to all qualified defendants statewide, including all members of the proposed class.

Common Injury. Under Plaintiffs’ proposed class definition, each class member did not receive counsel for more than 30 days after their initial appearances because Defendants did not secure an attorney for them. Plaintiffs further demonstrated that during this initial 30-day stage, certain crucial events, deadlines, and other circumstances occur in a Wisconsin criminal case for which a defendant needs legal

assistance, and therefore, the absence of counsel during this time jeopardizes the adequacy of each class member's defense.

To satisfy Section 803.08(1)'s commonality requirement, Plaintiffs identified two questions that connect Defendants' common treatment to the class's common injury:

1. **Common Question #1:** Whether the first 30 days of the prosecution is a "critical stage" of the proceedings; and
2. **Common Question #2:** Whether a greater-than-30-day appointment delay resulting from Defendants' failure to appoint counsel on their behalf is *per se* unreasonable.

Each of these questions goes to the heart of Plaintiffs and the proposed class members' right-to-counsel claims and is capable of classwide adjudication—the answer will be either a collective "yes" or a collective "no." Plaintiffs have also demonstrated that their proposed class satisfies Section 803.08(2)(b) because they seek a declaratory judgment that would establish that each class member's constitutional rights have been violated, among other equitable relief.

Accordingly, the circuit court's refusal to certify Plaintiffs' proposed class was an erroneous exercise of discretion. The court's decision rested on a number of legal and analytical errors addressed below, but three bear mentioning at the outset:

First, in its commonality analysis, the circuit court completely failed to consider Plaintiffs' first proposed common question—whether the first 30 days of the prosecution is a "critical stage of the proceedings." This was an abuse of discretion, especially considering that even a single common question satisfies the commonality requirement.

Second, the circuit court held that, to show common treatment by

Defendants, Plaintiffs must show that the SPD had a deliberate policy in place to deny qualified defendants an attorney. This is a clear error of law. A plaintiff can establish common treatment through passive conduct—such as a failure to provide counsel—provided that such conduct affects class members similarly. Further, no mental state is required with respect to right-to-counsel violations.

Third, the circuit court erroneously concluded that the existence of case-specific “environmental” factors—such as the number of private-bar attorneys willing and able to take the case in question—means that Plaintiffs cannot show that the 30-day delays suffered by class members are categorically unreasonable. The law does not require that the proposed class members’ circumstances be identical in all respects. And, in any event, these environmental differences are irrelevant to the right-to-counsel claims of Plaintiffs and the proposed class: Whether a stage is “critical” and whether counsel was appointed within a reasonable time both turn on *the objective impact of counsel’s absence on an accused*, not on the *reasons* for the State’s failure to provide counsel. Further, by creating a public defense system that relies heavily on private-bar attorneys and then chronically underpaying them for years, the State’s own actions have caused—or at least heavily contributed to—these conditions.

Accordingly, the circuit court erred by concluding that Plaintiffs had failed to satisfy Section 803.08(1)(b)’s “commonality” requirement and Section 803.08(2)(b)’s “common relief” requirement, and the Court should reverse the circuit court’s denial of class certification and remand

this case for further proceedings.

II. Statement of Facts

To provide the factual context underlying Plaintiffs’ class certification motion, the following sections describe the structure of Wisconsin’s public defense system, *see infra* Section A, the SPD’s appointment policies and practices, *see infra* Section B, the nature and scope of the crisis, *see infra* Section C, and the effects of the crisis on defendants, *see infra* Section D.

A. The Structure of Wisconsin’s Public Defense System

To fulfill its constitutional obligation to promptly provide counsel to qualified defendants, Wisconsin has enacted a statutory scheme that provides for the establishment, funding, and operation of a statewide public defense system administered by the SPD.² An independent government agency, the SPD is responsible for providing legal representation to qualified defendants in Wisconsin. The stated mission of the SPD is to “zealously represent clients, protect constitutional rights, and advocate for an effective and fair criminal justice system.”³

The SPD is led by the State Public Defender.⁴ By statute, the State Public Defender is responsible for “supervis[ing] the operation, activities, policies and procedures of the [SPD]”⁵ and “mak[ing] all final decisions

² *See generally* Wis. Stat. ch. 977.

³ *See* Wisconsin State Public Defender – Mission And Vision, <https://www.wisspd.gov/mission-and-vision> (last visited Apr. 13, 2026).

⁴ Wis. Stat. §§ 977.05–.08.

⁵ *Id.* § 977.05(4)(a).

regarding the disposition of any case handled by the office,”⁶ among other responsibilities. To carry out this mandate, the State Public Defender may “delegate the legal representation of any person to any [certified] member of the State Bar of Wisconsin[.]”⁷ The State Public Defender at the time this lawsuit began was Kelli Thompson; the current State Public Defender is Defendant Jennifer Bias.⁸

The SPD Board has ultimate supervisory authority over the State Public Defender and the SPD.⁹ By statute, the Board must appoint the State Public Defender and may remove the State Public Defender through a specified procedure.¹⁰ Moreover, the Board may promulgate certain kinds of rules for the SPD’s operation, including those for determining eligibility for SPD representation,¹¹ and for handling conflicts of interest cases.¹² However, the Board may not (and does not) exercise day-to-day supervision over SPD operations.¹³ The current Board consists of Defendants Ellen Thorn, Joseph Miotke, Anthony Cooper, Jr.,

⁶ *Id.* § 977.05(4)(b).

⁷ *Id.* § 977.05(5)(a).

⁸ Leadership, *State Public Defender: Jennifer Bias*, Wis. State Pub. Def., <https://www.wisspd.gov/about/leadership/>; *see also* R.169:13.

⁹ Wis. Stat. §§ 977.02–.04.

¹⁰ *Id.* §§ 977.02(1), 977.03(1).

¹¹ *Id.* § 977.02(2m).

¹² *Id.* § 977.02(6).

¹³ *Id.* § 977.04.

Ingrid Jagers, T.R. Williams, Mai Neng Moua, Martina Gauthier, Deja Vishny, and Dr. Charles Westerberg.¹⁴

Through their collective administration of the SPD, Defendants are the public officials responsible for fulfilling Wisconsin’s constitutional obligation to promptly appoint public defense counsel to qualified defendants.¹⁵ Accordingly, they are the proper defendants against whom to assert claims that the State violated the constitutional rights of Plaintiffs and the proposed class.

B. The SPD’s Appointment Policies and Practices

The SPD provides legal representation to qualified defendants by appointing either SPD staff attorneys or members of the private bar willing to accept SPD appointments.¹⁶

Currently, the SPD maintains a registry of roughly 900 private bar attorneys who are certified to take SPD appointments.¹⁷ To be certified, attorneys must complete an application process with the SPD.¹⁸ According to the SPD’s Assigned Counsel Division Manual, the SPD gives certified private bar attorneys complete discretion over which appointments to accept (if any).¹⁹

¹⁴ Public Defender Board, Wis. State Pub. Def., <https://www.wisprd.gov/about/leadership/>.

¹⁵ About SPD, How It Works, Wis. State Pub. Def., <https://www.wisprd.gov/about/how-it-works/>.

¹⁶ R.175:29.

¹⁷ R.172:12.

¹⁸ *Id.* at 10–11; *see also* Wis. Admin. Code PD 1.04.

¹⁹ R.181:14 (“Attorneys may accept or decline cases . . . There is no minimum number of cases that [they] must take.”).

The State Public Defender has the responsibility to secure counsel²⁰ but largely delegates this duty to the local SPD offices. Specifically, local SPD offices determine whether to assign a case to an SPD staff attorney or to look for a member of the private bar.²¹ However, the factors that the local SPD offices must consider in this determination are the same and include the SPD staff attorney workloads as well as ethical considerations, such as whether the SPD believes it would be a conflict of interest to represent the defendant.²² According to the SPD, “the most important consideration is the timely appointment of counsel.”²³ Ultimately, however, the State Public Defender has the final say on appointment decisions and can decide whether a case is handled by an SPD staff attorney or a member of the private bar.²⁴ The SPD assigns approximately 60% of cases to its staff attorneys and 40% to the private bar.²⁵

The State Public Defender also largely delegates the responsibility for finding and appointing private bar attorneys to the local SPD offices.²⁶ According to the SPD’s official policy, such appointments must occur “as soon as possible” with a stated goal of appointing an attorney within 72 hours.²⁷ Nothing in the policy defines “as soon as possible,”

²⁰ R.169:19.

²¹ *Id.* at 7.

²² *Id.*

²³ *See* R.164:9.

²⁴ R.169:14.

²⁵ R.172:10.

²⁶ *See* R.164:8.

²⁷ R.164:8; R.175:33 (“Q. So the SPD’s goal is to appoint counsel within 72

however.²⁸ In addition, the SPD has no procedures or practices in place to measure or monitor the local SPD office’s compliance with this policy—let alone enforce it.²⁹

Beyond the vague, directive to appoint counsel “as soon as possible,” the State Public Defender does not provide direction or guidance to the local SPD offices about whether and how to prioritize cases.³⁰ Nor does the SPD have any established procedures permitting the local offices to escalate the cases that have been pending for extraordinary amounts of time³¹ (except if the defendants file a class action lawsuit, apparently).

Unsurprisingly, this results in a free-for-all in which the local SPD offices send lists of available appointments to local private-bar attorneys *en masse* and the attorneys pick and choose which cases they wish to take.³² There is no prioritization of those who are in custody, or of those with the most serious charges; there is no structure for a first in, first out process pairing the next available qualified lawyer with the next case

hours . . .?” “A. [Y]es.”).

²⁸ R.169:19.

²⁹ See R.175:33 (“Q. Does the SPD office monitor in how many cases it’s meeting the goal . . .? A. I don’t know . . .”), (“Q. Do you have any sense about how often the SPD would not hit that goal? A. No. I couldn’t say.”); R.170:16; R.172:13.

³⁰ See R.175:32 (“Q. So the SPD and the administrative office w[ere] not telling local offices, ‘This is how we need to prioritize cases? A. No.’); *id.* (“A. I would never say, ‘You have to prioritize this.’”).

³¹ See *id.* at 31 (“Q. So there [is] no . . . system for sending things up the chain . . .?” “A. No” “Q. [I]t just was more informal and ad hoc? A. Right.”).

³² See R.172:6 (“Q. . . . Is there any policy or guidance that’s determining how it is you prioritize cases or make them available to private bar attorneys? A. There is no policy on that.”); *id.* at 7 (“Q. [P]ractically speaking, is there like an order in which cases are appointed and assigned? A. No.”).

on the list. As a result, some individuals may get their case picked up in a day or two; others may wait a week or two, or a month or two, or even more than a year.

Despite being responsible for timely appointments, and well aware of the ongoing crisis, the SPD does little to monitor delays statewide. The SPD does not have a centralized system for determining how many defendants are waiting for attorneys across the state, let alone how long these individuals have been waiting.³³ When the SPD wants to obtain this information, it must piece together informal, ad hoc reports from the local offices.³⁴

Indeed, Defendants and their staff admitted that the SPD does not have any enforced policies, procedures, or practices to ensure that defendants are appointed counsel within any particular time after their prosecutions begin—let alone within its stated goal of 72 hours.³⁵

C. The Nature and Scope of the Public Defense Crisis

Over the last decade, the Wisconsin public defense system has been plagued with widespread delays in the appointment of counsel lasting weeks, months, and even years.³⁶ These delays have not been

³³ See R.170:14 (“Q. . . . There is not a centralized system for tracking which defendants are waiting to be assigned counsel; is that correct? A. Correct.”).

³⁴ See R.175:10 (“I would have no ability . . . as the state public defender to track locally. I would have to call [the local offices] and say . . . ‘what are we looking at?’”).

³⁵ See R.170:12 (“[D]oes the [SPD] have any policies in place specific to timely appointing counsel for eligible criminal defendants? A. No.”).

³⁶ See R.175:6 (“Q. Are you aware of . . . qualified indigent defendants experiencing . . . delays [in the appointment of counsel]? A. Yes . . . this was an ongoing issue for our agency for some time. . . . We do not always have enough attorneys who are willing or able to take the number of cases”); R.169:21 (“Q. Do you agree that

limited to a few counties or regions. Nor have they affected only certain types of cases. Rather, these delays have adversely impacted thousands of defendants charged with all kinds of offenses in every corner of the state.

The state of Wisconsin’s public defense system has been rapidly worsening over the last decade. As Defendant Jennifer Bias, the current state public defender, recounts, “in 2015 I felt we were showing some signs of maybe beginning to struggle . . .”³⁷ By 2018, Bias testified that the problem was acute in the Western and Northern parts of the state.³⁸ And by fall of 2019, these delays had escalated into a statewide emergency. Speaking at the Marquette University Law School on October 15, 2019, then-State Public Defender Kelli Thompson repeatedly characterized the situation as a “crisis”:

It’s a crisis . . . We’ve had people sitting in custody on conflict cases literally we were making hundreds of calls to get one attorney to come take a case. . . . And so it’s absolutely a crisis. . . . [P]eople should not be sitting in custody without representation because we can’t find an attorney to take this case. . . that throws their entire life upside down when we do that.³⁹

Thompson also made clear that while the problem had originated with serious, complex cases, by the fall of 2019, it had expanded to “run

there has been a longstanding problem in Wisconsin with getting enough lawyers . . . for . . . [e]very indigent criminal defendant? A. Yes . . .”).

³⁷ R.169:21.

³⁸ *Id.* at 22.

³⁹ R.180:7–8; *see also* R.175:27 (“[I]n 2019 at \$40 an hour . . . we just couldn’t find enough attorneys to take it. So many people were coming into the system. . .”).

of the mill” cases.⁴⁰ Later, Thompson clarified that the crisis to which she was referring was not limited to certain parts of the state and was ongoing.⁴¹

The pandemic served only to exacerbate an already dire situation.⁴² By 2021, according to State Public Defender Bias, the “incredible backlog” of cases had spread “state wide.”⁴³ At that point, even “metropolitan areas like Madison and Milwaukee were having challenges” with timely appointing counsel, and the SPD was “having staff challenges” across the entire state.⁴⁴

Even as the pandemic retreated, the problems of being able to promptly provide counsel remained. Ongoing case backlogs and SPD vacancies combined with resumption of pre-pandemic prosecution rates made case delays common. When Kelli Thompson ended her tenure as State Public Defender in October of 2023, the crisis was ongoing.⁴⁵

Two and a half years later, Wisconsin’s statewide public defense crisis continues. When asked to identify parts of the state where it is

⁴⁰ R.180:7 (“Before it used to be the really serious cases, but these were . . . what I would consider more the run-of-the mill cases.”).

⁴¹ See R.175:9 (“[I]f I’m calling it a crisis in 2019, it was something that we were seeing across the state. . . . even in bigger counties [a]nd it wasn’t just at the moment. It’s looking forward”); *id.* (“[I]t wasn’t just an individual county issue[.]”).

⁴² R.175:8 (“And then COVID hit, so then that obviously had a significant impact.”).

⁴³ R.169:23–24.

⁴⁴ *Id.* at 24.

⁴⁵ R.175:15 (Thompson admitting the “ongoing public defender crisis” referenced in June 2022 SPD board meeting minutes is the same as from her October 2019 remarks); *id.* (admitting the backlog still existed when she left office in October of 2023).

difficult to make appointments, State Public Defender Bias answered: “As of today? Everywhere.”⁴⁶ And Kate Drury, in speaking to her experience as a Regional Attorney Manager, stated that it was “common” to “require a call to every lawyer in Wisconsin” to obtain appointed counsel for clients waiting for private-bar representation.⁴⁷

Although Defendants concede that there is a crisis, they themselves have been unable to fully ascertain (or meaningfully respond to) its scope. As explained above, the SPD does not track how long defendants are waiting to be appointed attorneys in any centralized or systematic manner.⁴⁸

Accordingly, to ascertain the scope of the delays, Plaintiffs retained Dr. Kirti Gupta and her team from Cornerstone Research (“Cornerstone”), an expert analytics and consulting firm. Building on information produced by Defendants in discovery, Dr. Gupta and Cornerstone conducted a comprehensive analysis of publicly available data from the Wisconsin Circuit Court Access Portal. Pursuant to this analysis, Dr. Gupta and Cornerstone identified 8,445 eligible defendants in felony cases awaiting appointed counsel for more than 30 days after the initial appearance.⁴⁹ The results of this analysis underscore that the lengthy delays in appointment of counsel are a statewide problem, impacting defendants facing a range of charges.

⁴⁶ R.169:21.

⁴⁷ *See* R.174:13.

⁴⁸ *See* R.172:15 (“[T]here’s no statewide monitoring of which defendants or how many defendants are waiting to be appointed counsel, right? A. I am not aware of it. . . .”).

⁴⁹ R.166:4.

D. The Effects of the Crisis on Defendants

The widespread delays experienced by thousands of defendants statewide fundamentally impair their ability to defend themselves.

To better understand the impact of these delays, Plaintiffs retained three experts: Professor Eve Brensike Primus, Dr. Aaron S. Benjamin, and Professor Brian L. Landers.

Primus. Professor Primus is a distinguished law professor at the University of Michigan Law School and expert in public defense systems. Plaintiffs retained Professor Primus to evaluate Wisconsin's process for appointing counsel to qualified defendants. Leveraging her extensive experience as a public defender and a researcher with expertise on the structure of public defense delivery systems nationwide, she attended multiple hearings in Brown and Shawano counties, reviewed applicable law and academic studies, and conducted interviews with knowledgeable practitioners. Her expert assessment was that the systemic appointment delays experienced by defendants across the state critically undermine their ability to defend themselves and necessitate structural reform.⁵⁰

Benjamin. Dr. Benjamin is a professor of psychology and neuroscience at the University of Illinois Urbana-Champaign. Plaintiffs retained Dr. Benjamin to explain the effects of delayed investigations on witness memory in forensic contexts. Drawing from his extensive research on human memory, forgetting, and decision-making, Dr. Benjamin reviewed relevant scientific literature and applied psychological principles to explain the degradation of witness testimony over time.⁵¹

⁵⁰ *See generally* R.165.

⁵¹ *See generally* R.167.

Dr. Benjamin's testimony highlights how memory quality decreases rapidly after an event, making early evidence collection crucial.⁵² Delays in information gathering and witness interviewing increase the risk of memory distortion, loss of critical details, and susceptibility to post-event influences, all of which compromise the accuracy and reliability of an eyewitness' testimony.⁵³

Landers. Professor Landers is a seasoned expert in law enforcement practices, criminal justice education, and evidence management in the state of Wisconsin. Plaintiffs retained Professor Landers to evaluate the impact of delays on criminal evidence. Landers analyzed the effects of time on the collection, storage, and analysis of physical and witness evidence.⁵⁴ His findings indicate that delays can significantly compromise evidence integrity, degrade physical evidence, and diminish witness reliability.⁵⁵ And he concluded that timely prosecution is critical to maintaining the availability and reliability of evidence, and delays pose substantial risks to the integrity of criminal investigations.⁵⁶

As set forth below, the testimony of Plaintiffs' experts establishes that the lengthy delays in the appointment of counsel impair defendants' ability to adequately defend themselves against the charges for which they stand accused.

⁵² *Id.* at 5–7.

⁵³ *Id.*

⁵⁴ *See generally* R.168.

⁵⁵ *Id.*

⁵⁶ *See id.* at 5.

Evidence Identification, Collection, Documentation, and Preservation. As multiple Defendants have admitted, without counsel, defendants are unable to identify, collect, document, and preserve relevant evidence.⁵⁷ This includes favorable, exculpatory evidence, such as that which might support an alibi or cast doubt on a witness’s credibility or accuracy. It also includes evidence that can be used to mitigate guilt, identify alternate suspects, or raise questions as to the accuracy of the state’s case.

Three types of evidence are at risk of deterioration or deletion over time:

1. **Physical evidence**, such as fingerprints and DNA.⁵⁸
2. **Digital evidence**, such as emails and video recordings, which is often subject to automatic deletion protocols.⁵⁹
3. **Eyewitness testimony** before the witness’s memories fade and become unreliable.⁶⁰

⁵⁷ See R.176:98 (“Q. [I]s the ability of defendants to gather relevant evidence hindered by not getting appointed counsel within a timely manner? A. Yes.”); R.172:72–73 (noting that an attorney should investigate as soon as possible because “people’s memories fade,” “witnesses disappear,” and that “digital evidence and video surveillance may be overwritten”); R.174:53 (same); R.169:39 (same).

⁵⁸ See R.168:7 (noting that because physical evidence deteriorates, “the race against time begins the moment the events have occurred”); see also R.175:82 (“Q. Physical evidence deteriorates? A. Right.”); R.172:72 (same); R.173:53 (same).

⁵⁹ See generally R.168.

⁶⁰ See R.165:13 (“Late-appointed counsel is unable to interview the client and witnesses while their memories are fresh before important details are forgotten.”); R.167:1 (“When an investigation is not promptly begun, there is a significant risk that forgetting will reduce the quality of the evidence.”); see also R.169:40 (acknowledging that, over time, “people’s memor[ies] are going to fade regardless of what type of case it is.”); R.175:82 (same).

Thus, if defense counsel is not promptly appointed, a defendant may not be able to identify, collect, and preserve exculpatory evidence, which fundamentally impairs their defense.

Assertion of Rights and Navigation of the Legal System. Lengthy delays also impair defendants' ability to assert their rights and otherwise navigate the legal system during crucial points during the proceedings. Within 30 days of a defendant's initial appearance, a defendant is entitled to a preliminary hearing (Wis. Stat. § 970.03(2)) and either a pretrial detention hearing (*id.* § 969.035) or bond review hearing (*id.* § 969.08). Moreover, a defendant is entitled to challenge the sufficiency of the criminal complaint (*id.* § 971.31(5)) and is required to give notice of any alibi defense (*id.* § 971.23). An uncounseled defendant is unable to meaningfully exercise these rights or satisfy these obligations. Further, unrepresented individuals are not able equipped to adequately handle other circumstances which may occur within 30 days after their initial appearances: whether to plead guilty;⁶¹ how to contest custody and fight for reasonable bail conditions;⁶² whether to engage in plea

⁶¹ R.165:19. ("The lack of available counsel increases the pressure on [defendants] 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.").

⁶² *Id.* ("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.").

negotiations;⁶³ when and how to assert constitutional rights (speedy trial, right to counsel, etc.);⁶⁴ and how to raise competency issues.⁶⁵

With no one to help explain the process or answer critical questions, those who are unrepresented can spend weeks, months, or more in limbo—not knowing what is happening, what rights they can assert, or how to raise and frame legal challenges. For those at liberty, each trip back to court, each day taken off from work, each ride secured from a friend or neighbor, each hour spent waiting in a courtroom only to hear a recitation of the same script—of whether they still want a lawyer, that one has not been located, that they should keep calling the SPD to find out whether a lawyer has been located, and for them to return again in 30, 45, or 60 days to engage in this same exercise again—erodes their confidence in the fairness of the legal system and their resolve to battle.

For those in custody, without a lawyer, they are left on their own to navigate efforts to be heard in court. Pitted against a trained, experienced prosecutor, any misstep in properly filing or arguing an issue can be fatal. Some are encouraged to waive their right to counsel just to move their cases forward.

In sum, without the assistance of counsel, a defendant cannot adequately protect or assert their rights or otherwise navigate the judicial system, which fundamentally impairs their defense.

⁶³ *Id.* (“Unrepresented individuals are unable to negotiate with the prosecution without waiving their constitutional rights.”).

⁶⁴ *Id.* at 3 (“Without attorneys, these indigent criminal defendants do not have any legal advice or assistance to help them . . . make speedy trial demands.”).

⁶⁵ *Id.* at 3 (“Without attorneys, these indigent criminal defendants do not have any legal advice or assistance to help them . . . navigate complicated competency issues.”); *id.* at 17.

III. Procedural History

Plaintiffs filed the initial complaint in this matter on August 23, 2022. R.12. The SPD immediately secured counsel for each plaintiff and moved to dismiss the case as moot, among other reasons. R.36. On December 16, 2022, Plaintiffs filed the First Amended Complaint (“Complaint”), adding additional named plaintiffs. R.48. On January 30, 2023, after securing counsel for the new named plaintiffs, Defendants moved to dismiss the Complaint, again arguing mootness. R.57. On February 1, 2023, Plaintiffs filed their initial motion for class certification. R.66. On September 21, the circuit court granted in part and denied in part Defendants’ motion to dismiss, ruling that the mootness exception for issues of “great public importance” applied. R.119. That same day, the court also denied Plaintiffs’ initial class certification motion, concluding that Plaintiffs had not established Section 803(1) “numerosity” and “commonality” requirements. R.118. However, the circuit court permitted the filing of a renewed class certification motion after discovery. R.146.

Over the next year, Plaintiffs conducted substantial fact discovery and engaged four experts. On January 10, 2025, Plaintiffs filed a renewed motion for class certification. R.189.

On January 13, 2026, the circuit court denied Plaintiffs’ renewed motion for class certification, ruling that Plaintiffs had not satisfied Section 803(1)(b)’s “commonality” requirement and Section 803.08(2)(b)’s “common relief” requirement. R.265. This appeal followed.

STANDARD OF REVIEW

This Court may reverse a circuit court’s class certification decision for an “erroneous exercise of discretion.” *McDaniel v. Wis. Dep’t of Corr.*, 2025 WI 24, ¶ 15, 416 Wis. 2d 516, 527, 21 N.W.3d 749, 754. A circuit court erroneously exercises its discretion when it fails to “examine the relevant facts,” “apply a proper standard of law,” and/or “use[] a demonstrative rational process,” as well as if it “reach[es] a conclusion that [no] reasonable judge could reach.” *Id.* “When a court’s discretionary decision involves a question of law, [this Court] review[s] the question of law independently of the determination of the circuit court[.]” *Id.*

ARGUMENT

The Court should reverse the circuit court’s denial of Plaintiffs’ class certification motion because Plaintiffs have satisfied (i) Section 803.08(1)(b)’s “commonality” requirement and (ii) Section 803.08(2)(b)’s “common relief” requirement, and the circuit court’s conclusions otherwise were erroneous exercises of discretion.

I. The Commonality Requirement is Satisfied.

Plaintiffs’ proposed class satisfies Section 803.08(1)(b)’s commonality requirement, and the lower court erred by concluding that there are no common questions of law or fact.

Like Rule 23(a)(2) of the Federal Rules of Civil Procedure,⁶⁶ Section 803.08 requires a plaintiff to show *commonality*—that there are “questions of law or fact common to the [proposed] class.” Wis. Stat. § 803.08(1)(b). “Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury,” therefore, “superficial common questions like whether each class member ‘suffered a violation of the same provision of law’ . . . are not enough.” *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 497 (7th Cir. 2012) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50, (2011)). Rather, the plaintiff must show that the class members’ claims “depend on a common contention . . . of such a nature that it is capable of classwide resolution—which means that the 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.” *Jamie S.*, 668 F.3d at 497 (quoting *Dukes*, 564 U.S. at 350). In other

⁶⁶ Wisconsin courts “look to federal case law for guidance on Wisconsin’s class certification law.” *McDaniel*, 2025 WI 18, ¶ 24.

words, the common question must “generate [a] common answer”—a collective “yes” or a collective “no”—that is “apt to drive the resolution of the litigation.” *Dukes*, 564 U.S. at 350. Importantly, “[o]ne common question is enough” to satisfy the commonality requirement. *McDaniel*, 2025 WI 24, ¶ 20 (citing *Dukes*, 564 U.S. at 350).

A court should “consider the underlying legal claims and evidence to determine whether a common legal question exists.” *Id.* ¶ 28 (citing *Dukes*, 564 U.S. at 350). However, courts “must walk a balance between evaluating evidence to determine whether a common question exists . . . without weighing that evidence to determine whether the plaintiff class will ultimately prevail on the merits.” *Id.* (quoting *Eddlemon v. Bradley Univ.*, 65 F.4th 335, 341 (7th Cir. 2023)).

The “underlying legal claims” in this case are Plaintiffs’ right-to-counsel claims under the Sixth Amendment and Wisconsin Constitution. “A criminal defendant in Wisconsin is guaranteed this fundamental right to the assistance of counsel for his defense by both Article I, § 7 of the Wisconsin Constitution and the Sixth Amendment of the United States Constitution.” *State v. Klessig*, 211 Wis. 2d 194, 201–02, 564 N.W.2d 716, 719–20 (1997). This right attaches as soon as the prosecution commences—that is, “the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty.” *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 194 (2008). In Wisconsin, attachment occurs at the defendant’s initial appearance (if not earlier). See Wis. Stat. §§ 970.01, 970.02.

Once attachment has occurred, the accused is entitled to “the presence of appointed counsel during any ‘critical stage’ of the post attachment proceedings.” *Rothgery*, 554 U.S. at 212. And a defendant is

entitled to receive such counsel “within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.” *Id.* Thus, there are “two avenues for a Sixth Amendment violation” in this context: “(1) lack of counsel at a critical stage, or (2) unreasonable delay in appointment that fails to provide for adequate representation at [a] critical stage.” *Betschart v. Garrett*, 700 F. Supp. 3d 965, 981 (D. Or. 2023).

Plaintiffs have raised both critical-stage and unreasonable-delay theories in support of their claims that the State violated their constitutional rights and have proffered a common question that goes to the heart of each theory: First, whether the first 30 days of the prosecution is a “critical stage,” and second, whether a 30-day delay in the appointment of counsel is per se unreasonable. For the reasons explained below, each of these questions satisfies the commonality requirement.

A. Whether the first 30 days constitutes a “critical stage” of the prosecution is a common question.

Plaintiffs’ first question—whether the first 30 days of a criminal prosecution constitutes a “critical stage” of the proceedings—is a question common to the proposed class, and the circuit court erred by failing to consider it.

As noted above, denial of counsel during a “critical stage” of the prosecution violates the right to counsel. *See Schmidt v. Foster*, 911 F.3d 469, 478–79 (7th Cir. 2018) (citing, inter alia, *United States v. Cronin*, 466 U.S. 648, 659 (1984)). No showing of prejudice is required; prejudice is presumed. *Schmidt*, 911 F.3d at 478. Thus, whether the stage in question is “critical” is an “issue that is central to the validity” of a right-to-counsel claim.

Moreover, whether a stage is “critical” is an objective question that turns on whether it “hold[s] significant consequences” for defendants. *Id.* at 479. Importantly, critical stages may occur “outside the presence of the court” or even “before a criminal proceeding takes place in a court room.” *Robbins v. Billings*, No. CV-22-054 (Me. Super. Ct. Kennebec Cnty. Mar. 7, 2005), LEXIS 37, at *15–16 (collecting Supreme Court precedent). In determining whether a stage is “critical,” a court must examine the criminal procedures of the state in question. *See Richardson v. Superintendent Coal Twp. SCI*, 905 F.3d 750, 765 (3d Cir. 2018) (“The critical-stage inquiry may vary from state to state, depending on how states choose to configure their criminal procedures.”); *e.g.*, *Robbins*, 2025 Me. Super. LEXIS 37, at *20 (concluding that “in Maine[,] the Sixth Amendment entitles indigent defendants to continuous representation [after] their initial appearance or arraignment”).

Here, by definition, each proposed class member failed to receive an attorney for at least 30 days after their initial appearance. R.189:21. Accordingly, whether this initial 30-day period is a “critical stage” is an “issue that is central to the validity” of each one of their claims. Furthermore, this issue is “capable of classwide resolution”: If the initial 30-day period is a critical stage of the prosecution, as Plaintiffs contend, then each class member suffered a violation of their right to counsel on that basis. Because this common question will lead to either a collective “yes” or a collective “no,” commonality is satisfied.

This conclusion is reinforced by Plaintiffs’ showing that the question can be resolved with common evidence. Plaintiffs have proffered substantial, unrebutted evidence—including expert testimony—that in Wisconsin, the first 30 days after initial appearance “hold significant

consequences for the accused” and, therefore, constitute a critical stage. *See* Statement of Facts § IV, *supra*.

The circuit court altogether failed to consider whether this first proposed common question satisfies Section 803.08(1)(b)’s commonality requirement. Because even one common question satisfies the commonality requirement, this failure was an erroneous exercise of discretion, and the Court should—at minimum—reverse and remand on that ground.

B. Whether the 30-day delay in appointment of counsel here is per se unreasonable is a common question.

Plaintiffs’ second proposed common question—whether the State’s 30-day delay in appointment of counsel was per se unreasonable—is a question common to the class because it is “central to the validity” of Plaintiffs’ claims and “capable of classwide resolution.” And although the circuit court considered this proposed question, the circuit court erred by concluding that it was one not “capable of classwide resolution.”

1. The reasonableness of the delay is “central to the validity” of Plaintiffs’ claims and “capable of classwide resolution.”

As explained above, the Sixth Amendment and Article I, § 7 of the Wisconsin Constitution entitle qualified defendants in Wisconsin to an attorney “within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.” *Rothgery*, 554 U.S. at 212; *see also Castelan v. Villarreal*, 2025 U.S. Dist. LEXIS 21233, at *39 (W.D. Tex. Feb. 6, 2025) (“[T]he reasonable time for an appointment must not encroach on the time necessary for appointed counsel to adequately represent the defendant[.]”). An

unreasonable delay in the appointment of counsel “not only interferes with indigent criminal defendants’ progression to critical stages by delaying those stages but also prevents any meaningful advocacy.” *Betschart*, 103 F.4th at 620. Like critical-stage claims, a plaintiff need not show prejudice; if the delay is objectively unreasonable, prejudice is presumed. *See Farrow v. Lipetzky*, 637 F. App’x 986, 988 (9th Cir. 2016) (“The district court erroneously required the plaintiffs to allege actual prejudice” from the delay). Thus, whether a delay is reasonable is an “issue that is central to the validity” of a right-to-counsel claim under *Rothgery*.

The reasonableness of the delay is also “capable of classwide resolution.” To be sure, in determining whether a delay in the appointment of counsel is reasonable, courts must consider all *relevant* circumstances. *See Farrow v. Lipetzky*, 2017 U.S. Dist. LEXIS 65331, at *45 (N.D. Cal. Apr. 28, 2017); *Castelan*, 2025 U.S. Dist. LEXIS 21233, at *41–42. But not all circumstances are relevant in this regard. Indeed, as with other right-to-counsel claims, the reasonableness inquiry turns on *the potential impact of the delay on the accused’s defense*; in other words, on whether the delay still “allow[s] for adequate representation” at later critical stages. *Rothgery*, 554 U.S. at 212; *see also Farrow*, 2017 U.S. Dist. LEXIS 65331, at *45–46 (holding that factors to be considered include “time needed to prepare for an upcoming critical stage” and other factors related to the “value of appointed counsel to protect [the plaintiff’s] process and liberty interests”). Thus, circumstances that do not relate to the adequacy of the accused’s defense are irrelevant to the reasonableness inquiry.

Castelan is instructive. There, the plaintiff alleged that the State of Texas’s two-month delay in appointing counsel on his behalf was unreasonable under the Sixth Amendment. 2025 U.S. Dist. LEXIS 21233, at *3–7. The court examined Texas’s pre-trial procedures and noted that, under Texas law, defendants are entitled to a mandatory bail reduction within 30 days of their initial hearing (which the plaintiff had not received because no bail reduction hearing had been scheduled on his behalf). *Id.* at *27–30. The court held that, *based on this single circumstance*, a 30-day delay was unreasonable, explaining:

[A]s a general matter, it is unreasonable to delay appointment of counsel beyond the date that state law requires a bond reduction or release on personal bond. . . . Appointment of counsel is needed before that date passes so that the attorney can protect the rights of the accused to the statutory bail reduction.

Id. at *42.

Importantly, the court did not consider external explanations for the delay—such as attorney availability, charge severity, arrest volume, COVID-19, or any other “reason” for the state’s delay and expressly rejected those justifications as irrelevant to the Sixth Amendment analysis. *Id.* at *42, 44–47.

As *Castelan* shows, under *Rothgery*, the relevant circumstances are those that affect the adequacy of the accused’s defense, such as the length of the delay, the seriousness of the offense, and the procedural events requiring legal assistance during that period, such as the bail reduction hearing in *Castelan*. Where, as in this case, such circumstances apply generally to the proposed class, the reasonableness of the delay is a common question “capable of classwide resolution.” *See Lacy v. Cook*

County, 897 F.3d 847, 865 (7th Cir. 2018) (concluding that “commonality abounds” where the “plaintiffs share[d] a common physical impairment,” “face[d] common physical barriers,” and “s[ought] common modifications”).

Here, by definition, each class member was charged with a felony and did not receive an attorney within 30 days of their initial appearance because the State failed to provide them with an attorney. During this time, Wisconsin law entitled each to a preliminary hearing, a pretrial detention hearing or bond review hearing, the opportunity to challenge the sufficiency of the criminal complaint and required notice of any alibi defense Wis. Stat. §§ 970.03(2), 969.035, 969.08, 971.31(5), 971.23(8). In addition, each class member’s defense was exposed to the inherent risk of evidence degradation as witness memories faded and physical evidence deteriorated. *See* Statement of Facts, § IV, *supra*.

Considering that the relevant circumstances of the delays were the same, the question of whether the delays experienced by each class member were per se unreasonable will yield a common answer for the class and is therefore “capable of classwide resolution.”

2. The circuit court erred in concluding that the reasonableness of the delay cannot be adjudicated on a classwide basis.

In reaching its incorrect conclusion that the reasonableness of the delay is not an issue “capable of classwide resolution,” the circuit court made two errors of law. *First*, the court erroneously concluded that, to satisfy commonality, Plaintiffs must show that the State acted under a specific policy to deny counsel to class members. *Second*, the court

incorrectly found that case-specific, environmental factors bear on the reasonableness analysis.

Plaintiffs need not show a specific policy of denial. The circuit court concluded that, to establish commonality here, Plaintiffs must show that the SPD adopted a “specific policy” to “consciously deny[] eligible defendants an attorney” for more than 30 days. R.265:8. Not so.

True, commonality requires that the Defendants’ allegedly harmful conduct apply generally to class members. *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756 (7th Cir. 2014) (“Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.”). Such common treatment is the “glue” that binds the class members’ individual claims together. *Dukes*, 564 U.S. at 352.

But the conduct required to show common treatment in a particular case necessarily depends on the nature of the claims at issue. *See Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014) (“Commonality cannot be determined without a precise understanding of the nature of the underlying claims.”). In *Dukes*, the U.S. Supreme Court’s leading commonality case, the claims at issue were Title VII employment discrimination claims. Because the “crux” of a Title VII claim is the “*reason* for a particular employment decision,” 564 U.S. at 352 (emphasis added), to show commonality, the U.S. Supreme Court explained that the plaintiffs must show that there was some “general policy of discrimination,” connecting the unfavorable employment decisions experienced by class members. *Id.* at 352–53. (“Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer to the

crucial question *why was I disfavored.*”). Importantly, however, the Court did not hold that such a policy is necessary in every class action.

Unlike the Title VII claims at issue in *Dukes*, Plaintiffs’ right-to-counsel claims do not turn on the State’s “reasons” for failing to appoint counsel. If the State fails to provide counsel to a qualified defendant within a reasonable time, the State violates the plaintiff’s right to counsel. This is true regardless of the State’s intent, and it is true even if the State did its very best to find an attorney. Because the “reasons” for the State’s failure to provide counsel are legally irrelevant, Plaintiffs need not show that the State “operated under a general policy” to deny counsel to class members. Rather, Plaintiffs need only show that the State treated each class member similarly in failing to appoint counsel within 30 days of their initial appearances.

Indeed, the decision in *Scott v. Dart*, on which the circuit court relied, underscores this point. *Scott* involved due process claims against a municipality (a.k.a., *Monell* claims), which require proof of “an express municipal policy, widespread custom, or deliberate act of a decision-maker with final policy-making authority.” 99 F.4th 1076, 1088 (7th Cir. 2024). The court held that Cook County’s deliberate refusal to staff an oral surgeon at the Cook County Jail satisfied this requirement for all class members’ due process claims, making the objective reasonableness of that policy a question common to the class. *Id.* at 1089. But claims against state officials—such as the right-to-counsel claims here—are not *Monell* claims. *See Starks v. Tucker*, 2025 U.S. Dist. LEXIS 198274, at *5 (N.D. Ind. Oct. 7, 2025) (noting that “*Monell* applies to municipal actors,” not “state officials”). To prevail on their claims against Defendants, therefore, each class member is not required to show that Defendants

acted “deliberat[ly]” or under an “express municipal policy” or “widespread custom.” Accordingly, to satisfy commonality, Plaintiffs need not do so either.

At bottom, the circuit court overcomplicated what is a straightforward commonality analysis:

1. The State had a constitutional obligation to timely appoint counsel to each class member;
2. Defendants are responsible for carrying out this obligation; and
3. Defendants did not provide counsel to each class member for at least 30 days.

This common treatment—failure to provide counsel within 30 days—is the “glue” that binds the class members’ claims together. Accordingly, the circuit court erred by concluding that Plaintiffs must show that the SPD adopted a specific policy to deny class members attorneys for more than 30 days.

Environmental factors do not defeat commonality. The circuit court also erred in concluding that environmental factors bear on reasonableness of the delays at issue, identifying the following “variables”:

The county where the charges are being brought; the reputation of the prosecutor; the circuit court branch the case is assigned to; the facts underlying the charge(s); the severity of the charge(s); SPD staff attorney conflicts; the number of private attorneys in the vicinity, their areas of practice, their existing caseloads, and their experience levels; the SPD’s alleged appointment practices and the local SPD office appointing the case; etc.

R.265:10. According to the circuit court’s reasoning, one or more of these “variables” could justify an appointment delay of greater than 30 days.

But the circuit court is simply mistaken that these “variables” have any bearing on Plaintiffs’ unreasonable-delay claims. As explained above, the touchstone of the reasonableness inquiry is the impact of counsel’s absence on an accused’s defense, i.e., whether the delay still “allow[s] for adequate representation” at later critical stages (or inhibits such representation), *Rothgery*, 554 U.S. at 212, not the “reason” for delay.

Of the “variables” identified by the circuit court, only the seriousness of the charge could conceivably impact the adequacy of the accused’s defense. Here, however, the proposed class members *have all been charged with felonies*. R.189:21. Considering the objective seriousness of felony charges, the “severity of [a particular class member’s] charge” here could not justify an appointment delay of greater than 30 days alone or together with the other factors identified by the circuit court. *See Castellan*, 2025 U.S. Dist. LEXIS 21233 (seriousness of the felony at issue not considered in reasonableness analysis). Indeed, the categorical seriousness of felony charges is one of the reasons that each class member is entitled to timely appointed counsel in the first instance. *See Crayton v. United States*, 799 F.3d 623, 631 (7th Cir. 2015) (noting that *Gideon* “established an affirmative right to counsel in all *felony* cases” (emphasis added)).

The rest of these factors—the particular court, the particular prosecutor, the availability and experience of private attorneys in the area, the SPD’s local practices, etc.—are all “environmental” in nature and completely irrelevant to the reasonableness inquiry. Indeed, it is unclear how factors such as the “reputation of the prosecutor” could justify even

a single-day delay in the appointment of counsel.

Notably, the court in *Castelan* rejected reasoning similar to the circuit court’s in this case. There, the defendant argued that the delay in appointment of counsel was reasonable because of the COVID-19 pandemic and the increased number of prosecutions brought about by Operation Lone Star, Texas’s campaign to arrest large numbers of migrants at the U.S.-Mexico border. *See Castelan*, 2025 U.S. Dist. LEXIS 21233, at *41–42. Although acknowledging the possibility that “some unique and unprecedented circumstances may affect the reasonableness of a delay in counsel,” the court concluded these environmental factors could not justify a delay beyond 30 days:

The increased prosecutions may create logistical issues for appointing attorneys to those in need. But logistical issues . . . do not justify delaying appointment of counsel when the delay reaches a point of depriving Sixth Amendment rights to accused indigents[.] . . . The asserted logistical problems do not justify extending the reasonable time for appointment beyond the date Texas law requires release on a personal bond . . . or a bond reduction [i.e., within 30 days].

Id. at *44–45.

The Seventh Circuit also rejected similar reasoning in *Scott*. As with Plaintiffs’ unreasonable-delay claims here, there was a reasonableness standard embedded in the *Scott* plaintiffs’ due process claims. *See* 99 F.4th at 1089 (explaining that proposed class members’ “claims of inadequate medical care . . . [are] governed by an objective-reasonableness standard”). The court rejected the argument that “individualized factors, such as type of dental issue, degree of pain, and how long each detainee waited before receiving treatment” could defeat commonality. *Id.* at 1089–90. In effect, therefore, the court concluded that absence of an oral

surgeon at the prison could be per se unreasonable regardless of each class member's precise dental situation, and if so, whether each class member received "unreasonable medical care" could be determined on a classwide basis. *See id.*

Jamie S. also does not support the circuit court's conclusion. There, the plaintiffs, who were students with disabilities, alleged that the school district violated the Individuals with Disabilities Education Act ("IDEA"). 668 F.3d at 485. The IDEA requires school districts to "identify children with disabilities" and "determine whether these children require special-education services." *Id.* As the court noted, identifying and evaluating eligible students is a "highly individualized" task "because every child is unique." *Id.* Thus, whether the district had violated the child-find requirements was not a common question because the answer for some class members would be "yes," and for others, the answer would be "no."

Here, the proposed claims do not require the court to undertake individualized inquiries. By definition, each class member is eligible for public defense counsel, has been charged with a felony, and has been denied legal representation for more than 30 days. And, as explained above, the "environmental" factors identified by the Court do not bear on the reasonableness of the delay. Accordingly, whether the 30-day delay is per se unreasonable is a common question.⁶⁷

⁶⁷ The circuit court concluded that there could be no commonality because not all class members would be entitled to the same injunction. R.265:10. However, if there is a common question, commonality is satisfied, even if the precise remedies differ from class member to class member.

Unfortunately, the circuit court appears to have implicitly adopted the State’s incorrect interpretation of *Rothgery*’s reasonableness requirement, which focuses on the reasonableness of *the State’s efforts to secure counsel*, rather than the reasonableness of the delay’s *impact on the accused*. Under the State’s view, any delay is reasonable if the State is trying its best—or even simply hard enough—to find an attorney but fails to do so because of external circumstances (such as those described by the circuit court). But the State’s interpretation of *Rothgery*’s “within a reasonable time” language to mean “as soon as possible under the circumstances”—which conveniently mirrors the SPD’s own vague policy—is simply wrong as a matter of constitutional law.

The circuit court also failed to recognize that *the State’s own conduct* has helped create these conditions. “Governmental entities may not infringe on the constitutional right to counsel by creating circumstances that in turn create a shortage of attorneys or by fostering an environment that does not adequately protect the right to counsel for those arrested.” *Castelan*, 2025 U.S. Dist. LEXIS 21233, at *45–46. If there are not enough defense attorneys to represent eligible criminal defendants, “[t]he simple solution in such circumstances is to exercise greater discretion while making arrests or pursuing prosecutions,” not to keep violating constitutional rights. *Id.* at *46.

Here, *the State* has chosen whether, where, when, and with what offenses to charge the proposed class members, despite the fact there are obviously not enough attorneys to represent all the individuals being charged. Worse, as the record shows, the shortage of private-bar attorneys in certain parts of Wisconsin is a problem because *the State* has chosen (1) to use a public defense system that relies substantially on local

private-bar appointments and (2) to grossly underpay private-bar attorneys *for years*. Indeed, despite repeated warnings that Wisconsin’s public defense system was on the brink of crisis, the State repeatedly declined to raise its court-appointed counsel rates. The State cannot now point to the conditions it helped create to justify the delays in appointment of counsel.

II. The Common Relief Requirement is Satisfied.

Plaintiffs’ proposed class satisfies Section 803.08(2)(b)’s “common relief” requirement, and the lower court’s conclusion otherwise is erroneous.

Plaintiffs bring this class action under Section 803.08(2), which, like Rule 23(b)(2) of the Federal Rules of Civil Procedure, requires the party seeking class certification to establish that the opposing party “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.” Wis. Stat. § 803.08(2)(b).

Section 803.08(2)(b) “is the appropriate rule to enlist when the plaintiffs’ primary goal is not monetary relief, but rather to require the defendant to do or not do something that would benefit the whole class,” *Chi. Teachers Union, Local No. 1 v. Bd. of Educ. of Chi.*, 797 F.3d 426, 441 (7th Cir. 2015), or to declare the defendant’s conduct unlawful as to the whole class. “[C]ivil rights cases . . . are prime examples” of class actions that should be brought under Section 803.08(2)(b). *Id.*; see also Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(B)(2)*, 99 B.U. L. Rev. 59, 64 (2019) (noting that Rule 23(b)(2) class actions “help to ensure that any system-wide problems receive a system-wide response”).

The “key” to Section 803.08(2)(b) is the “indivisible nature of the injunctive or declaratory remedy warranted—the notion that the [defendant’s] conduct is such that it can be enjoined or declared unlawful only as to all the class members or as to none of them.” *Dukes*, 564 U.S. at 360.

Plaintiffs’ proposed class action satisfies Section 803.08(2)(b). Defendants’ failure to appoint public defense counsel on behalf of Plaintiffs and proposed class members within 30 days is a “refus[al] to act on grounds that apply generally to the class.” Wis. Stat. § 803.08(2). Moreover, Defendants’ application of the SPD appointment policies and practices to Plaintiffs and the proposed class members—which is how the State purports to comply with its constitutional obligations—is conduct that “appl[ies] generally to the class.” *Id.*; see, e.g., *Chi. Teachers Union*, 797 F.3d at 441–43 (concluding that challenged turnaround policies of defendant school board applied generally to a class of Black teachers).

Plaintiffs’ requested relief satisfies Section 803.08(2)(b) as well. Plaintiffs seek a declaratory judgment that the State’s conduct, among other things, violated their and the proposed class’s constitutional rights, which is “corresponding declaratory relief . . . respecting the class as a whole.” *Id.* at 441 (holding that “a declaratory judgment that the [defendant school board’s] turnaround policies violated Title VII” was appropriate classwide relief). And Plaintiffs also seek an order (1) prohibiting Defendants from administering Wisconsin’s public defense system insofar as it prevents appointment of counsel within 30 days of defendants’ initial appearances and (2) requiring Defendants to establish a system that appoints counsel within 30 days. Each request is “final injunctive relief . . . respecting the class as a whole.” See, e.g., *id.* (finding injunction

preventing defendant school board from applying its turnaround policies and requiring appointment of a monitor was appropriate classwide relief).

The court made three errors in reaching its conclusion that Plaintiffs had failed to satisfy Section 803.08(2)(b).

First, the circuit court completely ignored Plaintiffs’ request for declaratory relief. The circuit court’s decision is entirely devoid of analysis about why Plaintiffs’ requested declaratory judgment—that the delays suffered by Plaintiffs and the proposed class were unreasonable and/or a denial of counsel during a “critical stage,” and thereby violated their constitutional rights—is not “declaratory relief . . . respecting the class as a whole.” Wis. Stat. § 803.08(2). The circuit court’s failure to consider one of the primary forms of relief sought by Plaintiffs in its Section 803.08(2)(b) analysis is an erroneous exercise of discretion.

Second, the circuit court wrongly concluded that it could only order classwide injunctions if they were “simple,” such as ordering a jail to hire an oral surgeon. R.265:11–12 (referencing *Scott*, 99 F.4th 1076). The court cited no authority for this proposition, and it is wrong as a matter of law: If the requested injunction would provide classwide relief, its complexity is irrelevant to Section 803.08(2)(b) analysis. Holding otherwise would shield widespread constitutional violations from judicial review and prevent structural reform simply because the issues are complex.

Regardless, the Plaintiffs’ requested injunction is not complex. Plaintiffs claim that the SPD’s current policies and practices—which are how the State purports to comply with its right-to-counsel obligations—have resulted in lengthy appointment delays that violate Plaintiffs’ and the proposed class’s rights. Enjoining Defendants from administering

these policies and practices insofar as they facilitate greater-than-30-day delays and directing Defendants to appoint counsel within 30 days comprise a straightforward directive.

Further, to the extent that the circuit court was concerned with Defendants ability to comply with Plaintiffs' requested injunction that concern is misplaced. Although it is not the judiciary's role to determine how the SPD must protect the constitutional rights of defendants (that is the Defendants' responsibility), the record shows SPD could take concrete steps to reduce appointment delays, including instituting official policies and procedures to centrally monitor delays across the state and to formally prioritize obtaining counsel or those who have been waiting the longest, among other measures.

Although the SPD operates under budget constraints, many public entities do, and such constraints have not precluded effective structural reform injunctions in comparable contexts.

Indeed, one need not look further than the Maine Superior Court's injunction in the *Robbins* case for an example of an appropriate injunction in similar circumstances:

The Court will order the [Defendant state public defender officials] to provide continuous representation as required by the Sixth Amendment. The Court understands that the Defendants are constrained by the resources that the Executive and Legislative Branches have provided. There is nothing in the trial record, however, that gives the Court any confidence that those branches will soon be providing the resources that the Defendants state they need.

2025 Me. Super. LEXIS 21, at *27–28.

Third, the circuit court wrongly concluded that it lacked the power to issue Plaintiffs' requested injunction. According to the circuit court,

“such an order cannot be crafted without usurping decision-making authority of those appointed, elected, and entrusted to run each county’s judiciary and criminal justice system.” R.265:12. As an initial matter, Plaintiffs’ requested injunction would only apply to Defendants, who are state-level executive officials, not any county-level judges or other officials.

More fundamentally, however, the Sixth Amendment and the Wisconsin Constitution require the State of Wisconsin to provide counsel to qualified defendants during “critical stages” of the proceedings and within a reasonable time after the prosecution begins. *See* R.207:39. And “the Wisconsin Constitution entrusts the judiciary with the duty of interpreting and applying” the law to adjudicate “cases and controversies arising under [it].” *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 37, 376 Wis. 2d 147, 897 N.W.2d 384; *see also id.* (“It is emphatically the province and duty of the judicial department to say what the law is.” (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803))).

Thus, although Defendants may have been “appointed” and “entrusted” to run Wisconsin’s public defense system, it is the judiciary’s responsibility to ensure that Defendants safeguard the constitutional rights of defendants in this State. And if Defendants fall short of their obligations, as they have with respect to timely appointments of counsel, it is the judiciary’s obligation to issue appropriate injunctive and declaratory relief.

Here, Plaintiffs are asking that the circuit court declare that the State has violated their constitutional rights and to enjoin the State from continuing to do so. Plaintiffs are *not* asking the court to order the State to provide more funding to SPD or to require Defendants to implement

any specific appointment policy.

Thus, the circuit court's abstention based on supposed "separation of powers" concerns is an erroneous exercise of discretion.

CONCLUSION

Because the circuit court erroneously concluded that Plaintiffs had not satisfied (i) Section 803.08(1)(b)'s commonality requirement and (ii) Section 803.08(2)(b)'s "common relief" requirement, the Court should reverse the circuit court's denial of Plaintiffs' class certification motion and remand for further proceedings.

Dated this 14th day of April, 2026.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 10,964 words.

Dated this 14th day of April, 2026.

Signed:

Electronically signed by
Michael P. Mayer

Electronically signed by
James W. Randall

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with Section 809.19(2)(a) and that contains, at a minimum (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Section 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of April, 2026.

Signed:

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CERTIFICATE OF SERVICE

I hereby certify that I have submitted an electronic copy of the foregoing document which complies with the requirements of Section 809.19(12).

I further certify that a copy was served on all counsel of record via the Wisconsin Appellate Court Electronic Filing System, which will accomplish the electronic notice and service for all participants who are registered.

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