IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

JENNIFER L. DAVID; T'CHAKA SPILLER; JORGE LEDBETTER; TRAVIS HERBERT; DAKOTA WILCOX; COREY BOSTON; JOSEPH STRUEMPH; and CHRISTOPHER JONES, on behalf of themselves and all others similarly situated,

Petitioners,

v.

STATE OF MISSOURI; MISSOURI PUBLIC DEFENDER COMMISSION; MARY FOX, in her official capacity as Director of Missouri's Office of State Public Defender; HON. JUDGE CAROL ENGLAND; HON. JUDGE COTTON WALKER; HON. JUDGE RONALD CARRIER; HON. JUDGE TERRY CUNDIFF; HON. JUDGE ELIZABETH SWANN; HON. JUDGE MICHAEL RUMLEY; and HON. JUDGE STACEY LETT,

Respondents.

Case No. _____

Division _____

MOTION TO CERTIFY A CLASS PURSUANT TO RULE 52.08 AND SUGGESTIONS IN SUPPORT

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I. INTRODUCTION

As detailed in Petitioners' Class Action Petition for Declaratory Judgment and Injunctive Relief ("Petition"), Respondents' practice of systematically placing, and/or authorizing the placement of, indigent criminal defendants on waiting lists represents a failure to provide constitutionally adequate counsel in violation of the Missouri Constitution. This practice has already impacted thousands of indigent criminal defendants across the State of Missouri, including the named Petitioners. These indigent criminal defendants, who are all innocent until proven guilty, often languish in jail for weeks, months, or even over a year, waiting to be assigned an attorney from the Missouri State Public Defender Office ("MSPD"). Even those who are not in custody are suffering as a result of being placed on a waiting list since the absence of counsel makes it virtually impossible for them to conduct any meaningful investigation or otherwise prepare a viable defense to the charges against them.

As such, Respondents' use of waiting lists has created a systemic problem that affects thousands of indigent criminal defendants across the state. The injuries to Petitioners are the result of a common practice on the part of Respondents of utilizing waiting lists to deprive indigent criminal defendants of the legal representation to which they are statutorily and constitutionally entitled. The class numbers in the thousands, with more members added each day. Class members, by definition, have no access to legal representation to bring their own claims for prospective relief. If an individual class member somehow brought such a claim, any relief awarded such a litigant—for example, removing them from a waiting list and appointing them an attorney—would, by definition, worsen the plight of other individuals within the class because it would further reduce the MSPD's available resources and make it less likely for other class members to be removed from the waiting list. *See U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980).

Petitioners therefore ask the Court to certify a Proposed Class defined as follows:

> All indigent persons who have been charged with a crime and are currently on a waiting list for legal representation, or who will be charged with a crime and placed on a waiting list for legal representation during the pendency of this litigation.

As detailed below, the Proposed Class, the named Petitioners, and class counsel satisfy the requirements for class certification under Missouri Supreme Court Rule 52.08(a) and (b).

II. LEGAL STANDARD

Class actions for injunctive relief are favored in civil rights actions and, in particular, to address systemic issues within the criminal justice system. *See* William B. Rubenstein, *Newberg on Class Actions* § 25:18 (4th ed. 2002) ("The class action device was specifically designed to aid the court and the parties in resolving certain difficulties common to criminal justice class suits."). "A class action is designed to promote judicial economy by permitting the litigation of the common questions of law and fact of numerous individuals in a single proceeding." *State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 (Mo. 2004).

Missouri courts have held that whether a class should be certified is "based primarily upon the allegations in the petition." *Elsea v. U.S. Eng'g Co.*, 463 S.W.3d 409, 417 (Mo. Ct. App. 2015). Moreover, in a "class certification determination, the court assumes the named [Petitioners'] [ ] allegations are true." *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 224 (Mo. Ct. App. 2007). While the instant case is a quintessential case to be certified as a class action, "courts should err in close cases in favor of certification because the class can be modified as the case progresses." *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 715 (Mo. 2007).

In Missouri state court, a class is properly certified if the evidence in the record, taken as true, satisfies the requirements of Rule 52.08(a)(1) – (a)(4) and the requirements of either Rule 52.08(b)(1), 52.08(b)(2) or 52.08(b)(3). Because the text of Rule 52.08 is essentially the same as

Federal Rule of Civil Procedure 23 ("FRCP 23"), Missouri courts have long held that federal court interpretations of FRCP 23 are relevant and may be considered in the determination of class certification questions. *See State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 n.5 (Mo. banc 2004); *Koehr v. Emmons*, 55 S.W.3d 859, 864 n.7 (Mo. Ct. App. 2001) ("Because Missouri Rule 52.08 and Federal Rule 23 are identical, we consider federal interpretations of Rule 23 [as] interpetrating (sic) Rule 52.08").

To satisfy the requirements of Rule 52.08(a), Petitioners must demonstrate that the Proposed Class satisfies the following requirements:

> (1) the class is so numerous that joinder of all members is impracticable [(numerosity)];
>
> (2) there are questions of law or fact common to the class [(commonality)];
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [(typicality)]; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class [(adequacy)].

Rule 52.08(a)(1)-(a)(4).

Second, Petitioners must demonstrate that the Proposed Class fits into at least one of the categories identified in Rule 52.08(b). As relevant here and discussed below, the Proposed Class meets the requirements of both Rule 52.08(b)(1)(B) and (b)(2).

III. DISCUSSION

Courts across the country have certified classes of indigent criminal defendants to challenge structural, system-wide problems with the delivery of public defense services. *See, e.g.*, *Hurrell-Harring v. State of New York*, 914 N.Y.S.2d 367, 372 (N.Y. App. Div. 2011); *Wilbur v. City of Mount Vernon*, 298 F.R.D. 665 (W.D. Wash. 2012); *Kuren v. Luzerne Cty.*, 146 A.3d 715, 718 (Pa. 2016); *Tucker v. Idaho*, Case No. CV-OC-2015-10240, Order Granting Class

Certification, Jan. 17, 2018. Petitioners' Proposed Class is no different: it clearly satisfies the requirements of numerosity, commonality, typicality, and adequacy, and is necessary to ensure that one class member's claims do not impinge on the potential claims of another. Moreover, the same questions of law and fact apply to each claim and, as such, a class action is the most effective and efficient method to resolve Petitioners' claims. This Court should therefore certify Petitioners' Proposed Class.

A. Rule 52.08(a)

The Proposed Class satisfies Rule 52.08(a) because (1) the size of the Proposed Class—numbering in the thousands—and other factors discussed below show that joinder would be impracticable; (2) the questions raised by this suit are common to all members of the putative class, and a decision by this Court on those common questions would resolve class claims simultaneously; (3) the named Petitioners' claims and interests are aligned with and typical of those of the putative class members; and (4) the named Petitioners and their counsel will adequately and zealously represent the class.

1. Rule 52.08(a)(1): Numerosity

This case easily satisfies the requirement under Rule 52.08(a)(1) that the class be "so numerous that joinder of all members is impracticable." *Rule 52.08(a)(1).* Petitioners' Proposed Class comprises thousands of indigent criminal defendants across the state, who have been deprived of counsel and placed on waiting lists for legal representation. Moreover, many more indigent criminal defendants are placed on waiting lists in Missouri every day, all of whom are innocent until proven guilty and, by definition, unable to afford their own representation. Both the number of class members and the nature of the action make joinder of all members of the Proposed Class implausible. *See Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559-60 (8th Cir.

1982) (in addition to class size, court may consider "nature of the action" and "any other factor relevant to the practicability of joining all the putative class members").

The size of the Proposed Class alone warrants certification. Respondent MSPD's court filings and response to a January 2020 Sunshine Request indicate that well over 4,600 criminal defendants are currently on waiting lists across the state, approximately 600 of whom remain in pretrial detention. (*See* Ex. H, January 9, 2020 Response to Sunshine Request from Missouri State Public Defender System*)*. Joinder of even a tiny fraction of the eligible Petitioners would quickly overwhelm this Court. *See Esler v. Northrop Corp*., 86 F.R.D. 20, 34 (W.D. Mo. 1979) (certifying class of 186 members).

Additional considerations also weigh in favor of finding that Petitioners have satisfied the Rule 52.08(a)(1) criteria. First, the Proposed Class is fluid—members will frequently join and leave the class. *See Barrett v. Claycomb*, 2011 WL 5822382, *2 (W.D. Mo. Nov. 15, 2011) (individual lawsuits would be impractical where class membership was fluid). New class members are being added to the class every day as Respondents continue to place or authorize the placement of criminal defendants on waiting lists, and members leave the class if, for example, MSPD eventually appoints an attorney to represent them or the class member pleads out.

Second, members of the Proposed Class are, by definition, financially unable to hire counsel and fund litigation themselves; joinder in this context is thus not only impracticable, it is virtually impossible. *See* William Rubenstein, *Newberg on Class Actions* § 3:11 (5th ed. 2011). Third, the Proposed Class members are dispersed across the state of Missouri. *See* Ex. H (January 9, 2020 Response to Sunshine Request from Missouri State Public Defender System); *see also Darling v. Bowen*, 685 F. Supp. 1125, 1127 (W.D. Mo. 1988) (geographic dispersion of

class members contributed to impracticability finding). And finally, many individuals will enter the Proposed Class—by being charged with a crime and qualifying for MSPD services—only after certification of the class is complete. Joinder of future class members is impracticable. *See Weaver v. Reagen*, 701 F. Supp. 717, 721 (W.D. Mo. 1998) (potential future members made seven-member class sufficiently "numerous"); *Lane v. Lombardi*, No. 2:12-cv-4219-NKL, 2012 WL 5462932, at *2 (W.D. Mo. Nov. 8, 2012).

2. Rule 52.08(a)(2): Commonality

Commonality is satisfied when "there are questions of law or fact common to the class." *Rule 52.08(a)(2).* However, Courts have interpreted this requirement as being satisfied so long as there is at least one question of law or fact which is common to the class. *Elsea v. U.S. Eng'g Co.*, 463 S.W.3d 409, 419 (Mo. Ct. App. 2015) ("[E]ven a single [common] question will do." (bracket-replaced text in original)). Further, courts in Missouri have gone out of their way to point out that the commonality requirement "is written in the disjunctive, and hence, the common question may be one of fact *or* law and need not be one of each." *Elsea*, 463 S.W.3d, at 418 (emphasis in original). Ultimately, the bar for establishing commonality is set incredibly low.

As a result of this low standard, the commonality requirement is "easily met in most cases because it 'requires only that the course of conduct giving rise to a cause of action affects all class members, and that at least one of the elements of that cause of action is shared by all class members.'" *Egge v. Healthspan Services Co.*, 208 F.R.D. 265, 268 (D. Minn. 2002). The determination of whether a question is "common" or, in the alternative, "individual" is based on the nature of the evidence that will suffice to resolve the question. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 175 (Mo. Ct. App. 2006). "If, to make a *prima facie* showing on a given question, the members of a proposed class will need to present evidence that varies from member

to member, then it is an individual question. If the same evidence will suffice for each member to make a *prima facie* showing, then it becomes a common question." *Id.* (citing *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 382 (Mo. Ct. App. 2005).

Common questions of law or fact exist, as in the present case, because the Respondents have engaged in standardized conduct toward the members of the Proposed Class. *Keele v. Wexler*, 149 F.3d 589 (7th Cir. 1998); *State ex rel. St. Louis Fire Fighters Ass'n v. Stemmler*, 479 S.W.2d 456 (Mo. banc 1972) (challenge to validity of charter amendment presents common question of law). Here, commonality is met because Respondents have treated members of the Proposed Class identically by placing, or authorizing the current or future placement of, each member of the Proposed Class on a waiting list for legal representation. Respondents have engaged in this conduct regardless of the nature of the pending charges or potential penalties at stake for each member of the Proposed Class.

Moreover, this case presents several additional questions of law common to the Proposed Class, including the core question of whether Respondents have violated the Missouri Constitution and/or Missouri statutory law by placing indigent criminal defendants who qualify for MSPD representation on waiting lists, thereby impermissibly denying them access to counsel. That overriding question breaks down into several sub-questions, all with common answers.

a. Whether Mo. Rev. Stat. § 600.063.3(5) violates the right to counsel under the Missouri Constitution to the extent that it authorizes the placement of indigent defendants on waiting lists for legal representation;

b. Whether Respondents are required under the Missouri Constitution and/or under Missouri law, to provide competent legal representation to all indigent criminal defendants who have been placed on MSPD waiting lists across the state; and

c. Whether Respondent Judges are required under the Missouri Constitution and/or under Missouri law, to dismiss all pending charges against indigent criminal defendants who have been placed on a waiting list and denied access to counsel.

The answer to each of these questions will turn on common evidence and/or common legal arguments, making each of these questions sufficient to satisfy Rule 52.08(a)(2). Even if this Court determines that some of these questions must be assessed on an individual basis, so long as one of these questions is found to be common, the commonality prerequisite is satisfied. *See Elsea,* 463 S.W.3d at 419.

Indeed, any one of these questions, independently, would be a "common question" sufficient to sustain a class action. Each one requires an analysis of MSPD at the system-wide level and does not depend on the particular circumstances of each member of the Proposed Class. Although each Petitioner's individual experience will provide a concrete example of an indigent criminal defendant being placed on a waiting list, it is Petitioners' *collective* experiences that support the conclusion that indigent criminal defendants in Missouri are being denied their constitutional right to legal counsel and are therefore entitled to prospective injunctive relief.

3. Rule 52.08(a)(3): Typicality

This case also meets the requirement of Rule 52.08(a)(3) that the named Petitioners' claims be typical of the class claims, a requirement that is "fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc*., 84 F.3d 1525, 1540 (8th Cir. 1996). Petitioners' claims in this case stem from the same

course of conduct as the class claims—namely Respondents' failure to provide constitutionally adequate legal representation by placing indigent criminal defendants on waiting lists—and give rise to the same claim for prospective injunctive relief under provisions of the state constitution guaranteeing the right to counsel.

By placing Petitioners on waiting lists, Respondents have deprived Petitioners of legal representation at critical stages of their criminal proceedings. As a result, Petitioners have suffered the same harms inflicted on all indigent criminal defendants placed on a waiting list in Missouri—significant delay in the provision of counsel, extended and unnecessary pretrial detention, potential loss of exculpatory evidence or witness testimony, lack of consistent or meaningful communication with an attorney, and absence of representation at critical stages of the case. Petitioners have plausibly alleged that the injustices they suffer, like the harms inflicted on other members of the class, stem directly from being placed on a waiting list after being charged with a crime in Missouri. *Id. Cf. Claycomb*, 2011 WL 5822382, at *3 (assessing "legal significance of varying degrees" of impact of challenged policy "would require resolution of the merits[,] which is not properly done at the class certification stage"). Petitioners' claims are thus typical of the Proposed Class as a whole and meet the requirements of Rule 52.08(a)(3).

4. Rule 52.08(a)(4): Adequacy

Adequacy is satisfied when "the representative parties will fairly and adequately protect the interests of the class." *Rule 52.08(a)(4)*. In order to demonstrate adequacy, Petitioners must show that: (1) "class counsel is qualified and competent to conduct the litigation" and (2) the proposed class representatives have "no interests that are antagonistic to the other proposed class members." *Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc.*, 524 S.W.3d 116, 130 (Mo. Ct. App. 2017). The adequacy requirement is met by class counsel and the Proposed Class

representatives.

Here, Petitioners have satisfied both requirements of Rule 52.08(a)(4). Petitioners satisfy the first requirement because the Proposed Class will be represented by experienced, well-resourced counsel. Attorneys from the American Civil Liberties Union's national Criminal Law Reform Project, the American Civil Liberties Union of Missouri, the Roderick & Solange MacArthur Justice Center, and the global law firm of Orrick, Herrington & Sutcliffe, LLP, have between them decades of experience in litigation generally, specific expertise in litigating class actions and indigent defense reform suits, as well as sufficient resources to vigorously prosecute this lawsuit.

Petitioners also satisfy the second requirement because Petitioners' interests are far from antagonistic to the rest of the Proposed Class. They have every motive to see this case advance so that they can benefit from the legal representation the Missouri Constitution requires, and their interest in doing so coincides with the interests of other class members. This Court should thus find that the requirement of adequacy for class certification is satisfied.

B. Rule 52.08(b)

A class must satisfy at least one of the requirements laid out in Rule 52.08(b). The Court should certify this class because two independent subsections of Rule 52.08(b) are satisfied: subsection (1)(B) and subsection (2). Satisfying either would be sufficient to warrant certification, and Petitioners here meet the criteria for both.

1. Rule 52.08(b)(1)(B)

This case meets the requirements of subsection (b)(1)(B) of Rule 52.08. That subsection allows for the certification of a class when not certifying the class would create a risk of:

> [A]djudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of

> the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]

Rule 52.08(b)(1)(B). In other words, subsection (b)(1)(B) is concerned with prejudice to the members of the Proposed Class if certification were not granted. *See Doran v. Mo. Dep't of Soc. Servs*., 251 F.R.D. 401, 407 (W.D. Mo. 2008).

This case is a type of "common fund" case where the State has only so many resources to spend on its public defender program. In "common fund" cases, "the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members." *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 834 (1999). All indigent criminal defendants in Missouri have a right to counsel, but the existing pool of public defenders is a limited, finite resource. Putting to one side the sheer implausibility of thousands of individual claims being brought by indigent defendants to secure adequate counsel in the first instance, if each member of the Proposed Class were to file suit separately, some might succeed in being removed from a waiting list and have an attorney assigned to their case. But others likely would not. Indeed, a victory for one would "substantially impede" the ability of other indigent criminal defendants to obtain adequate counsel and be removed from a waiting list, because there would be even fewer public defender resources available as a result of the individual relief granted. A class action is the only way to tackle the problem of Respondents' systematic reliance on waiting lists in a comprehensive and equitable way.

2. Rule 52.08(b)(2)

Furthermore, Petitioners' Proposed Class also meets Rule 52.08(b)(2)'s requirement that a class may be certified if:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final

> injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]

Rule 52.08(b)(2).

Here, Petitioners' Proposed Class is a textbook example of a Rule 52.08(b)(2) class because a single injunction or declaratory judgment would provide relief to each member of the class. *See Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016). The use of waiting lists in Missouri has been authorized by a state statute, Missouri Revised Statute § 600.063.3(5), that is "generally applicable to the class." Respondents' conscious decision to place or authorize the placement of indigent criminal defendants on waiting lists has caused indigent individuals charged with a crime in Missouri to be deprived of legal representation. The injunction requested by Petitioners seeks the following, among other things:

- An Order from this Court suspending the application of Missouri Revised Statute § 600.063.3(5), which authorizes courts to place indigent defendants on waiting lists for legal representation, as unconstitutional;
- An Order requiring Respondents to stop placing indigent criminal defendants charged with a crime in Missouri on a waiting list;
- An Order immediately removing all indigent criminal defendants currently on a waiting list for counsel in Missouri and (1) appointing competent counsel to all such indigent criminal defendants; or, if appointment of counsel is impracticable, (2) immediately dismissing the charges against all such indigent criminal defendants.

In addition to this injunctive relief, Petitioners' also seek to recover their costs, expenses, and reasonable attorneys' fees. While this would be a monetary recovery, it does not constitute *damages*, and therefore does not disrupt the requirements of a Rule 52.08(b)(2) class.

IV. CONCLUSION

For the foregoing reasons, and those set forth in Petitioners' Class Action Petition for Declaratory Judgment and Injunctive Relief, Petitioners respectfully request that this Court grant their Motion for Class Certification pursuant to Rule 52.08.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing motion and suggestions in support was served upon counsel for Mary Fox, the Public Defender Commission, and the State of Missouri by e-mail on February 27, 2020.

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