IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

JENNIFER L. DAVID, et al.,	)	
Petitioners,	)	
	)	
vs.	)	
	)	**Case No. 20AC-CC00093**
STATE OF MISSOURI, et al.,	)	
Respondents.	)	
	)	
	)	

ORDER

This matter is before the Court on Respondents Motion to Stay Proceedings or Defer Ruling. Petitioners filed this class action seeking remedies for alleged violations of the Missouri Constitution arising out of the failure by the State to timely furnish legal counsel to Petitioners and others similarly situated by placing them on Missouri Office of State Public Defender waiting lists. On July 14, 2020, a class was certified, defined as all indigent persons who have been charged with a crime and are currently on a Missouri State Public Defender waiting list for legal representation, or who will be charged with a crime and placed on a Missouri State Public Defender waiting list for legal representation during the pendency of this litigation. A bench trial was held on November 17 and 18, 2020.

The parties recently filed supplemental suggestions at the Court's invitation discussing potential remedies in this case. Respondents accompanied their suggestions with their motion to stay which the Court now considers. In considering the motion, the Court will first address the likelihood of success of

Petitioners' claims.[1] Second, the Court will address the countervailing principles of mootness and comity.

I. Likelihood of success on the merits of Petitioners' claims

Factual Background.

Petitioners filed this lawsuit against Respondents State of Missouri, the Missouri Public Defender Commission, and Mary Fox in her official capacity as Director of the Missouri Office of State Public Defender.[2] Their petition alleges that since the fall of 2017, the Missouri Office of the State Public Defender (MSPD), in cooperation with courts, have been placing or authorizing the placement of many indigent defendants charged with an offense in state court on waiting lists for legal representation. Count I claims that the MSPD waiting list statute, § 600.063.3(5), RSMo Supp. 2013 violates the right to counsel guarantee afforded under Article I, Section 18(a) of the Missouri Constitution to the extent that it allows courts to authorize the placement of indigent defendants on waiting lists for legal representation. Counts II, III, and IV assert other related violations of the Missouri Constitution, and for brevity, those counts are not discussed in this Order.

Section 600.063[3] allows any MSPD district defender, under certain

[1] Section I, entitled "Likelihood of success on the merits of Petitioners' claims," contains the preliminary views of this Court of the matters discussed. The only part of this Order which immediately binds the parties is the provision granting the stay set forth on page 19.

[2] The petition also named as Respondents seven judges, but by agreement of all parties the judges were dismissed.

[3] The full text of section 600.063, RSMo Supp. 2013 is as follows:

1. 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. The motion shall state the reasons why the individual public defender or public defenders will be

conditions, to request a conference to discuss caseload issues involving any individual public defender or defenders with the presiding judge of the circuit. If

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Section 600.063 (continued)

unable to provide effective assistance of counsel due to caseload concerns. When a motion to request a conference has been filed, the clerk of the court shall immediately provide a copy of the motion to the prosecuting or circuit attorney who serves the circuit court.

2. If the presiding judge approves the motion, a date for the conference shall be set within thirty days of the filing of the motion. The court shall provide notice of the conference date and time to the district defender and the prosecuting or circuit attorney.

3. Within thirty days of the conference, the presiding judge shall issue an order either granting or denying relief. If relief is granted, it shall be based upon a finding that the individual public defender or defenders will be unable to provide effective assistance of counsel due to caseload issues. The judge may order one or more of the following types of relief in any appropriate combination:

(1) Appoint private counsel to represent any eligible defendant pursuant to the provisions of section 600.064;

(2) Investigate the financial status of any defendant determined to be eligible for public defender representation under section 600.086 and make findings regarding the eligibility of such defendants;

(3) Determine, 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 allow such cases to proceed without the provision of counsel to the defendant;

(4) Modify 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;

(5) 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; and

(6) Grant continuances.

4. Upon receiving the order, the prosecuting or circuit attorney and the district defender shall have ten days to file an application for review to the appropriate appellate court. Such appeal shall be expedited by the court in every manner practicable.

5. Nothing in this section shall deny any party the right to seek any relief authorized by law nor shall any provisions of this section be construed as providing a basis for a claim for post-conviction relief by a defendant.

6. The commission and the supreme court may make such rules and regulations to implement this section. Any rule or portion of a rule, as that term is defined in section 536.010, that is created by the commission under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536 and, if applicable, section 536.028. This section and chapter 536 are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536 to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2013, shall be invalid and void.

the presiding judge finds that the individual public defender or defenders will be unable to provide effective assistance of counsel due to caseload issues, the judge is authorized to grant one or more forms of relief, including the following option per section 600.063.3 (5): "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."

At the November, 2020 bench trial, evidence was adduced that, starting, in 2017, multiple MSPD district defenders sought caseload relief, resulting in the creation of MSPD waiting lists in parts of the state. Some waiting lists were created informally by agreement with the presiding judge of the judicial circuit without a formal hearing or written order, and other waiting lists were by written order of the presiding judge after hearing. Tr. 171-175. Once the waiting lists began, the number of defendants placed on the lists grew substantially. In November, 2019, there were more than 5,800 cases on MSPD waiting lists, involving 16 different MSPD district defender offices. The waiting lists were in existence for cases pending in 29 counties: Jasper, Newton, Boone, Cooper, Callaway, Audrain, Cass, Henry, Bates, Jefferson, Miller, Moniteau, Cole, Jackson, Camden, Stone, Barry, Lawrence, Crawford, Pettis, Greene, Christian, Taney, St. Charles, Buchanan, Franklin, Howell, Shannon, and Oregon. Pet. Ex. 2.

As of November, 2019, nearly 600 persons on the waiting lists had been waiting for counsel for over one year from the initial determination of indigency. Approximately 1,546 had been waiting for at least six months, 1,916 for at least five months, and 2,273 were waiting for at least four months. Pet. Ex. 2.

An indigent defendant who has been placed on a waiting list does not have access to an MSPD attorney until the defendant has been removed from the waiting list and assigned MSPD counsel. This is so regardless of whether the defendant is in custody or out of custody. While an indigent defendant is on a waiting list awaiting counsel, no MSPD attorney talks to the defendant, investigates the case, reviews evidence, gives advice, or assists the defendant in any way.

As of November 15, 2020, two days before trial, there were approximately 2,500 persons on waiting lists statewide. Tr. 87, 90-91, Pet. Ex. 102. 233 had been waiting for over a year; 665 for over six months; 734 for over five months; 922 for over four months. The ten oldest cases on the Boone County waiting list had an average waiting time of eighteen months. Tr. 102, 108, 188.

Discussion.

The Sixth Amendment of the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Article 1, Section 18(a) of the Missouri Constitution, provides, "That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; . . ."

In *State v. Green*, 470 S.W. 2d 571, 572 (Mo. banc 1971), the Missouri Supreme Court stated:

> In 1963, in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L. Ed.2d 799, the United States Supreme Court held that the United States Constitution requires the State of Missouri, and other States, to furnish counsel to an indigent accused of crime. This means, in practical effect, that an indigent accused of crime cannot be prosecuted, convicted, and incarcerated in Missouri unless he is furnished counsel.

The Sixth Amendment right to counsel (and, by extension, the right to counsel under the Missouri Constitution, embodied in Art. 1 Sec. 18(a)), attaches "at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 194 (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." *Id.* at 213. Attachment occurs at first appearance because that marks "the point at which 'the government has committed itself to prosecute,' 'the adverse positions of government and defendant have solidified,' and the accused 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Id.* at 198 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

"[C]ounsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id.* at 212. "Once attachment occurs, the accused at least is entitled to

the presence of appointed counsel during any 'critical stage' of the postattachment proceedings." *Id.* "[A] defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Id.* at 209-210.

"The cases have defined critical stages as proceedings between an individual and agents of the State (whether formal or informal, in court or out), that amount to trial-like confrontations, at which counsel would help the accused in coping with legal problems or meeting his adversary." *Id.* at 212 f.n. 16 (internal quotations and citations omitted). "[O]ur cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings . . . The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.' " *United States v. Wade*, 388 U.S. 218, 224, 225 (1967). Thus, in *Hamilton v. Alabama,* 368 U. S. 52 (1961), arraignment was considered a critical stage of the prosecution because the accused at arraignment requires the guiding hand of counsel, and in addition "[w]hat happens there may affect the whole trial." *Id.* at 54. Moreover, a critical stage existed at arraignment because of the possible loss of available defenses if not preserved at that stage. *Id.*

Within days after a defendant's attachment of right to counsel at first appearance, the defendant typically encounters critical stages requiring the presence of counsel. First, if a defendant is in custody, one or more hearings are held where the judge decides whether to release the defendant from custody, and if so, the conditions imposed. The release hearing must be held within seven days

after defendant's first appearance per Missouri Supreme Court Rule 33.05. Though not entirely free from doubt, it appears that such a release hearing is a critical stage for which a defendant has the right to counsel. *Booth v. Galveston County*, 352 F. Supp. 3d 718, 738-739 (S.D. Tex. 2019) states:

> There can really be no question that an initial bail hearing should be considered a critical stage of trial. See *Higazy v. Templeton*, 505 F.3d 161, 172 (2d Cir. 2007) ("a bail hearing is a critical stage of the State's criminal process") (internal quotation marks and citation omitted); *Caliste*, 329 F. Supp. 3d at 314 ("the issue of pretrial detention is an issue of significant consequence for the accused"). As a District Court in the Eastern District of Louisiana recently noted:
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> > [W]ithout representative counsel the risk of erroneous pretrial detention is high. Preliminary hearings can be complex and difficult to navigate for lay individuals and many, following arrest, lack access to other resources that would allow them to present their best case. Considering the already established vital importance of pretrial liberty, assistance of counsel is of the utmost value at a bail hearing.
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> *Caliste*, 329 F. Supp. 3d at 314. The importance of providing counsel at the initial detention hearing is underscored by empirical research which indicates that case outcomes for pretrial detainees are much worse — in terms of an increased likelihood of conviction and harsher sentences — than for those who are released pending trial. *See, e.g.*, Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1720 (2002). Given this research, it is imperative from a constitutional standpoint that individuals facing a pretrial detention hearing be afforded counsel to help guide them through the complicated and overwhelming process.
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> . . . Because bail was not contested in *Rothgery*, the high court never addressed whether an initial bail hearing is a critical stage of trial. Even so, this Court is confident that, based on longstanding precedent, the Supreme Court would undoubtedly conclude that a pretrial detention hearing is a "critical stage" for Sixth Amendment purposes. See *Coleman*, 399 U.S. at 9-10, 90 S.Ct. 1999 (holding that Sixth Amendment required the presence of counsel at preliminary hearing because, in part, counsel could make effective arguments about necessity of bail); *Smith v. Lockhart*, 923 F. 2d 1314, 1319 (8th Cir. 1991) (holding that hearing on bail reduction motion was a critical stage of proceeding requiring representation by counsel).

Accord: Gonzalez v. Commissioner of Correction, 68 A.3d 624, 643 (Conn. Sup. 2013) (Palmer, J., concurring) (bail hearing is a critical stage of a criminal prosecution in light of the significant consequences, including that "a defendant who is released from confinement pending trial may be better able to assist counsel in preparing for that trial, or to maintain employment so as to afford counsel of choice, or both"); *Hurrell-Harring v. State*, 15 N.Y. 3d 8, 20, 930 N.E. 2d 217, 904 N.Y.S. 2d 296 (2010) (following *Higazy* and concluding that "[t]here is no question that a bail hearing is a critical stage of the [s]tate's criminal process." *Contra: People v. Collins*, 298 Mich. App. 458, 828 N.W. 2d 392 (2012) (bond revocation hearing not a critical stage); *United States v. Hooker,* 418 F. Supp. 476, 479 (M.D. Penn. 1976) (bond hearing not a critical stage).

The named petitioners in this case provide examples of issues faced by defendants at bond hearings, and the mention of two will suffice. Petitioner Travis Herbert was on the MSPD waiting list for 147 days while incarcerated and charged with three felonies. While on the waiting list he attended seven bond hearings without counsel. A prosecutor appeared each time, and all bond reductions were denied until the sixth hearing, when he was released on his own recognizance. Petitioner Dakota Wilcox was on the MSPD waiting list for over five months while in custody charged with several felonies. At the end of the waiting period, an attorney through MSPD entered, and within two days obtained Mr. Wilcox' release.

The confrontation at a bond hearing is a proceeding between an individual and agents of the State that amounts to a trial-like confrontation "at which counsel would help the accused in coping with legal problems or meeting his adversary, " *Rothgery, supra,* 554 U.S. at 212, f.n. 16. Further, "[w]hat happens there may affect the whole trial." *Hamilton v. Alabama, supra*, 368 U. S. at 54. It follows that the bond hearing is likely a critical stage, obligating the State to furnish the defendant with counsel at the hearing.

Second, a defendant is faced early in the litigation process with the decisions of whether to request a change of judge or change of venue. As MSPD Director Mary Fox testified, the choice of judge and venue are choices that can affect the trial itself. Tr. 128. The right to a timely change of judge has been described as "virtually unfettered" and "highly prized." *State v. Cella*, 976 SW 2d 543, 550 (Mo. App. E.D. 1998); *State ex rel. Amoco Oil Co. v. Ely*, 992. S.W. 2d 915, 918 (Mo. App. W.D. 1999). Generally a change of judge and, in counties with a population of 75,000 or less, change of venue must be requested within the first ten days after entry of the initial plea pursuant to Missouri Supreme Court Rules 32.07 and 32.03. The choices of venue and judge are likely a critical stage, as the defendant requires the "guiding hand of counsel," and the choices "may affect the whole trial." *Hamilton v. Alabama, supra,* 368 U. S. at 54. Hence the State must furnish a defendant with counsel in time to guide the defendant in making these decisions. While a judge having jurisdiction can delay the arraignment proceedings in order to avoid triggering the ten day deadline for change of judge and venue, the defendant

is then placed in the untenable position of being charged with a crime and *not even being allowed to plead not guilty to the charge* because of the unwillingness of the State to provide counsel. "The purpose of arraignment in Missouri is to ascertain whether defendant is personally before the court . . . and to give him the opportunity to plead." *State v. Donnell,* 430 S.W. 2d 297, 300 (Mo. 1968).

But it is not enough for the State to furnish counsel at all critical stages. In addition, the State is required to furnish counsel "within a reasonable time after attachment to *allow for adequate representation at any critical stage before trial, as well as at trial itself*." *Rothgery, supra,* 554 U.S. at 212. Again, a "defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Id*. at 209-210. To provide "adequate representation" at trial, the lawyer must investigate the facts, and must do so while the facts are still available. Investigating facts and communicating with the defendant in the days after the defendant's first court appearance provide the foundation upon which the defense of a case is built. The value of timely attorney-client communication, discovery review, and case investigation is obvious and beyond dispute. Our system of justice depends largely on the memory of witnesses, and memory rapidly dissipates over time. If evidence is not discovered and preserved when it is available, it affects the whole trial, and a belated appointment after the dissipation of evidence does not allow for "adequate representation" at trial. This is so regardless of the advocate's zeal once finally appointed.

Neither the United States Supreme Court nor Missouri courts have addressed what constitutes a "reasonable" amount of time following attachment, but other courts applying *Rothgery* have suggested that a "reasonable" amount of time is to be measured in days or weeks—not months or years. *See, e.g.*, *Lavelle v. Justices in Hampden Sup. Ct.*, 442 Mass. 228 , 237-238 (Mass. 2004) (finding that waiting weeks to receive an attorney was unreasonable under *Rothgery* and explaining that such a delay will impair an attorney's ability to perform the kind of investigation and counseling necessary to ultimately have a fair criminal proceeding and holding, ultimately, that indigent defendants could not be held in custody without counsel for longer than seven days and if someone was facing a felony or misdemeanor with jail time sought their case must be dismissed if they are held for more than 45 days); *see also, e.g.*, *Farrow v. Lipetzky,* 637 Fed. App'x 986, 987 (9th Cir. 2016) (finding that a delay of seven days was reasonable but remanding for a determination as to whether thirteen days was reasonable and remarking that it was a "closer call"). Moreover, statements made by the United States Supreme Court make clear that appointment of counsel is expected promptly after the first appearance or arraignment. *See e.g. Michigan v. Jackson*, 475 U.S. 625, 630, f.n. 3 (1986) (["T]he most critical period of the proceedings against these defendants was *from the time of their arraignment* until the beginning of their trial") (quoting *Powell v. Alabama*, 287 U. S. 45, 57 (1932) (emphasis in original) (internal quotation marks omitted); *Rothgery, supra,* 554 U.S. at 203-205 ("The only question is whether there may be some arguable justification for the minority practice [of

'denying appointed counsel on the *heels of the first appearance*']. Neither the Court of Appeals in its opinion, nor the County in its briefing to us, has offered an acceptable one.") (emphasis added).

A judge having jurisdiction in a criminal case without defense counsel due to MSPD waiting lists is in an unenviable position. The judge can release a defendant from custody in order to avoid the critical stage of a bond hearing, but concerns for community or victim safety sometimes preclude that option. The judge can stay action in the case to avoid the uncounseled lapse of the rights of change of venue and change of judge, but that results in icing the defendant in a state of unchallengeable indictment where the defendant is charged with a crime and is forbidden to come into court and deny the charge at arraignment because the State does not see fit to furnish defendant with a lawyer. Even if the judge releases the defendant from custody and stays all action in the case — that is, even if the case *procedure* remains static while the defendant is on the waiting list — the *condition of the evidence* is not static. Each day's delay in investigating for the defendant and preserving evidence accrues to the defendant's detriment, and thus a delay of weeks, much less of months or years, violates the obligation of the State to furnish counsel to "allow for adequate representation" at critical stages and at trial. In the alternative, in order to avoid this constitutional harm to the defendant, the judge can appoint private counsel without pay to immediately represent the defendant. However, given the size of the waiting lists,[4] to institute a system for appointing

[4] Michael Barrett, MSPD director from 2014 through 2019, described the number of people on the MSPD waiting list in late 2019 as "staggering, really high" in certain jurisdictions.

private counsel to waiting list cases is to conscript the services without pay of most or all of the local attorneys in the geographical area of the MSPD shortage to represent the indigent defendants. Moreover, appointing scores of private counsel without pay to represent the thousands on the waiting lists forces private citizens to satisfy an obligation that is owed by the State.

It is no defense to assert, as does the State, that we don't know with respect to a given defendant whether the delay in appointing counsel is hurting that specific defendant's case. The right to counsel is a *prospective* right and that right is broader than the right to set aside a conviction for ineffective assistance of counsel. In *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W. 3d 592, 607 (Mo. banc 2012), our Supreme Court explained:

> No case suggests that a court analyze whether the Sixth Amendment right to counsel has been preserved at all critical stages only by retrospectively determining that the lack of such counsel deprived a defendant of a fair trial. To the contrary, . . . the United States Supreme Court has explained that "[i]t is well settled" that the Sixth Amendment right to counsel is broader than the question of whether a court must retrospectively set aside a judgment due to ineffective assistance of counsel. The constitutional right to effective counsel applies to all critical stages of the proceeding; it is a prospective right to have counsel's advice during the proceeding and is not merely a retrospective right to have a verdict or plea set aside if one can prove that the absence of competent counsel affected the proceeding.

The State further emphasizes that the MSPD waiting list was envisioned by the Missouri Supreme Court in *Waters,* where the Court stated that "a trial court can use its inherent authority over its docket to 'triage' cases so that those alleging the most serious offenses . . . are given priority in appointing the public defender and scheduling trials. . ." *Waters, supra,* 370 S.W. 3d at 611. However, this

overlooks a sentence from the previous paragraph of the opinion: "[T]rial courts have both the authority and the responsibility to manage their dockets in a way that both moves their cases and *respects the constitutional*, statutory and ethical *rights* and obligations *of the defendant*, the prosecutor, the public defender and the public." *Id.* at 610-611 (emphasis added). Thus *Waters* is unlikely authority for the months-long denial of counsel to an indigent defendant the State seeks to incarcerate when that very opinion specifies that the constitutional rights of the defendant be respected.

For the reasons previously stated, the State violates the Sixth Amendment (and the Missouri Constitution equivalent in Article I) by charging an indigent defendant with a crime in which the State seeks the defendant's incarceration, and then delaying for weeks, months, and even more than a year before furnishing the defendant with an attorney. On the other hand, the constitutional impediment would seem to be diminished or eliminated if the State were to first promptly provide counsel, and *then* engage in the "triaging" process. Once an attorney enters for the defendant, gains a working knowledge of the case and communicates with the defendant, it would seem acceptable and appropriate to engage in conversations with opposing counsel and the judge having jurisdiction concerning whether to expedite or delay the case. The latter example is a form of "triaging" that "respects the constitutional . . . rights . . . of the defendant." *Id.*

It is likely that Petitioners' claim discussed above — that section 600.063.3(5) is unconstitutional as applied to members of the class — is likely to succeed. In

particular, section 600.063.3(5) cannot be applied to allow the State to charge a defendant with a crime or probation violation wherein the State seeks defendant's incarceration, and then fail to furnish the defendant with counsel within two weeks after the defendant has been found indigent and otherwise entitled to appointment of counsel; such an application of the statute violates the right to counsel afforded by Article I, section 18(a) of the Missouri Constitution. The use of a waiting list is not itself a deprivation of a defendant's right to counsel, as the constitutional right to counsel does not specify counsel through the MSPD. Rather, the State fails in its obligation to provide counsel when it fails to provide counsel through MSPD and and further fails to provide counsel by any other mechanism within such two week period, as such a failure falls below the minimal obligation placed upon the State to appoint counsel within a reasonable time after attachment.[5] A defendant, having had an initial appearance with a judge and having been subject to accusation, "is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Rothgery*, 554 U.S. at 209-210.

II. Mootness and Comity

On February 8, 2021, Respondents State of Missouri, Missouri Public Defender Commission, and Mary Fox, as Director of the Office of the Missouri State Public Defender, filed their Motion to Stay Proceedings or Defer Ruling, asserting

[5] The window for appointment of counsel would necessarily be shortened if counsel's presence is necessary to adequately represent a defendant at an earlier critical stage, such as consulting with the defendant within the deadline for requesting a change of judge or change of venue after a *pro se* arraignment, or appearing at a release hearing.

that the size of MSPD's waiting list has decreased significantly since the date of trial, and that prospective budgetary increases "may cause this case to become moot in a matter of months." Respondents state that the waiting list as of February 8, 2021 contains 1,934 cases, representing a 600-case reduction from the size of the waiting list at the time of trial and an approximately 3,000-case reduction from the size of the waiting list near the time the Petition was filed in early 2020. MSPD hopes the 1,934 cases currently on the waiting list might be further reduced to approximately 1,300 this month due to internal budgetary and staffing adjustments.

Respondents further state that MSPD requested FY22 funding for eliminating its waiting list by adding twelve attorneys for district offices with existing waiting lists, and that on January 27, 2021 the Governor's annual budget recommendations to the General Assembly recommended that MSPD receive such funding. As a result, Respondents are optimistic that there will be sufficient funding to wholly eliminate the MSPD waiting list sometime this calendar year. Respondents urge that separation-of-powers and comity interests are furthered by allowing the General Assembly time to provide funding to eliminate the MSPD waiting lists, which in turn will hopefully render moot Petitioners' requests for relief.

Respondents cite *Sauer v. Nixon*, 474 S.W.3d 624, 630 (Mo. App. W.D. 2015) for the proposition that action by the legislature to solve a problem initially sought to be solved litigation may render a case moot. In *Sauer*, the Court of Appeals

dismissed as moot an appeal of a judgment forbidding certain state agency actions, based upon intervening legislation that forbade those same agency actions. As the action of the General Assembly effectively granted the relief sought by petitioners, the lawsuit was rendered moot. Respondents also cite *McCarthy v. Ozark Sch. Dist.*, 359 F. 3d 1029, 1035 (8th Cir. 2004) (state legislature's change in the law after commencement of litigation mooted schoolchildren's religious-belief exemption under a mandatory immunization statute); *Smith v. Hundley*, 190 F. 3d 852, 855 (8th Cir. 1999) (an inmate's claims for declaratory and injunctive relief to improve conditions within the prison were rendered moot when he was transferred to a different facility and was no longer subject to those conditions).

The Missouri Supreme Court has likewise shown past deference to the legislature by allowing time for it to act relating to the State's obligation to furnish counsel to indigent defendants charged with crimes. In *State v. Green*, 470 S.W. 2d 571 (Mo. banc 1971), the Court held that the State was obliged to furnish counsel to indigent defendants and announced that Missouri attorneys would no longer be required to perform this task alone without compensation. However, the Court, believing that a "permanent solution to the problem presented is an appropriate subject for the legislature," gave time for the General Assembly to react during the next legislative session. *Id.* at 573. The legislature did just that, creating in 1972 a public defender commission which ultimately became the predecessor to MSPD. See *State ex rel. Missouri Pub. Defender Comm'n v. Pratte,* 298 S.W.3d 870, 874-876 (Mo. banc 2009).

In considering the State's obligation to provide counsel to indigent defendants the State charges with a crime and seeks to incarcerate, the United States Supreme Court opinion in *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) provides guidance. There the issue was the second amendment right to keep and bear arms. Writing for the majority, Justice Scalia takes the occasion to comment generally on the importance of enumerated constitutional rights such as the right to counsel asserted in the instant case:

> The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

Id. at 2821.

Over the objection of Petitioners, the Court accepts Respondents' invitation to temporarily stay this cause. The case is stayed until June 30, 2021. Counsel for Respondents are requested to provide monthly updates giving the number of defendants on the MSPD waiting list and the status of legislative and executive branch actions relevant to the permanent elimination of MSPD waiting lists.

The case is docketed for case review on July 1, 2021 at 9:00 a.m.

Date: February 18, 2021

William E. Hickle, Judge