

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 STACEY LETT; and
HON. JUDGE MICHAEL RUMLEY,

Respondents.

Case No. _____

Division: _____

**MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION AND SUGGESTIONS IN SUPPORT**

Pursuant to Mo. Sup. Ct. Rule 92.02 and for the reasons discussed herein, Petitioners request a temporary restraining order and, upon hearing, a preliminary injunction, to immediately end Respondents' unconstitutional practice of placing indigent criminal defendants on "waiting lists" to receive legal representation.

INTRODUCTION

On August 3, 2019, Petitioner Jennifer L. David was arrested and charged with a felony offense. Ms. David was taken to the Callaway County Jail in Fulton, Missouri. Ms. David was able to use a credit card to post a surety bond and was released from jail that same day. She has been out on bond ever since. Ms. David was arraigned, without counsel, before Judge Carol England on September 13, 2019. Ms. David has had several counsel status hearings before the court since that initial appearance, all without an attorney representing her. A January 7, 2020 court filing indicates that Ms. David completed a Missouri State Public Defender (“MSPD”) application, qualified for MSPD services, but was placed “on a wait list pending the availability of a public defender to provide representation.” Ex. A. The notice did not indicate any time frame within which Ms. David could expect to be assigned an attorney to represent her. However, after taking the initiative to reach out to MSPD via email, on January 31, 2020, Ms. David was told by MSPD that the estimated amount of time that she will be on the waitlist is eight months. Ex. B. As such, she has been unable to communicate with an attorney, review discovery, interview witnesses, gather evidence, or otherwise mount a viable defense to the charge against her. Ms. David has been a registered nurse in Missouri since 2011. In July 2019, she suffered the tragic loss of her own infant child. Because of the pending charge against her, she is unable to find employment as a nurse and has had at least three job offers retracted because of the pending charge. Ms. David appeared for a counsel status hearing on February 21, 2020, at which time she again informed Respondent Judge England that she was still on the MSPD waitlist. The court set her case out for another counsel status hearing on March 13, 2020.

On November 8, 2019, Petitioner T’Chaka Spiller was arrested and charged with a felony offense and multiple misdemeanor offenses in St. Charles County. Mr. Spiller was arraigned

without counsel before Judge Terry Cundiff four days later, at which time Judge Cundiff denied his request for a bond reduction. Despite being deemed indigent and entitled to representation by the MSPD, Mr. Spiller was placed on MSPD's waiting list, and has remained in pretrial detention since. Mr. Spiller has appeared in front of Judge Cundiff multiple times, only to have his case continued repeatedly due to his lack of legal representation. *See Ex. M.* Due to the pretrial detention, Mr. Spiller cannot take care of his mother, who had a stroke after his arrest. He also missed his six-year-old's birthday during the detention, and his effort to seek joint custody of his child will be delayed or otherwise negatively impacted due to his prolonged detention on a waiting list.

On or about December 20, 2019, Petitioner Jorge Ledbetter was arrested and charged with a felony offense in St. Charles County. Three days after on December 23, 2019, Mr. Ledbetter was arraigned without counsel in front of Judge Elizabeth Swann. Since then, Mr. Ledbetter has remained in pretrial detention and appeared before the court on two subsequent occasions, only to have his case continued repeatedly due to his lack of legal representation. *See Ex. S.* In addition, his bond reduction request was not accepted. While Mr. Ledbetter has been detained, he has been prevented from supporting his pregnant fiancé. Their efforts to get married have been stymied by his incarceration, and he is concerned that he will not be released from custody to be present for his child's birth.

On December 26, 2019, Petitioner Travis Herbert was arrested and charged with several felony offenses in Greene County. On December 27, 2019, Mr. Herbert was arraigned before Judge Ronald Carrier, without counsel, and had his bond set at \$75,000. Subsequently, the MSPD filed a letter with the court, dated February 3, 2020, indicating that Mr. Herbert had been placed on a waiting list for an attorney and providing no time frame within which he is likely to

receive representation in his criminal case. See Ex. D. Since being placed on the waiting list, Mr. Herbert has remained in pretrial detention without access to counsel. As such, he has been unable to communicate with an attorney, review discovery, interview witnesses, gather evidence, or otherwise mount a viable defense to the charges against him. He has been forced to navigate his court appearances—including a February 11, 2020 bond reduction hearing—without the assistance of an attorney. Mr. Herbert also filed a pro se discovery motion on February 13, 2020 in a desperate effort to move his case along, notwithstanding the absence of defense counsel. He is scheduled to return to court on March 4, 2020 for another counsel status hearing.

On August 22, 2019, Petitioner Dakota Wilcox was arrested and charged with multiple misdemeanor and felony offenses in Jefferson City. After being detained at the Cole County Jail for the next few days, Mr. Wilcox was arraigned before Judge Cotton Walker on August 26, 2019. Since then, Mr. Wilcox has remained in pretrial detention and appeared before the court on seven different occasions, culminating in a bond reduction hearing on January 24, 2020, during which the court denied his motion and declined to set bail at all. Mr. Wilcox received a letter from the MSPD dated October 2, 2019, indicating that he had been placed on a waiting list for an attorney and providing no time frame within which he is likely to receive representation in his criminal case. Ex. E. As such, Mr. Wilcox has been without access to counsel—unable to communicate with an attorney, review discovery, interview witnesses, gather evidence, or otherwise mount a viable defense to the charges against him. Mr. Wilcox has now been in custody for nearly six months without access to an attorney. He is scheduled to return to court on March 3, 2020 for another counsel status hearing.

On or about November 4, 2019 Petitioner Corey Boston was arrested in Jefferson City, and charged with a felony offense. Two days later, on November 6, Mr. Boston appeared before

Judge Cotton Walker, without counsel, while still in custody at the Cole County Jail. At the November 6 hearing, the court denied Mr. Boston's request for a bail reduction and declined to set bail at all. Since then, Mr. Boston has been before the court on at least one other occasion, only to have his case continued yet again. Despite being found eligible for the services of the MSPD, Mr. Boston was placed on a waiting list for an attorney and given no time frame within which he is likely to receive representation in his criminal case. Ex. F. Since being placed on the waiting list, Mr. Boston has been without access to counsel—unable to communicate with an attorney, review discovery, interview witnesses, gather evidence, or otherwise mount a viable defense to the charge against him. Mr. Boston has now been in custody for more than three months without access to an attorney. He is scheduled to return to court on March 3, 2020 for another counsel status hearing.

On March 28, 2019, Petitioner Joseph Struempf was charged with a felony offense in Cass County. On April 5, 2019, Mr. Struempf was arraigned without counsel. After failing to appear for a hearing in June 2019, Mr. Struempf was arrested on November 26, 2019. On December 2, 2019, Mr. Struempf appeared before Judge Michael Rumley without counsel and a cash-only bond was set. Mr. Struempf applied for MSPD services following his November 2019 arrest and was deemed indigent and entitled to representation. Subsequently, he received a letter from MSPD, on or about December 17, 2019, indicating that, although he was indigent and entitled to representation, he had been placed on a waiting list indefinitely pending, pending the availability of competent MSPD counsel with the capacity to provide representation. Since being placed on the waiting list, Mr. Struempf has remained in pretrial detention without access to counsel. As such, he has been unable to communicate with an attorney, review discovery, interview witnesses, gather evidence, or otherwise mount a viable defense to the charge against

him. On February 6, 2020, Mr. Struempf and appeared before Judge Rumley, again without counsel only to have his case continued. During his time in custody, Mr. Struempf has lost both his part-time job and his residence. Mr. Struempf has now been in custody for nearly three months without access to an attorney. He is scheduled to return to court for a case review hearing on February 27, 2020.

On or about January 15, 2020, Petitioner Christopher Jones of Cass County was arrested after he failed to appear at a scheduled hearing in December 2019. Mr. Jones has been accused of violating his probation and applied for public defender services shortly after his arrest. Subsequently, Mr. Jones received a letter from MSPD informing him that he qualified for MSPD services but was placed on a waiting list indefinitely, pending the availability of competent MSPD counsel with the capacity to provide representation. Since being placed on the waiting list, Mr. Jones has remained in pretrial detention without access to counsel. As such, he has been unable to communicate with an attorney, review discovery, interview witnesses, gather evidence, or otherwise mount a viable defense to the charges against him. Mr. Jones has now been in custody for more than a month without access to an attorney. He is scheduled to return to court on March 10, 2020.

Unfortunately, the Petitioners' experiences mirror that of thousands of indigent defendants across the state of Missouri, who have been placed on waiting lists and denied timely access to counsel, in clear violation of their constitutional rights to counsel and due process.

The situation is dire. As of January 2020, the MSPD and criminal court judges have placed over 4,600 criminal defendants on waiting lists across the state, approximately 600 of whom remain in pretrial detention. Ex. H. Some indigent criminal defendants have been in pretrial detention and on a waiting list for an attorney for weeks, months, and even *years*. *See id.*

(Client ID numbers ending in 7A1F8E, 6571E0 and 5BB4C3). There are many more indigent defendants who were initially placed on waiting lists but were removed, not because they received legal counsel but because they were so desperate to get out from detention that they accepted plea bargains that they would not have otherwise accepted if adequate legal counsel were provided. *See e.g.*, Ex. I (Letter from S. Harrison to court) (stating that she had been placed on a waiting list, asking to “plead out on this case now so everything will be done with once I leave [the jail]”); Ex. S (Katie Moore, Missouri Judge Says: Represent Yourself in Court or Plead Guilty to Save Time, Kansas City Star, Nov. 20, 2019, available at <https://www.kansascity.com/news/local/crime/article237037159.html>) (describing that Victor Bach, who was on the wait list for about a year, took a guilty plea because “he was finally ‘tired of dealing with it’”). The harm that the waiting lists have caused is severe, irreparable, ongoing, and will be inflicted on more and more people if the practice is not enjoined immediately.

BACKGROUND

It is no secret that Missouri’s public defense system is broken. The astronomical workloads among public defenders in this state, as well as the ongoing lack of adequate resources for the MSPD have been well-documented over the last two decades. According to Missouri-specific caseload standards developed over the last several years by the MSPD and the American Bar Association, public defender workloads are so high that even if every single one of MSPD’s attorneys worked 100 hours per week, with zero time off for vacation, illness, or training, MSPD would still not be able to provide minimally adequate representation to each of their clients. Ex. J (Missouri State Public Defender Cumulative Caseload Metrics); Ex. K (American Bar Association and RubinBrown, the Missouri Project (2014)) at 23.

Then, in 2017, the Missouri Supreme Court issued an order in the matter of *In re Hinkebein*, finding that a senior MSPD attorney should be disciplined, including by threatening to suspend the attorney's law license indefinitely, because he was unable to provide effective legal representation to a number of his clients—notwithstanding the fact that the attorney's failures were largely the result of the limitations placed upon him by his excessive caseload. Order, *In re Hinkebein*, SC94089 (Mo. Sept. 12, 2017). In response, MSPD offices and attorneys across the state, who continue to operate under crushing workloads, have taken various measures to avoid jeopardizing their law licenses while also continuing to accept appointments to represent indigent defendants. One such measure has been to place indigent defendants on “waiting lists” for an indefinite amount of time until the local MSPD office has the capacity to represent them. In other words, many indigent defendants are forced to wait—often while still in pretrial custody—until an MSPD attorney has the time to take up their case. While placing defendants on waiting lists may be a convenient (and even understandable) workaround for the MSPD, the practice violates Missouri constitutional law and does nothing to help indigent defendants, like Petitioners, who are often required to wait for months before receiving counsel—all while they languish in jail, potentially exculpatory evidence disappears, witnesses' memories fade, and their cases become otherwise compromised.

The waiting list practice is also authorized by Section 600.063.3(5) of the Missouri Revised Statutes, which gives the presiding judge of a criminal case the authority to “place cases on a waiting list for defender services.” Accordingly, judges across the state have also required or allowed MSPD offices to place numerous criminal defendants on waiting lists for representation, despite the fact that this subsection plainly violates the Missouri Constitution.

The justification for this injunctive relief is simple: it is to protect the fundamental right to counsel, due process, and equal rights and opportunity under the Missouri Constitution, which offers the same protections for those rights as does the Sixth and Fourteenth Amendments to the United States Constitution. The Supreme Court of the United States has held that counsel must be appointed “within a reasonable time” after the start of the adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel, to “allow for adequate representation at any critical stage before trial, as well as at trial itself.” *Rothgery v. Gillespie County*, 554 U.S. 191, 212-13 (2008). Placing indigent defendants on waiting lists for months, or even years, is an undisputed violation under the “reasonable time” standard. The violation is especially clear when indigent criminal defendants have to appear in court without counsel for critical proceedings, such as arraignments and bond hearings.

While Section 600.063.3(5) impermissibly allows for the use of waiting lists, other portions of the statute also make clear that the use of waiting lists is not the only way to address the MSPD’s workload issue. In fact, Missouri Revised Statutes Section 600.063 specifically provides alternative forms of relief when the MSPD is unable to provide effective legal representation: the court may appoint private counsel; investigate whether defendants receiving MSPD services are actually eligible; dispose the case without the imposition of a jail or prison sentence; modify the conditions of release, such as by reducing the amount of bond; or grant continuances. Mo. Rev. Stat. §600.063.3(1)-(4), (6) (2013). With these alternative forms of relief available, Respondents will suffer minimal (if any) burden if a temporary restraining order, and ultimately, an injunction, is granted.

Because of the scope, severity, and ongoing nature of Respondents’ violations of Petitioners’ constitutional right to counsel and due process, in addition to the urgent need to

address the continued pretrial detention of indigent defendants who have been denied access to counsel, Petitioners move for a temporary restraining order and a preliminary injunction to immediately end the use of waiting lists for any reason by the MSPD and circuit courts across the state. Relatedly, Petitioners respectfully request that this Court find Missouri Revised Statutes Section 600.063.3(5) unconstitutional insofar as it authorizes courts or the MSPD to place indigent defendants on waiting lists for legal representation.

GENERAL FACTUAL ALLEGATIONS

The State's Use of Waiting Lists

1. MSPD has suffered for decades from excessive workloads and the resulting deficiencies in representation, including failure to represent clients at initial appearances and other critical stages of the case; lack of consistent communication with clients; lack of sufficient investigation; and failure to seek and review discovery in a timely manner, among other things. *See generally*, Ex. K (American Bar Association and RubinBrown, the Missouri Project (2014)).
2. Since the fall of 2017, following the *Hinkebein* decision, MSPD offices across the state have communicated with the criminal court judges in their districts to inform them of the MSPD's intention to refuse cases and establish waiting lists for indigent defendants whose cases have been assigned to MSPD attorneys, in a desperate effort to comply with both the criminal courts' orders appointing them to represent new defendants and the Missouri Supreme Court's finding that attorneys are ethically required to refuse representation if they do not have the capacity to provide an adequate defense. *E.g.* Ex. G (Letter to court regarding Stephanie Harrison) (stating that "due to an excessive caseload,

we cannot assign an attorney to represent this defendant as no attorney is available at this time”).

3. MSPD offices also routinely sends out letters to indigent criminal defendants assigned to MSPD offices, informing them that while they meet the eligibility guidelines for representation by the MSPD, they are unable to assign an attorney to his or her case, and the indigent defendant’s name will be placed on a waiting list for a lawyer; but despite without counsel, the indigent defendant must appear at all scheduled court appearances. *See e.g.* Exs. C, D, E, F, G, U.
4. Many indigent defendants have remained on the waiting list for months, and some for more than a year, before having an attorney assigned to their case. *See* Ex. H (Client ID numbers ending in 7A1F8E, 6571E0 and 5BB4C3) (showing that three indigent defendants have been in pretrial detention and on a waitlist for over two years).
5. Indeed, the circumstances surrounding the named Petitioners’ cases illustrate the larger problem.
6. Petitioner Jennifer L. David was arrested and charged with a felony on August 3, 2019. Despite qualifying for the services of MSPD, Ms. David was subsequently placed on a waiting list for representation and denied access to counsel. Ms. David is not in custody. Ms. David returned to court on February 21, 2020, only to have her case continued again—this time to March 13, 2020.
7. Petitioner T’chaka Spiller was arrested and charged with a felony offense and multiple misdemeanor offenses on November 8, 2019. Mr. Spiller applied for MSPD services on a separate felony case prior to his arrest, on November 1. Despite qualifying for the services of the MSPD, he was placed on a waiting list for representation and denied

- access to counsel. Mr. Spiller has been in custody for over three months without access to an attorney and is not scheduled to return to court until March 19, 2020.
8. Petitioner Jorge Ledbetter was arrested and charged with a felony offense on or about December 20, 2019. Despite qualifying for the services of the MSPD, Mr. Ledbetter was subsequently placed on a waiting list for representation and denied access to counsel. Mr. Ledbetter has been in custody for more than two months without access to an attorney. Mr. Ledbetter is scheduled to return to court on March 18, 2020, for a counsel status hearing.
 9. Petitioner Travis Herbert was arrested and charged with several felony offenses on December 26, 2019. Despite qualifying for the services of the MSPD, Mr. Herbert was subsequently placed on a waiting list for representation and denied access to counsel. Mr. Herbert has been in custody for two months without access to an attorney. He is scheduled to return to court on March 4, 2020.
 10. Petitioner Dakota Wilcox was arrested and charged with a number of misdemeanor and felony offenses on or about August 22, 2019. Despite qualifying for the services of the MSPD, Mr. Wilcox was subsequently placed on a waiting list for representation and denied access to counsel. Mr. Wilcox has been in custody for nearly six months without access to an attorney. He is scheduled to return to court on March 3, 2020.
 11. Petitioner Corey Boston was arrested and charged with a felony offense on November 4, 2019. Despite qualifying for the services of the MSPD, Mr. Boston was subsequently placed on a waiting list for representation and denied access to counsel. Mr. Boston has been in custody for more than three months without access to an attorney. He is scheduled to return to court on March 3, 2020.

12. Petitioner Joseph Struempf was charged with a felony offense on March 28, 2019. After failing to appear for a hearing in June 2019, Mr. Struempf was arrested on November 26, 2019. Despite qualifying for the services of the MSPD, Mr. Struempf was subsequently placed on a waiting list for representation and denied access to counsel. Mr. Struempf has been in custody for nearly three months without access to an attorney. He is scheduled to return to court on February 27, 2020.
13. Petitioner Christopher Jones was arrested on or about January 15, 2020, after he failed to appear at a scheduled hearing in December 2019. Despite qualifying for the services of the MSPD, Mr. Jones was subsequently placed on a waiting list for representation and denied access to counsel. Mr. Jones has been in custody for more than a month without access to an attorney. He is scheduled to return to court on March 10, 2020.
14. There are currently more than 4,600 individuals on waiting lists across the state and the lists continue to grow. *See* Ex. H.
15. In some MSPD offices, defendants on the waiting list who are in custody or have been on the waiting list the longest have not been prioritized; instead, MSPD offices may have a “color coded waitlist based upon how outraged the judge is and whether they are to the point of ordering us into the case or not.” Ex. L (*Church v. State of Missouri*, District Defender Rod Hackathorn deposition) at 85:18-86:7.
16. Defendants in all kinds of criminal cases, “from misdemeanor up to murder,” have been placed on the waiting list. *Id.* at 95:7-11.

Missouri Courts’ Practice of Placing Indigent Defendants on Waiting Lists for Legal Representation

17. Missouri Revised Statutes Section 600.063 provides that “upon approval by the director or the commission, any district defender may file a motion to request a conference to

- discuss caseload issues involving any individual public defender or defenders, but not the entire office, with the presiding judge of any circuit court served by the district office.”
18. As the language of the statute suggests, and as courts have repeatedly found, Section 600.063 is not designed to address systemic deficiencies in the delivery of indigent defense services. Ex. N (*In re: Area 16 Public Defender Office III*, Case No. 1716-MC14505, Judgment/Order (June 27, 2019)) at 5.
 19. Missouri Revised Statutes Section 600.063.3(5) provides that, after the conference, the presiding judge of a criminal case, “based upon a finding that the individual public defender or defenders will be unable to provide effective assistance of counsel due to case load issues,” may “place cases on a waiting list for defender services, taking into account the seriousness of the case, the incarceration status of the defendant, and such other special circumstances as may be brought to the attention of the court by the prosecuting or circuit attorney, the district defender, or other interested parties.”
 20. Judges across the state, including Respondents in this action, have issued orders allowing indigent criminal defendants to be placed on waiting lists for public defender services.
 21. In St. Louis County, Presiding Judge Gloria C. Reno issued an administrative order establishing the MSPD wait list on January 2, 2020, but noting that “the court reserves the continuing right to review this administrative order if the establishment of a wait list causes or threatens to cause any undue disruption to any party’s constitutional rights, community safety, the administration of justice or to any county court stakeholders.” Ex. O at 2.
 22. Respondent Judge Carol England authorized or permitted Petitioner Jennifer L. David to be placed on a waiting list indefinitely and thereby denied access to counsel.

23. Respondent Judge Cotton Walker authorized or permitted Petitioners Dakota Wilcox and Corey Boston to be placed on waiting lists indefinitely and thereby denied access to counsel.
24. Respondent Judge Ronald Carrier authorized or permitted Petitioner Travis Herbert to be placed on a waiting list indefinitely and thereby denied access to counsel.
25. Respondent Judge Terry Cundiff authorized or permitted Petitioner T'chaka Spiller to be placed on a waiting list indefinitely and thereby denied access to counsel. Judge Cundiff continued to hold court hearings (including arraignment, bond hearings, and "counsel status hearings"), sometimes without Mr. Spiller being present.
26. Respondent Judge Elizabeth Swann authorized or permitted Petitioner Jorge Ledbetter to be placed on a waiting list indefinitely and thereby denied access to counsel. Judge Swann continued to hold court hearings in Mr. Ledbetter's case, including a bond reduction hearing, and denied Mr. Ledbetter's request to lower bond.
27. Respondent Judge Stacey Lett authorized or permitted Petitioner Christopher Jones to be placed on a waiting list indefinitely and thereby denied access to counsel.
28. Respondent Judge Michael Rumley authorized or permitted Petitioner Joseph Struempf to be placed on a waiting list indefinitely and thereby denied access to counsel.

Indigent Criminal Defendants Placed on Waiting Lists, Including the Named Petitioners, Have Suffered Irreparable Harm and Prejudice Due to the Use of Waiting Lists, and Future Indigent Defendants Will Suffer Irreparable Harm If Respondents Continue to Use Waiting Lists

29. Petitioner Jennifer L. David was arrested in Callaway County on August 3, 2019, and charged with a felony offense. Ms. David has had several counsel status hearings before the court. A January 7, 2020 court filing indicates that Ms. David completed a MSPD application, qualified for MSPD services, but was placed "on a wait list pending the

availability of a public defender to provide representation.” Ex. A. Although the notice does not indicate any time frame related to the availability of an attorney, Ms. David took the initiative to reach out to MSPD via email, and on January 31, 2020, Ms. David was told by MSPD that the estimated amount of time that she will be on the waitlist is eight months. Ex. B. Ms. David, a registered nurse, has been unable to find employment because of the pending charge. She appeared for a counsel status hearing on February 21, 2020, at which time she again informed the judge that she was still on the MSPD waitlist. The court set her case out for another counsel status hearing on March 13, 2020.

30. Petitioner T’chaka Spiller was arrested and charged with a felony offense and multiple misdemeanor offenses on November 8, 2019. Mr. Spiller applied for MSPD services on a separate felony case prior to his arrest, on November 1. He was told he qualified for MSPD services. Four days later, on November 12, Mr. Spiller appeared for arraignment before Judge Terry Cundiff, without counsel, while still in custody at the St. Charles County Justice Center. At the November 12 hearing, Mr. Spiller was read his charges and his request for bond change was denied. Mr. Spiller has been before the court on two other occasions, only to have his case continued again and again. Judge Cundiff also has continued Mr. Spiller’s case without Mr. Spiller even appearing in court. Mr. Spiller has been forced to navigate his court appearances, including multiple bond reduction hearings, without the assistance of an attorney, and has been unable to take any steps to develop a viable defense to the charges against him. Mr. Spiller has been in custody for over three months without access to an attorney and is not scheduled to return to court until March 19, 2020. Mr. Spiller has been told that the waitlist is seven to eight weeks long if you are detained, and even longer if you are not incarcerated. While Mr. Spiller

has been detained at the St. Charles County jail without an attorney, he was preventing from caring for, or even checking in on his mother, who had a stroke after his arrest in November. He missed his six-year-old's birthday on February 22, and is frustrated that his efforts to secure joint custody with his child's mother—efforts well underway at the time of his arrest—will be delayed or otherwise negatively impacted because of his prolonged detention on a waiting list.

31. Petitioner Jorge Ledbetter was arrested and charged with a felony offense on or about December 20, 2019. Mr. Ledbetter was arraigned, without counsel, before Judge Elizabeth Swann on December 23, 2019. At that time, Judge Swann set Mr. Ledbetter's bond at \$75,000, with 10% authorized. Mr. Ledbetter has appeared before Judge Swann on two subsequent occasions, only to have his case continued repeatedly because he is on the waiting list and without representation. When he asked for a bond reduction, Judge Swann told him should could not lower the bond and he would have to wait for representation. But when he applied for a public defender, he was told that if he paid his bond to get out of jail he would no longer be eligible for MSPD services. He applied for a public defender in December 2019 and was placed on a waiting list for a public defender on or about January 2, 2020. He was told the wait would be eight to ten weeks. Since being placed on the waiting list, Mr. Ledbetter has remained in pretrial detention without access to counsel. As such, he has been unable to communicate with an attorney, review discovery, interview witnesses, gather evidence, or otherwise mount a viable defense to the charge against him. While Mr. Ledbetter has been detained at the St. Charles County jail without an attorney, he has been prevented from supporting or caring for his fiancé, who is pregnant and due with their first child in early May. Their efforts to

get married have been stymied by his incarceration, and he is concerned he will not be released from custody to be present for his child's birth. Mr. Ledbetter has called the public defender's office nearly every day he has been in custody. No one has ever returned his calls. His family has called the public defender's office on his behalf and also has not received a return call.

32. Petitioner Travis Herbert was arrested and charged with several felony offenses in Greene County on December 26, 2019. On December 27, 2019, Mr. Herbert was arraigned before Respondent Judge Ronald Carrier, without counsel, and had his bond set at \$75,000. Subsequently, the MSPD filed a letter with the court, dated February 3, 2020, indicating that Mr. Herbert had been placed on a waiting list for an attorney and providing no time frame within which he is likely to receive representation in his criminal case. *See Ex. D.* Since being placed on the waiting list, Mr. Herbert has remained in pretrial detention without access to counsel. As such, he has been unable to communicate with an attorney, review discovery, interview witnesses, gather evidence, or otherwise mount a viable defense to the charges against him. He has been forced to navigate his court appearances—including a February 11, 2020 bond reduction hearing—without the assistance of an attorney. Mr. Herbert also filed a pro se discovery motion on February 13, 2020 in a desperate effort to move his case along, notwithstanding the absence of defense counsel. To make matters worse, Mr. Herbert was recently transferred from the Greene County Jail to the Johnson County Jail, more than 100 miles away from his family in Springfield, and has now been in the state's custody for more than two months without access to an attorney. He is scheduled to return to court on March 4, 2020, for another counsel status hearing.

33. Petitioner Dakota Wilcox was arrested and charged with multiple misdemeanor and felony offenses in Cole County on August 22, 2019. After being detained at the Cole County Jail for the next several days, Mr. Wilcox was arraigned before Respondent Judge Cotton Walker on August 26, 2019. Since then, Mr. Wilcox has remained in pretrial detention and appeared before the court on seven different occasions, including a bond reduction hearing on January 24, 2020, during which the court denied his motion and declined to set bail at all. Despite being found eligible for public defender services, Mr. Wilcox was placed on a waiting list for an attorney and given no time frame within which he is likely to receive representation in his criminal case. Ex. E. As such, Mr. Wilcox has been forced to navigate all of his court appearances—including his recent bond reduction hearing—without the assistance of an attorney, and has been unable to take any steps to develop a viable defense to the charges against him. Mr. Wilcox has now been in custody for nearly six months without access to an attorney and is not scheduled to return to court until March 3, 2020.
34. Petitioner Corey Boston was arrested on or about November 4, 2019 in Cole County, and charged with a felony offense. Two days later, on November 6, Mr. Boston appeared before Judge Cotton Walker, without counsel, while still in custody at the Cole County Jail. At the November 6 hearing, the court denied Mr. Boston's request for a bail reduction and declined to set bail at all. Since then, Mr. Boston has been before the court on at least one other occasion, only to have his case continued yet again. Despite being found eligible for the services of the MSPD, Mr. Boston was placed on a waiting list for an attorney and given no time frame within which he is likely to receive representation in his criminal case. Ex. F. As such, Mr. Boston has been forced to navigate his court

appearances—including his November 2019 bond reduction hearing—without the assistance of an attorney, and has been unable to take any steps to develop a viable defense to the charges against him. Mr. Boston has now been in custody for more than three months without access to an attorney and is not scheduled to return to court until March 3, 2020.

35. Petitioner Joseph Struempf was arrested and charged with a felony offense on or about March 28, 2019. He was arraigned without counsel on April 5, 2019. After failing to appear for a hearing in June 2019, Mr. Struempf was arrested on November 26, 2019. On December 2, 2019, Mr. Struempf appeared before Respondent Judge Michael Rumley without counsel and a cash-only bond was set. Mr. Struempf applied for MSPD services soon after his November arrest. But despite being found eligible for the services of the MSPD, Mr. Struempf received a letter from the MSPD, dated December 17, 2019, indicating that he had been placed on a waiting list for an attorney and providing no time frame within which he is likely to receive representation in his criminal case. Unable to afford bond, Mr. Struempf has remained in pretrial detention since his arrest. During his time in custody, Mr. Struempf has lost both his part-time job and his residence. On February 6, 2020, Mr. Struempf appeared before Respondent Judge Rumley, again without counsel, only to have his case continued yet again. Mr. Struempf has been in custody for nearly three months without access to an attorney and is not scheduled to return to court until February 27, 2020.
36. Petitioner Christopher Jones was arrested on or about January 15, 2020, after he failed to appear at a scheduled hearing in December 2019. Mr. Jones has been accused of violating his probation and applied for public defender services shortly after his arrest.

Despite being found eligible for the services of the MSPD, Mr. Jones was subsequently placed on a waiting list for representation and denied access to counsel. Mr. Jones has been in custody for more than a month without access to an attorney and is scheduled to return to court for a case review hearing before Respondent Judge Stacey Lett March 10, 2020.

37. Other indigent defendants on waiting lists have attempted to do anything they can to plead out to avoid remaining in detention. For example, in Greene County, after being placed on the MSPD waiting list for more than a month, an indigent defendant, Ms. Stephanie Gasca (also known as Stephanie Harrison), wrote the Court a letter, stating that she was in detention and never released, “would like to just plead out on this case as soon as [sic] a possible” and that she did not “have a public defender . . . due to case overloads,” and asking to “plead out on this case now so everything will be done with once I leave here.” Ex. I. Kansas City Star also reported that Victor Bach, who was charged with fourth-degree assault, was on the wait list for about a year and took a guilty plea because “he was finally ‘tired of dealing with it.’” Ex. S.
38. Indigent defendants on waiting lists have also expressed their desperation directly to public defenders. One public defender, Mr. Hackathorn, testified that “I have been getting letters, especially from some of our folks that are, you know, they are sitting in custody, you know, basically begging and pleading can you give me some idea exactly how much longer am I going to have to wait for an attorney.” Ex. L at 92:14-21.
39. But waiting lists are also unconstitutional as applied to those indigent defendants who have been released from custody, since their ability to build viable defenses, review discovery, and otherwise monitor their cases also suffers irreparable harm as a result of

being denied access to counsel. As Mr. Hackathorn notes, “those who are out of custody, I have gotten some phone calls from. You know, I’ve got another court date coming up. The judge really wanted me to have an attorney. What am I supposed do.” *Id.* at 9:14-21.

Alternatives to Waiting Lists Are Available

40. Missouri Revised Statutes Section 600.063.3 already provides alternatives to the use of waiting lists, including (1) appointing private counsel; (2) investigating “the financial status of any defendant determined to be eligible for public defender representation,” and “making findings regarding the eligibility of such defendants”; (3) determining, “with the express concurrence of the prosecuting or circuit attorney, whether any cases can be disposed of without the imposition of a jail or prison sentence” and allowing “such cases to proceed without the provision of counsel to the defendant”; (4) modifying “the conditions of release ordered in any case in which the defendant is being represented by a public defender, including, but not limited to, reducing the amount of any bond required for release.” Mo. Rev. Stat. §600.063.3(1)-(4).
41. These alternatives prescribed by the statute, as well as other alternatives that would not infringe on indigent defendants’ right to counsel, have been under-utilized by the Missouri court system. One deputy district defender, Mr. Christopher Hatley, questioned the under-usage of various waiting list alternatives in the court system, and suggested multiple ways to improve the court system to reduce or eliminate the usage of waiting lists. Ex. P (Email from Christopher S. Hatley to group of prosecutors and court personnel regarding public defender waitlist and early case resolution program). First, he pointed out that instead of immediately referring defendants to the public defender office,

“out of custody defendants should be set out for a minimum of 30 days and encouraged to hire private counsel. A list of criminal defense attorneys in the area could be provided by the court.” *Id.* Second, he questioned the court’s practice of sending out warrants for low-level and non-violent felony cases, because it “artificially inflates the jail population and places undue stress on the system to ‘process’ cases quickly.” *Id.* Instead, he suggested that the court send those types of cases out on a summons instead of a warrant. *Id.* Third, he suggested that prosecutors stop clogging the court with cases, by, for example, charging a Class B felony for a “simple shoplifting of \$3 worth of merchandise from Wal-Mart.” *Id.* Mr. Hatley also proposed other changes such as utilizing deferred prosecutions. *Id.*

Time Is of the Essence

42. The waiting lists in the various districts statewide currently include thousands of individuals, many of whom have been charged with serious felonies and will remain in pretrial detention, without access to counsel, until an MSPD attorney is available to provide constitutionally sufficient representation. As of January 2020, there were well over 4,600 criminal defendants on waiting lists across the state, more than 600 of whom remain in pretrial detention. Ex. H.
43. The waiting lists in some districts are still growing and will continue to do so as workloads continue to rise.
44. Since the institution of the waitlists, indigent defendants sometimes must attend court hearings without counsel, including during critical stages of the case such as bond hearings.

45. Without an attorney to advocate for them, defendants are often detained pre-trial, face exorbitant bond requirements, or are forced to agree to overly restrictive conditions of release.
46. The implementation of waiting lists often leads to worse outcomes for indigent defendants who are in custody because they are willing to bargain away a better result in order to be released from jail. Some feel pressured to plead guilty before an MSPD attorney is assigned, even if they have been released from custody; others will waive their right to counsel in order to move proceedings along, and in some cases, desperate defendants will even negotiate their own plea deals, obviously resulting in worse pleas than those received by individuals with adequate legal assistance from counsel.
47. As a result, the use of waiting lists violates Petitioners' fundamental constitutional right to effective legal counsel under the Missouri Constitution.
48. Petitioners have no alternative remedy to vindicate this fundamental right.

LEGAL STANDARD

Under Rule 92.02(a)(1) of the Missouri Supreme Court Rules, a temporary restraining order is warranted where, as here, the party seeking relief “demonstrates that immediate and irreparable injury, loss, or damage will result in the absence of relief.” Mo. R. R.C.P. Rule 92.02(a). A preliminary injunction preserves the status quo between the parties until a final adjudication of the merits and is appropriate “where the failure to grant a preliminary injunction would have the effect of rendering a final judgment for injunctive relief ineffectual.” *Furniture Mfg. Corp. v. Joseph*, 900 S.W.2d 642, 648 (Mo. App. W.D. 1995).

In evaluating whether temporary or preliminary relief is appropriate, a court should weigh: (1) the threat of irreparable harm to the movant absent the injunction; (2) the balance between this harm and the injury that the injunction's issuance would inflict on other interested

parties; (3) the public interest; and (4) the movant's probability of success on the merits. *State ex rel. Dir. of Revenue, State of Mo. v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996) (citing *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 928 (8th Cir. 1994)); *see also Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). Each of these factors weighs heavily in favor of ordering a temporary restraining order and, after hearing, a preliminary injunction.

ARGUMENT

I. PETITIONERS WILL SUFFER IRREPARABLE HARM IF RESPONDENTS ARE PERMITTED TO PUT THEM ON A WAITING LIST FOR PUBLIC DEFENDER SERVICES INDEFINITELY.

Petitioners, along with the class they seek to represent, will be irreparably harmed if Respondents are permitted to continue the practice of placing, or authorizing the placement of, indigent defendants on a waiting list for public defender services. As of January 9, 2020, there were well over 4,600 criminal defendants on waiting lists across the state, more than 600 of whom remain in pretrial detention. Ex. H. These numbers continue to rise. Many of the individuals on the waiting list have been charged with serious felonies, some of which carry sentences of up to life in prison. Without access to counsel, they are unable to effectively defend themselves in bond hearings or other critical stages of their case, request and review discovery, or engage in meaningful investigation, among other things. At the same time, their criminal cases are still proceeding, and many of the indigent defendants on the waiting list have been required to appear before the court without counsel.

This delay in receiving the assistance of counsel leads to severe financial and legal consequences, which cause a number of irreparable harms to indigent defendants. Most importantly, simply being placed on a waiting list—whether or not the defendant remains in custody—constitutes a loss of the right to counsel under the Missouri Constitution. The right to

counsel has been described “as one of the most pervasive rights [of a criminal defendant] ‘as it affects the defendant’s ability to assert any other rights he may have.’” *In re D.J.M.*, 259 S.W.3d 533, 535 (Mo. Banc 2008) (quoting *State v. Dixon*, 916 S.W.2d 834, 837 (Mo. App. 1995)). A loss of constitutionally protected rights, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 970 (8th Cir. 1999) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)) (granting preliminary injunction against the enforcement of a campaign disclosure law based on First Amendment violations); *see also Hernandez v. Sessions*, 872 F.3d 976, 994-95 (9th Cir. 2017) (“it follows inexorably from our conclusion that the government’s current policies are likely unconstitutional – and thus that members of the plaintiff class will likely be deprived of their physical liberty unconstitutionally in the absence of the injunction – that Plaintiffs have also carried their burden as to irreparable harm”). As a practical matter, the lack of timely access to counsel means that the defendant will be unable to communicate with an attorney about the status of their case, review discovery in an effort to assess the strength of the state’s case against them, interview potentially helpful witnesses, gather exculpatory evidence, or otherwise mount a viable defense to the charges against them.

In addition, those indigent defendants who have been placed on a waiting list and remained in pretrial detention often lose employment, access to housing, custody of a child, and/or medical benefits, among other things, as the result of their prolonged incarceration. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (“Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and impair his family relationship”). As a result, some indigent defendants feel compelled to accept a guilty plea because they cannot financially afford to wait in jail until a public defender is assigned, especially when they are the sole income earner for

their family. *See* Ex. I (Stephanie Harrison’s letter) (stating her frustration with the waiting list and her wish to plead out as soon as possible to get released from detention). When these indigent defendants choose to plead guilty due to lack of access to counsel, or when they are released on bond, but are unable to resolve the case in a timely way because they remain on the waiting list, they will continue to experience difficulties in housing, employment, and access to public benefits, among other things, as a result of their criminal records or pending charges. For example, Petitioner Jennifer David, a registered nurse, who has been released from detention but remains on the waiting list, has been unable to find employment as a nurse since her release. In fact, she has had at least three job offers retracted because of the pending charge that she is unable to resolve because she remains on the waiting list.

Moreover, because indigent defendants often have to remain in detention while on the waiting lists, they suffer from the violence and poor conditions in detention facilities, and their incarceration further contributes to the overcrowding issue in these facilities. The violence, poor conditions and overcrowding of Missouri jails are well-documented by local media. *See e.g.* Ex. Q (Ozarks First, “Overcrowding is a problem for jails both big and small,” Jun. 19, 2019, available at <https://www.ozarksfirst.com/uncategorized/overcrowding-is-a-problem-for-jails-both-big-and-small/>) (discussing poor conditions and overcrowding issues in Webster and Greene County jails); Ex. R (Sam Zeff, “Jackson County’s crumbling, overcrowded jail could really use that \$2 million Missouri owes it,” KCUR, Mar. 16, 2018, available at <https://www.kcur.org/post/jackson-countys-crumbling-overcrowded-jail-could-really-use-2-million-missouri-owes-it#stream/0>) (pointing out that the Jackson County Jail is “overcrowded and understaffed”). As one example, Petitioner Joseph Struempf was attacked by his cell mate in December 2019, and has not been getting the medical attention that he needs for the resulting

injury. *See* Ex. T (Struempf Letter to court) (December 31, 2019). And Petitioner Travis Herbert was transferred from the Greene County Jail to the Johnson County Jail—more than 100 miles away from his family in Springfield—due to severe overcrowding at the Greene County facility.

II. THE BALANCE OF HARMS FAVORS THE ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

The balance of harms also weighs in favor of the grant of a temporary restraining order. The irreparable harms that the individuals on waiting lists face are severe. As discussed above, the harms include the loss of a fundamental constitutional right under the Missouri Constitution – the right to counsel, which inevitably leads to the loss of other fundamental rights, such as the right to liberty, freedom, and a fair trial.

By contrast, Respondents will suffer (at most) minimal harm. The judges who put indigent defendants on waiting lists would suffer no harm from the injunction – they are required to adjudicate the cases that come before them, regardless of whether the indigent defendants are adequately represented by counsel or not. While judges have an interest in the expeditious resolution of the cases they adjudicate, that interest is overridden by the interest to ensure those cases are adjudicated *fairly*, including by ensuring indigent defendants are represented by counsel. Minor inconvenience to government officials does not outweigh the risk of foreclosing access to the fundamental constitutional right to counsel. *See State ex rel. Mack v. Purkett*, 825 S.W.2d 851, 857 (Mo. banc 1992) (stating that mere “administrative inconvenience” is the “weakest justification” for the loss of a right); *see also Carey v. Population Services, Intern.*, 431 U.S. 678 (1977) (“the prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights”). More importantly, providing representation of counsel to indigent defendants is “a duty which constitutionally is the burden of

the state.” *State v. Green*, 470 S.W.2d 571, 573 (Mo. banc 1971) (internal citation omitted). The state cannot violate its duty to provide effective counsel, and then complain about having to endure the burden that is constitutionally placed upon it.

Furthermore, Missouri Revised Statutes Section 600.063 has already provided alternatives to waiting lists to redress any burden or harm imposed on Respondents by the injunction. According to the statute, judges have the power to appoint private practitioners to represent indigent criminal defendants on a pro bono basis if necessary. Mo. Rev. Stat. §600.063.3(1) (a judge may “[a]ppoint private counsel to represent any eligible defendant . . .”); *see also* §600.064 (stating that a circuit court judge may “appoint[] private counsel to represent an indigent defendant”). Judges may also determine whether any cases can be disposed of without the imposition of a jail or prison sentence and allow such cases to proceed without the provision of counsel to the defendant. Mo. Rev. Stat. §600.063.3(3). Judges can also modify the conditions of release when the indigent defendant has been waiting for the appointment of counsel, such as reducing the amount of bond required for release. Mo. Rev. Stat. §600.063.3(4). These alternative measures would address MSPD’s caseload issue without depriving indigent criminal defendants of their constitutional right to counsel, while imposing little to no harm on Respondents.

In contrast, the indigent criminal defendants on waiting lists are being denied counsel, without means to defend themselves in court, and do not have any way to redress the many harms and loss of fundamental rights articulated above without this Court’s immediate injunctive relief. The balance of harms clearly favors the entry of a temporary restraining order and a preliminary injunction.

III. A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST.

The public interest lies with the enforcement of the Missouri Constitution. As federal circuit courts have observed, “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citing *G&V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079) (6th Cir. 1994). There is an extraordinary public interest in protecting the right to effective legal counsel. *See, e.g., State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 66-67 (Mo. banc 1981) (“Our primary obligation is to the people to insure the continued operation of the criminal justice system, for without it, the peace of the community cannot be attained . . . As a necessary part of this system the accused is entitled to counsel and, where indigent, counsel must be provided. It is our first obligation to secure to the indigent accused all of his constitutional rights and guarantees.”). For the public, there is no greater interest than maintaining a criminal justice system that is fair and just to everyone, regardless of the financial resources they may have. “An accused’s right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases ‘are necessities, not luxuries.’” *United States v. Cronin*, 466 U.S. 648, 653 (1984). The public also has a compelling interest in protecting juveniles in the criminal justice system. As the Supreme Court has recognized, “juveniles are more vulnerable or susceptible to negative influences and outside pressures.” *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

IV. PETITIONERS HAVE A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS.

Petitioners have a substantial likelihood of prevailing on the merits in this case. The Missouri Constitution provides “[t]hat in criminal prosecution the accused shall have the right to appear and defend, in person and by counsel.” Mo. Const. art. I, §18(a). Missouri’s courts have interpreted §18(a) to require the same things as the Sixth Amendment to the United States

Constitution, namely appropriate investigation, preparation, and presentation of each defendant's case. *See State ex rel. Missouri Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 874 & n.4 (Mo. 2009). The Missouri Constitution also provides "[t]hat no personal shall be deprived of life, liberty or property without due process of law." Mo. Const. art. I, § 10. Under this section, the State of Missouri is required to ensure that all indigent defendants in criminal or juvenile delinquency proceedings receive meaningful and effective legal representation. Courts analyze constitutionality of Section 10 the same way they analyze federal Fourteenth Amendment due process claims. *State v. Nathan*, 522 S.W.3d 881, 882 (Mo. 2017). The Missouri Constitution further provides "[t]hat all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. art. I, § 2.

To protect the constitutional rights to counsel, due process, and equal rights and opportunity, Missouri has enacted various statutes to safeguard indigent defendants' access to public defender services. For example, Section 600.042 provides in relevant part, "[t]he director and defenders shall provide legal services to an eligible person . . . [f]or whom the federal constitution or the state constitution requires the appointment of counsel." Mo. Rev. Stat. § 600.042.4(5). Missouri law also requires the appointment of counsel for the juvenile, if a request is made and the juvenile is indigent. Mo. Rev. Stat. § 211.211(2).

The constitutional right to counsel requires access to *effective* legal representation. "The special value of the right to the assistance of counsel explains why '[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.'" *Cronic*, 466 U.S. at 654 (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). The right to effective counsel attaches after the "initiation of 'adversary judicial proceedings.'" *Morris v. State*, 532 S.W.2d 455, 457 (Mo. banc 1976); *see also Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008) ("a

criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel"). It is also required at all critical stages of criminal proceedings, such as post-information/indictment lineup, interrogation by police or by state psychiatrist, preliminary hearing, and each stage of trial. *See e.g. U.S. v. Wade*, 388 U.S. 218 (1967); *Montejo v. Louisiana*, 566 U.S. 778 (2009); *Estelle v. Smith*, 451 U.S. 454 (1981); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Gideon v. Wainwright*, 372 U.S. 335 (1963). As a result, "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as trial itself." *Rothgery*, 554 U.S. at 212 (2008).

The systematic application of Section 600.063.3(5) of the Missouri Revised Statutes directly violates the Missouri Constitution. Placing indigent criminal defendants on waiting lists runs counter to the State's constitutional responsibility to ensure access to counsel for those who cannot afford an attorney. Moreover, placing an indigent criminal defendant on a waiting list for months, or even *years*, as is common practice in Missouri at the moment, constitutes unreasonable delay for the appointment of counsel. While Missouri courts have not opined as to what period of time constitutes unreasonable delay for the appointment of counsel, the Ninth Circuit has provided some guidance on this issue. In *Farrow v. Lipetzky*, 637 Fed. Appx. 986, 988 (9th Cir. 2016), the Ninth Circuit decided that the district court erred in dismissing the plaintiffs' Sixth Amendment claim when the complaint alleged that the county's public defender office withheld counsel from indigent defendants for periods ranging from seven to thirteen days, and sometimes more than thirteen days, after the indigent defendants' initial appearances. The Ninth Circuit held that "further arraignment" where indigent defendants entered pleas, would

constitute a “critical stage” at which indigent defendants are entitled to legal counsel. *Id.* The Ninth Circuit then rejected the district court’s ruling on whether the delay was unreasonable because the district court only considered “whether the delay ‘impacted [plaintiff’s] representation at subsequent critical stages of his proceedings,” which required the plaintiffs to allege actual prejudice, and instructed the district court to reconsider whether “appointing counsel five to thirteen days and ‘sometimes longer’ after the right attaches complies with the ‘reasonable time’ requirement articulated in *Rothgery*.” *Id.*

Here, indigent defendants placed on the waiting list normally have to wait far longer than seven to thirteen days after the initiation of adversarial judicial proceedings. In St. Charles County, defendants are told it typically takes 6-8 weeks to get off the waiting list. But indigent criminal defendants with felony charges have sat in the St. Charles County Jail and on the waiting list for over ninety days. *See, e.g., State v. Rigdon*, Case No. 1911-CR03803 (on waiting list 10/31/2019, counsel entered on 2/4/20); *State v. Kingston*, Case No. 1911-CR03851 (same). All of the named Petitioners in this case have been on the waiting list for at least a month.

As the number of people on the waiting list continues to grow, the wait time will inevitably become longer. Many indigent defendants have appeared at critical stages of their proceedings, such as arraignment and bond hearings, while still on the waiting list, or decided to plead guilty even when they would otherwise contest the charges in order to avoid remaining in detention. Actual prejudice has occurred, which is enough to show that the use of waiting lists causes unreasonable delay in providing counsel after indigent defendants’ first appearances in their criminal cases, violating the principals set forth in *Rothgery* and the Missouri Constitution.

CONCLUSION

For the foregoing reasons, Petitioners, on behalf of themselves and those similarly situated, respectfully request the Court issue a temporary restraining order and, after a hearing, a preliminary injunction suspending the application of Section 600.063.3(5) of the Missouri Revised Statutes and prohibiting Respondents from placing any indigent criminal defendants on any kind of “waiting list” to receive MSPD legal services.

Respectfully submitted,

/s/ Anthony E. Rothert

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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.

/s/ Anthony E. Rothert