STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE ex rel. ----------,

Defendant-Petitioner,

v. Case Number: _____

MILWAUKEE COUNTY CIRCUIT COURT,
BRANCH 25,
Honorable Stephanie -------, presiding,

Respondent, Milwaukee County Circuit Court
Case No. ----------

STATE OF WISCONSIN,

Plaintiff-Respondent.

EMERGENCY PETITION AND MEMORANDUM FOR SUPERVISORY WRIT

PETITION FOR STAY OF PROCEEDINGS PENDING APPEAL

Pursuant to Wis. Stat. §§ 809.50 and 809.51, Mr. ---------- petitions the Court of Appeals, District I, for leave to appeal from the non-final order in Milwaukee County Case Number ---------, entered on --------, in the Milwaukee County Circuit Court, the Honorable Stephanie ------- presiding, in which that court denied Mr. -------'s motion for a continuance of the trial date set for June 16, 2014 at 9:00 A.M. Mr. ------- also requests a supervisory writ of mandamus from this Court, pursuant to Wis. Stat. § 809.51, ordering the lower court to adjourn the scheduled trial for a minimum of four months.

Pursuant to Wis. Stat. § 809.52, Mr. ------- further requests that this Court stay the trial currently scheduled for June 16, 2014 at 9:00 A.M. pending the disposition of this petition.

STATEMENT OF ISSUE

Whether Mr. ------- has been effectively denied his constitutional right to present a defense and to present witnesses upon his motion for an adjournment of the scheduled trial date, filed on the basis that Mr. -------'s expert witnesses have had insufficient time to review highly probative medical evidence, generate reports, and prepare for trial, being denied by the Circuit Court.

STATEMENT SHOWING NECESSITY FOR REVIEW

Wis. Stat. § 808.03(2) directs an appellate court to grant an appeal from a non-final order if the court determines that an appeal will do one of the following:

1. Materially advance the termination of the litigation or materially clarify further proceedings in the litigation;
2. Protect the petitioner from substantial or irreparable injury; or
3. Clarify an issue of general importance in the administration of justice.

Mr. ------- respectfully requests that this Court grant an appeal from the circuit court's non-final order to protect him from the substantial injury caused by being forced to trial on a homicide case without the necessary expert testimony.

Non-final judgment and orders are appealable by permission of this Court. Wis. Stat. § 808.03(2). A circuit court's decision to grant a motion to enlarge time is reviewed under an erroneous exercise of discretion. *Rutan v. Miller*, 213 Wis. 2d 94, 570 N.W.2d 54 (Ct. App. 1997). A reviewing court will affirm discretionary decisions that are based

on the facts of record, the appropriate law, and the circuit court's reasoned application of the correct law to the relevant facts. *Binsfeld v. Conrad*, 2004 WI App 77, ¶20, 272 Wis. 2d 341, 679 N.W.2d 851. In the present case, the circuit court has failed to apply the relevant law and consider the appropriate factors when denying Mr. -------'s motion for a continuance. In fact, the circuit court has explicitly recognized that cases similar to Mr. ---------'s have been reversed on appeal. The trial court went so far as to characterize his citations to those published decisions as a "threat to appeal."

STATEMENT OF FACTS

This is a homicide case, although it did not begin that way. Mr. -------'s son, David A. ("Junior"), was born extremely premature and spent the first month of his life in the Neonatal Intensive Care Unit. Six weeks after being released from the hospital, Junior's health deteriorated, and he was rushed to Milwaukee Children's Hospital by his parents after he appeared distant and unresponsive. Medical staff at Children's Hospital alerted law enforcement because they suspected child abuse. Law enforcement took both Mr. ------- and Ashley Pettis ("Pettis"), Junior's mother, into custody. Mr. ------- was interrogated over the course of two days.

Junior's health was stabilized, but his prognosis was grim. Junior was released from the hospital and remained in hospice care for approximately six months. Law enforcement immediately assumed that Mr. ------- was responsible for physically abusing Junior. However, the defense experts take contrary positions, and have concluded that the evidence points to a child who was sick from the moment of his birth. Mr. ------- was charged with violating Wis. Stats. §§ 948.03(2)(a) – Child Abuse (Intentionally Causing Great Bodily Harm); 948.21(1)(c) – Neglecting a Child (Consequence is Great Bodily

Harm); and, most seriously, 940.02(1) – 1st Degree Reckless Homicide. The charges are extraordinarily serious, and Mr. ------- has a constitutional right to present an effective and meaningful defense to the jury.

The undersigned was appointed to represent Mr. ------- by the Office of the State Public Defender ("SPD") following a determination that Mr. ------- was indigent. Given the extraordinary complexity of this case, the SPD has taken the additional step of appointing a second attorney to this matter, Donna Kuchler. The undersigned's firm of Kuchler & Cotton, S.C. has considerable experience handling child abuse cases (particularly those resulting in death), and is familiar with the complicated medical evidence that these cases tend to require.

Due to the extremely poor health of Junior from birth, including his extreme prematurity and the prolonged period of unconsciousness during which healing could take place, the medical evidence in this case is especially complex. The process of obtaining records, organizing records, having records reviewed, and having reports drafted has taken longer than it might otherwise take if Mr. ------- were not indigent. Unfortunately for Mr. -------, medical experts are reluctant, if not unwilling, to take cases at the reduced rate of pay offered by the SPD. Those experts who will take these cases at the reduced rate of pay are busy, and require considerable time to finish their work. Recognizing the complexity of this case from the beginning, the undersigned has taken prompt and consistent action to organize and study the medical evidence this case required. Defense counsel has further utilized its significant contacts in the medical field to convince physicians to review this complicated case. And although doctors may take a

preliminary look at a case for defense counsel, such a preliminary look is a far cry from the actual process of reading and studying the file in detail and preparing a report.

Cases of this nature cannot be properly defended unless all of the child's medical records, from conception through placement in Children's Hospital and ultimately, death, are obtained. On January 4, 2013, defense counsel notified the State that it would need all of these medical records. The State objected and the circuit court, the Honorable Mel Flanagan then-presiding, required Mr. ------- to file a Motion to Subpoena Medical Records; that motion was docketed on February 5, 2013. A hearing was held on February 28, 2013, at which time the State rescinded its objection to Mr. -------'s receiving the medical records. Nearly two months of preparation time were wasted because the State objected to the release of probative and relevant medical evidence, without which defense counsel's prospective expert witnesses could do nothing.

When the State rescinded its objection, Judge Flanagan signed seven subpoenas and the matter was adjourned for a "status conference" on April 25, 2013, so that the various medical records could be obtained from the various providers. The various requests went out in a timely fashion, and medical records filtered in over time.

The homicide charge is neither dated nor old. In fact, by the time of the currently scheduled trial, Mr. ------- will have been facing the homicide charge for less than fourteen months. An amended complaint, charging him with homicide, was filed on April 25, 2013. Mr. ------- was only arraigned on that charge on May 3, 2013. Because subpoenas for medical records had already been signed, the defense had been receiving thousands of pages of records from the seven different entities involved.

Nevertheless, it took months for the State to turn over the autopsy report. As of July 18, 2013, three months after the autopsy report had been drafted, the State still had not provided the report to defense counsel. Without that report, it remained impossible to determine which specialists would be needed for this case, and no expert would review any records until defense counsel had obtained a complete set. Once the autopsy report was prepared, and once defense counsel had secured all of the medical records, the State Public Defender's Office approved funding for Nurse Debra Botticelli to organize the more than 2,000 pages of medical records and to prepare summaries. The experts who consult with defense counsel do not review this volume of medical records until the records are organized and summarized. Once the autopsy report was turned over, it was reviewed immediately. The defense experts suggested the possibility of rickets existing in this child. Rickets is a condition that can be mistaken for fractures. This is significant because Mr. ------- is accused of causing numerous fractures to the ribs of the child, even though none were seen at autopsy by the medical examiner.

Defense counsel has consulted with Dr. Julie Mack, from Hershey Medical Center in Hershey, Pennsylvania. Dr. Mack is a radiologist and has worked closely with defense counsel on other similar cases. Based on her preliminary review, she instructed defense counsel to consult with Dr. Waney Squier, from Oxford in England. Dr. Squier is a pathologist, but she is one of the premier experts on venous thrombosis. Venous thrombosis is essentially a blood clot occurring inside a blood vessel. These can cause death. Because venous thrombosis may have been the cause of death (instead of shaking or impact), Dr. Mack advised defense counsel to first get a report from Dr. Squier.

In August 2013, defense counsel was in contact with Dr. Squier. Her initial impression was that there might indeed be venous thrombosis in the child. She requested the brain dura and spinal cord sections with recuts. Dr. Squier provided counsel with a standard "tissue request" on August 20, 2013. Such samples are possessed by the medical examiner's office. Defense counsel was in regular contact with the medical examiner's office to facilitate this transfer, but the tissues were not sent. On October 14, 2013 the medical examiner's office assured defense counsel that these samples would be shipped. The samples were finally shipped, and on October 23, 2013, Dr. Squier confirmed that she was in receipt of them. This two-month delay was caused by the State medical examiner's office. Dr. Squier then requested that defense counsel provide her with the autopsy, birth labs, birth radiology reports, birth summary, Children's Hospital lab results, Children's Hospital radiology reports, Children's Hospital summary, pediatric records and vitamin notes. This was done forthwith.

Cases such as Mr. -------'s cannot be properly defended without the input of a forensic pathologist. Dr. Shaku Teas, a forensic pathologist out of Chicago, agreed to prepare a complete forensic report, tying together the different conclusions from the different experts. Dr. Teas has been working on this matter for over six months. On January 9, 2014, defense counsel received its final report from Dr. Squier regarding the venous thrombosis. That report was promptly turned over to both Dr. Teas and the State.

Dr. Squier's final report supports Mr. -------'s innocence. She has concluded that the injuries were older than thought – perhaps by weeks or months. She also studied the brain pathology and the cysts that developed after admission and concluded that these were not supportive of trauma. Her conclusions are extremely significant in that she

concludes that the imaging, pathology and clinical history are consistent with venous thrombosis.

The radiologist with whom defense counsel had been consulting, Dr. Patrick Barnes, notified defense counsel in January that he would not be able to work on the present case due to health reasons. This created a significant problem for Mr. -------'s defense, because the trial had been scheduled for April, and the full controversy cannot be tried until there is a determination on the rickets and the supposed fractures, as well as the dating of the brain injuries. When Dr. Barnes delivered this news, defense counsel immediately asked Dr. Julie Mack to prepare a draft report addressing these issues on January 29, 2014. Throughout the entire month of February, defense counsel had been in constant contact with Dr. Mack, but a report had not yet been drafted by her.

Dr. Mack eventually completed her initial review, and reported back that the child had an elevated parathyroid hormone level. An elevated parathyroid hormone is unusual, and, because the child was born premature, defense counsel must hire an expert to evaluate this condition. Dr. Mack also noted that the child's presentation was predominantly one of seizures that led to the intubation. She referred defense counsel to Dr. Chuck Hyman to examine the elevated parathyroid hormone and to Dr. Joseph Scheller for neurology.

Both of these doctors were immediately contacted. Both are willing to assist, even though the present case is an SPD appointment. Dr. Hyman can provide an initial overview relatively quickly, but it will take him at least two months to study the entire medical history and to provide that analysis. Dr. Scheller reports that he will review the

materials that are already available and will be able to provide a report in that same time period.

Because of the extensive medical evidence, the delay in receiving materials, the time required to organize the materials, the requirement of advance approval of expert hires by the SPD, the conflicting schedules of experts, the new issues that have emerged as the evidence has been reviewed by experts, and the late unavailability of Dr. Barnes, development of evidence has taken longer than defense counsel could have anticipated.

In October 2013, the parties selected the trial date of April 7, 2014. Defense counsel believed this to be realistic, given the information available at that time. However, when it became apparent that defense counsel's medical experts could not meet the deadlines associated with that trial date, defense counsel promptly brought this to the circuit court's attention. A continuance motion was filed with the circuit court on February 26, 2014, requesting that the circuit court adjourn the trial. A hearing was held on the motion on March 14, 2014, and the request was denied. In the intervening time, however, defense counsel received its report from Dr. Teas, the forensic pathologist. Dr. Teas' evaluation is more extensive than that of Dr. Squier. She has reviewed the entire medical history, and has concluded that all of the alleged injuries suffered by the child were naturally occurring, and not caused by an external actor.

Defense counsel immediately filed a second motion to continue the trial with the circuit court. Defense counsel also filed the exculpatory medical report from Dr. Teas. This motion was filed on the morning of March 26, 2014. Defense counsel also moved to exclude the State's witnesses on the grounds that the State had provided a formal written list only fourteen days before trial. The circuit court called an immediate hearing within a

matter of hours after the motion was filed. Despite the fact that defense counsel had a forensic pathologist report completed before trial, the circuit court refused to postpone the April 7 trial date. The circuit court also reaffirmed its previous ruling that defense counsel would be barred from calling any expert witnesses other than Dr. Squier.

This Court is being asked to intervene and to direct the trial court to adjourn this matter so that Mr. ------- has the opportunity to fully present his defense with the appropriate medical experts he needs.

ARGUMENT

As discussed above, presenting a competent defense to the serious charges in this case has required multiple medical experts to review thousands of pages of medical evidence, requests for further evidence, motions to secure access to medical records, subpoena applications, organization of large files by a medical expert, applications for funding to the SPD, consistent and ongoing contact with experts by defense counsel, drafting of multiple motions, the generation of multiple medical reports, continuous discovery, and extensive coordination with multiple experts across the country and beyond. Defense counsel has diligently pursued this process throughout the time this case has been pending. For reasons beyond the control of Mr. ------- or defense counsel, the process was not completed before the circuit court's deadlines. This prejudice will result

in substantial and irreparable injury because Mr. ------- will not have an opportunity to present a competent or complete defense to the charges at trial.

The United States Supreme Court has warned that a trial court's insistence upon expeditiousness in the face of a defendant's justifiable request for delay can violate that defendant's right to due process. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983). The Supreme Court has also held that the United States Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). This includes a defendant's right to be heard in his or her defense and the right to compel the attendance of witnesses the defendant wishes to call, to offer their testimony, and to question them. *See In re Oliver*, 333 U.S. 257, 273 (1948). Indeed, few rights are more fundamental than of an accused to present witnesses in his defense; the ability to do so is "an essential attribute of the adversary system itself." *Taylor v. Illinois*, 484 U.S. 400, 408 (1988). Of course, these rights are meaningless unless they can be effectively carried out by defense counsel on behalf of a defendant. ABA Defense Function Standard 4-4.1, titled "Duty to Investigate," puts into sharp focus what acts the undersigned must take on behalf of the Defendant as he represents him in this complex medical case:

> *Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case* and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's desire to plead guilty.

(4-4.1(a)) (emphasis added).

Dr. Teas has completed her report, finding that the medical evidence does not support a finding of child abuse. Yet she is prohibited from testifying because she could not complete her work before the deadlines expired. Failing to order a continuance that will permit defense counsel to submit Dr. Teas' report prior to the expiration of new time limits will lead to a miscarriage of justice because Mr. ------- will be severely prejudiced from his inability to present a competent defense to highly such complex medical evidence.

Where a failure to grant a continuance in a proceeding is likely to make a continuation of the proceeding impossible or result in a miscarriage of justice, Wisconsin's speedy trial statute (the only statute to expressly consider when a continuance should be granted) supports the ordering a continuance. Wis. Stat. § 971.10(3)(b)(1). In addition, where a case is "so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise," speedy trial deadlines may be altered. Wis. Stat. § 971.10(3)(b)(1).

The Wisconsin Supreme Court encouraged courts to look to "relevant factors" in determining whether a court misuses its discretion in failing to order a continuance. *Phifer v. State*, 64 Wis. 2d 24, 29, 218 N.W.2d 354 (1974). While the factors expressly outlined in that case pertained to situations where a denial of continuance affected counsel of choice, *id.*, the Seventh Circuit Court of Appeals has recited several relevant factors a court should consider when deciding a motion to adjourn or continue. These factors include: (1) the amount of time available for preparation; (2) the likelihood of prejudice form the denial of the continuance; (3) the defendant's role in shortening the effective preparation time; (4) the degree of complexity of the case; (5) the availability of

discovery from the prosecution; (6) the likelihood that a continuance will satisfy the movant's needs; and (7) the inconvenience and burden to the court and its pending case load. *See United States v. Crowder*, 588 F.3d 929, 936 (7th Cir. 2009). In the present case, virtually all these factors weigh in favor of Mr. -------'s continuance request.

1) Counsel has had limited time to prepare due to delays in obtaining discovery of medical records, organizing records, and disseminating records to experts.

The amount of time required to prepare is directly attributable to the time the experts require to evaluate the medical reports and records. Defense counsel had not even received the autopsy report at the time of the first hearing before Judge -------, held on July 18, 2013. Moreover, as noted above, there was further delay in obtaining and organizing medical records. The process of organization itself required advance approval by the SPD. The thousands of pages of organized materials then needed to be provided to Dr. Mack in Pennsylvania, who then had to review the materials before making referrals. Records had to be delivered to those experts, and those experts required sufficient time to review the thousands of pages of records and develop reports while working around their own schedules. Notably, it was only late October of 2013 that Dr. Squier finally received tissue samples for examination.

Experts have private practices, continuing educational requirements, professional obligations, and other cases on which they work. Given all these complications, trial dates sometimes must be continued in order to ensure that the full controversy is ultimately tried. In addition, defense counsel demanded in October 2012 that the State provide a formal list of its witnesses. The State provided this list only fourteen days before the then-scheduled trial date. That is unreasonable in a homicide case, and Mr. ----

--- has a right to conduct additional investigation into these witnesses now that it is clear precisely who the State intends to call at trial.

2) That Mr. ------- will be prejudiced by not having experts to refute the claims by the State is undeniable.

Cases dealing with alleged abusive head trauma involve an enormous amount of medical evidence that is often the subject of wide debate among medical professionals. In recent years, there has been an "emergence of a legitimate and significant dispute within the medical community as to the cause of" injuries that have traditionally been attributed to intentional head trauma. *State v. Edmunds*, 2008 WI App 33, ¶ 23, 308 Wis. 2d 374, 392, 746 N.W.2d 590, 599. As Justice Crooks noted in his dissent in *State v. Ward*, 2009 WI 60, 318 Wis. 2d 301, 767 N.W.2d 236, "Medical evidence in so-called 'shaken baby' cases is very much in dispute at the moment, and the risk of wrongful convictions based on powerful but ultimately discredited expert testimony is significant." *Id*., ¶ 84 n.4, 318 Wis. 2d at 362 n.4, 767 N.W.2d at 266 n.4. Justice Crooks made this observation in a dissent opened with his self-identification as "a father and a grandfather . . . ." *Id.*, ¶ 69, 318 Wis. 2d at 355, 767 N.W.2d at 262.

Forcing Mr. ------- to face a trial without being able to dispute all of the medical evidence admitted by the State will pervert the jury's comprehension of the certainty of that medical evidence. Mr. ------- made incriminating statements which, if given sufficient time, will undoubtedly be shown to be inconsistent with the medical evidence. Already, the forensic pathologist report calls into question the veracity of anything to which Mr. ------- "confessed." Yet, the jury will be deprived of knowing this information because of the circuit court's myopic insistence on maintaining the present trial date.

If the State is permitted to present its medical evidence as virtually undisputed and fully consistent with Mr. -------'s alleged "confession," without Mr. ------- being able to call his own expert witnesses to refute those claims, the jury will get a one-sided view of the evidence that does not align with the facts as they would be presented at trial at a later date. This minimal gain in judicial economy is greatly outweighed by the grave, and possibly irreparable, prejudice that would occur. "[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Phifer v. State*, 64 Wis.2d at 30-31 (1974) (quoting *Ungar*, 376 U.S. at 589). If a writ or appeal is not granted, there is a great danger of the trial becoming such an empty formality.

3) Defense counsel has expeditiously sought evidence and cultivated expert testimony.

As the facts establish, defense counsel has not been sitting on its hands during this case. Defense counsel began seeking discovery of medical evidence from the initial appearance, only to be initially stymied by the State's objections. Since then, defense counsel has consistently pursued further discovery, remained in consistent and ongoing contact with witnesses, and been diligent in seeking funding for experts through the SPD. Whatever delays have occurred cannot reasonably be attributed to negligence on the part of defense counsel.

4) This case is among the most complicated cases imaginable for defense counsel to attempt to defend.

So-called "shaken baby" cases rely on large amounts of complicated and often contradictory medical evidence that lawyers can only gain a clear understanding of through the use of experts. There is nothing in most law school educational programs that

assists an attorney in dating subdural hemorrhages or rib fractures. Most attorneys cannot recognize pseudo-fractures or rickets, identify venous thrombosis or blood disorders, or analyze tissue samples. All of that has to be coordinated with medical experts after the SPD agrees to fund them.

This case is even further complicated because of the long period of illness from birth until just a few weeks before the alleged abuse, and by the extended period that Junior was on life support, making the dating of injuries more indeterminate. As defense counsel noted in its initial adjournment motion to the circuit court, these cases are more similar to civil cases than traditional criminal cases because of the voluminous medical evidence and expert analysis they require. As such, a further delay of the trial is essential for Mr. ------- to present an adequate and effective defense against the serious charges he vehemently denies.

5) The State initially opposed discovery of important information and cannot be relied on to develop medical testimony that is contrary to its own agenda.

Mr. ------- needs to present his own medical evidence to demonstrate that claims made by the State's medical experts are in dispute; he cannot rely on discovery from the State to help him make that case. Now that the State has finally fulfilled its obligation to provide all necessary discovery, and has allowed Mr. -------'s experts access to relevant reports and tissue samples, the only remedy is to permit him the time he seeks to seek qualification for his experts for the purposes of trial and prepare them to testify.

6) It is reasonable to expect that Mr. -------'s case can proceed to trial in 2014.

Defense counsel has continued to have consistent contact with expert witnesses. When defense counsel agreed to the April 7, 2014, trial date, it was reasonably anticipated that expert witnesses would be ready for trial at that time. A continuance was

sought only because of delays with the experts and the accompanying prejudice this will cause Mr. -------.

7) No one disputes that the circuit court maintains a large case load that it must manage, but Mr. -------'s right to present a defense to this homicide charge far outweighs that concern.

Mr. ------- is on trial for murdering his child, a charge which carries significant social stigma and decades in prison if he is convicted. The law "requires a delicate balance between the defendant's right to adequate representation of counsel at trial, and the public interest in the prompt and efficient administration of justice." *Phifer*, 64 Wis. 2d at 31. Whatever burden is placed on the circuit court from an adjournment pales in comparison to any burden placed on Mr. ------- from not having the full controversy adequately tried.

The Defendant's first continuance motion was filed on February 26, 2014, and was heard at a hearing held on March 14, 2014. At that hearing the circuit court characterized "the issue" as whether defense counsel "had enough time thus far to procure the experts that [defense counsel] need[ed] and process the case accordingly." (7:17-19). The circuit court indicated that it was "satisfied that [defense counsel was] working diligently in the defense of this case," (7:23-24), and that the circuit court did not mean to imply that defense counsel was "not acting to the best of [its] ability to bring the matter forward apace," (12:4-5). The circuit court nevertheless denied the request, noting both that the State "also has a right to prompt disposition of the case," (10:15-17), and that "[t]he Court has an interest in moving the case forward," (10:17-18). In fact, the

circuit court indicated that the State "has an equal interest in advancing the case to trial to that of the defense." (12:8-10).

At the same hearing, despite being "satisfied that [defense counsel was] working diligently in the defense of this case" (7:23-24), the circuit court also excluded all expert witnesses other than Dr. Waney Squier from testifying on behalf of the Defendant. (81:6-7).

The circuit court acknowledged in its Decision on Third Defense Motion to Adjourn Jury Trial that the Defendant's request for "a continuance of the April trial date" was filed on February 26, 2014. In that motion, the Defendant requested a trial date in June 2014, and indicated that "[t]he defense . . . will have exact dates by which [its expert witnesses] would be available for trial, when this motion is heard." The State Public Defender's Office does not approve funding for expert witnesses who will not be able to testify at an already-scheduled jury trial. Because neither Dr. Hyman nor Dr. Scheller would be available or prepared for a trial beginning on April 7, defense counsel could not receive approval from the State Public Defender's Office to retain either doctor unless and until the trial was postponed.

The circuit court denied the motion on March 14,[1] and denied a second motion on March 26. At the March 26 hearing, the circuit court also excluded all but one of the

[1] The circuit court writes, "On February 26, 2014, the Defense requested a continuance of the April trial date. The State objected. The Court denied the motion. On March 14, 2014, the Court heard the suppression

Defendant's expert witnesses. The circuit court did eventually adjourn the trial on its own motion on March 31. That order, however, did not address the circuit court's exclusion of the Defendant's expert witnesses. As such, even after March 31, defense counsel could not receive approval from the State Public Defender's Office to retain Dr. Hyman or Dr. Scheller. It is true that the February 26 Motion for Continuance represented that both experts could be prepared by "late March or early April." This was true on February 26. It was no longer true on April 8. Because these two expert witnesses remain excluded, the State Public Defender's Office still cannot approve funding for them to be retained, and neither expert can begin any analysis, since neither would be allowed to testify.

The circuit court writes, "Ms. Kuchler asserts that the Defense experts are **now** unavailable for the June, 2014 trial- when that is a trial schedule originally offered by the **Defense** in its February 26, 2014 Motion for Adjournment." (Emphasis in original.) This statement misrepresents the February 26 Motion for Adjournment. While the motion indicates that, as of February 26, "a realistic trial date is in June," it also explicitly states that defense counsel would be prepared with "exact dates by which [experts] would be available for trial, when this motion is heard." The Defendant did not assert, and has never asserted, that these witnesses would be available on any specific dates in June, only that, as of February 26, such a date would provide the witnesses with enough time to be retained and to prepare.

---

motion. . . . **Only after the statement was deemed admissible** did the Defense submit a written order for the Court's signature denying the February request for an adjournment of the April 7, 2014 trial date." (Emphasis in original).

This language and emphasis imply that the circuit court's denial of the continuance request occurred prior to March 14, and that defense counsel was dilatory in submitting a written order. In fact, the continuance request was denied on the same day, March 14, at the same hearing in which the Defendant's statement was deemed admissible. The circuit court's concern, then, appears to be that defense counsel did not draft such an order during the brief recess that morning.

RELIEF REQUESTED

Based on the above stated facts and arguments, Mr. ------- seeks leave to a appeal the non-final order denying the request for continuance signed on April 24, 2014. Alternately, Mr. ------- seeks a supervisory writ of mandamus ordering the circuit court to adjourn the upcoming trial so that Dr. Teas and other defense expert witnesses can testify as to their opinions and findings. Mr. ------- also requests a stay of further proceedings while this petition is pending. Only through granting orders as requested will Mr. -------'s essential due process rights be preserved and grave injustice avoided.

Dated this _____ day of April, 2014, in Waukesha Wisconsin.

Respectfully Submitted,

_____
Lawyer Name
State Bar No.

CERTIFICATION

I certify that this petition for leave to appeal conforms to the rules contained in Wis. Stat. §§ 809.50(1) and 809.51(1), for a petition produced using a proportional serif font; double spaced with a 1.5 inch margin on each side; paginated at the center of the bottom margin, and that the length of this petition is 4,997 words.

_____

Lawyer Name