IN THE CIRCUIT COURT OF COLE COUNTY

STATE OF MISSOURI

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

ORDER

THIS MATTER comes before the Court on Petitioners' Motion for Class Certification, filed through counsel on February 27, 2020. A hearing was held on June 26, 2020, and the matter was taken under advisement. For the reasons stated herein, the Motion is GRANTED.

Petitioners Jennifer L. David, T'Chaka Spiller, Jorge Ledbetter, Travis Herbert, Dakota Wilcox, Corey Boston, Joseph Struemph, and Christopher Jones (collectively, "Petitioners") filed the instant suit on behalf of themselves and all others similarly situated, alleging that Missouri's practice of systematically placing, and/or authorizing the placement of, indigent criminal defendants on waiting lists deprives such defendants of their right to counsel, in violation of the Missouri Constitution. Petitioners contend that this practice has impacted, and continues to impact, thousands of indigent criminal defendants, who are all innocent until proven guilty, throughout all 114 counties and the City of St. Louis

in the State of Missouri.[1] Petitioners allege that this practice leads many to "languish in jail for weeks, months, or even over a year," and that even those who are not in custody are harmed by this practice "since the absence of counsel makes it virtually impossible for them to conduct any meaningful investigation or otherwise prepare a viable defense to the charges against them."[2] Petitioners now seek to certify a class defined as: "all indigent persons who have been charged with a crime and are currently on a waiting list for legal representation, or who will be charged with a crime and placed on a waiting list for legal representation during the pendency of this litigation."[3]

BACKGROUND

In Missouri, local Missouri State Public Defender (MSPD) offices are relied upon to provide defense services to virtually all indigent defendants facing criminal charges in the state. The state's obligation to provide counsel is grounded in the fundamental constitutional principles articulated in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the Constitution requires every State to provide counsel for criminal defendants who are unable to afford an attorney. The obligation is similarly grounded in the Missouri Constitution, which guarantees all persons accused in criminal prosecutions the right to counsel, due process, and equal rights and opportunity under the law. Mo. Const. art. 1, § 18(a) (establishing a right to counsel); Mo. Const. art. 1, § 10

[1] Class Action Pet. for Declaratory J. & Injunctive Relief ¶ 29 (filed Feb. 27, 2020).
[2] Mot. to Certify Class Pursuant to Rule 58.08 & Suggestions Supp. 1 (filed Feb. 27, 2020).
[3] Class Action Pet. ¶ 64.

(guaranteeing due process protections); Mo. Const. art. 1, § 2 (ensuring equality under the law).

Petitioners allege that the "chronic underfunding and increasing caseload of MSPD has led to a staffing crisis" which prevents MSPD attorneys from consistently providing constitutionally adequate representation to their clients. Thus, Petitioners allege, MSPD has resorted to placing indigent defendants on a waiting list for representation when the local MSPD office does not have the capacity to provide sufficient representation in a timely way.[4] Indigent defendants remain on the waiting list until an attorney becomes available. Petitioners contend that this practice results in a critical delay of months and sometimes years in their constitutionally required representation. Petitioners assert that as of January 9, 2020, three indigent defendants have been in pretrial detention and on a waiting list for over two years and that forty-four indigent defendants have been on a waiting list and in pretrial detention for over one year. The average number of days indigent defendants are on a waiting list and in jail is 114 days.[5] Petitioners allege that the practice results in a denial of their right to counsel at critical stages of the criminal process, including arraignments, plea negotiations, and the waiver of the right altogether to keep the proceedings moving forward.[6] Petitioners further note that, according to recent MSPD court filings and records, as of January 2020, there were more than 4,600 criminal

[4] Class Action Pet. ¶ 30-31.
[5] Class Action Pet. ¶ 36.
[6] *Id.* at ¶¶ 37-40.

defendants on the waiting list, approximately 600 of whom were being held in pretrial detention.[7]

PETITIONERS

Petitioners allege the following regarding the eight named Petitioners: Petitioner Jennifer David was arrested in Callaway County, Missouri, on August 3, 2019, and charged with a felony offense. A January 7, 2020 criminal court filing indicates that Ms. David completed an MSPD application, qualified for MSPD services, but was subsequently placed "on a wait list pending the availability of a public defender to provide representation."[8] Petition at 4. Although the notice does not indicate any time frame related to the availability of an attorney, Ms. David was told by an MSPD official that the estimated amount of time that she would be on the waiting list was eight months.[9] While on the waiting list, Ms. David alleges that was forced to navigate the court system on her own. Specifically, she was unable to communicate with an attorney, review discovery from her case, identify or interview potential witnesses, gather evidence, or otherwise mount a viable defense to the charges against her.

Petitioner T'Chaka Spiller was arrested and charged with a felony offense and multiple misdemeanor offenses on November 8, 2019 in St. Charles County. Mr. Spiller applied for MSPD services on a separate felony case prior to his

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[7] Class Action Pet. ¶ 41.
[8] Class Action Pet. ¶ 43.
[9] According to Respondents, after the filing of this lawsuit, the MSPD revisited Ms. David's indigency application and determined that she was no longer eligible for MSPD services. As such, Ms. David is no longer on the waiting list.

arrest, on November 1. He was told he qualified for MSPD services. On November 12, 2019, Mr. Spiller appeared for arraignment without counsel and 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 a bond reduction was denied. Mr. Spiller had been before the court on two other occasions, only to have his case continued again and again. The case was also continued on multiple occasions without Mr. Spiller even appearing in court. Due to his time on the waiting list, Mr. Spiller contends that he was forced to navigate his court appearances, including multiple bond reduction hearings, without the assistance of an attorney, and was unable to take any steps to develop a viable defense to the charges against him. Mr. Spiller was in custody for over three months without access to an attorney.

Petitioner Jorge Ledbetter was arrested and charged with a felony offense on or about December 20, 2019. Mr. Ledbetter was arraigned, without counsel, on December 23, 2019. At that time, Mr. Ledbetter's bond was set at $75,000, with 10% authorized. Mr. Ledbetter qualified for MSPD services but was later informed that he had been placed on a waiting list for representation as of January 2, 2020. Mr. Ledbetter's case was continued repeatedly because he was on the waiting list and without representation. When he asked for a bond reduction, he was allegedly told that the bond could not be lowered and he would have to wait for representation. He was told the wait would be eight to ten weeks long. During his time on the waiting list, Mr. Ledbetter alleges that he was

unable to communicate with an attorney, review discovery, interview witnesses, gather evidence, or otherwise mount a viable defense to the charges against him.

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 without counsel and had his bond set at $75,000. Subsequently, MSPD filed a letter with the court indicating that Mr. Herbert had been placed on a waiting list for an attorney. The letter provided no timeframe within which he was likely to receive representation in his criminal case. Since being placed on the waiting list, Mr. Herbert alleges that 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 an effort to move his case along, notwithstanding the absence of defense counsel.

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 on August 26, 2019; Mr. Wilcox 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. He was found eligible for public defender services, placed

on a waiting list for an attorney and given no time frame within which he was likely to receive representation in his criminal case. Mr. Wilcox then navigated all of his court appearances without the assistance of an attorney and had no attorney to assist in developing a viable defense to the charges against him.

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 in court without counsel, while still in custody at the Cole County Jail. The court denied Mr. Boston's request for a bail reduction and declined to set bail. Mr. Boston was found eligible for the services of the MSPD, placed on a waiting list for an attorney and given no timeframe within which he was likely to receive representation in his criminal case. Mr. Boston navigated his court appearances—including his November 2019 bond reduction hearing—without the assistance of an attorney, and alleges that he was unable to take any steps to develop a viable defense to the charge against him.

Petitioner Joseph Struemph was charged with a felony offense on March 28, 2019, but not taken into custody. He was arraigned, without counsel, on April 5, 2019. After failing to appear for a hearing in June 2019, Mr. Struemph was arrested on November 26, 2019. On December 2, 2019, Mr. Struemph appeared in court, again without counsel, and a cash-only bond was set. Mr. Struemph applied for MSPD services soon after his November arrest. He was deemed eligible for the services of the MSPD, but received a letter from the MSPD, dated December 17, 2019, indicating that he had been placed on a waiting list for an

attorney. The letter provided no timeframe within which he was likely to receive representation in his criminal case. Mr. Struemph alleges that, while on the waiting list, he was left to navigate the court system without the assistance of an attorney and was unable to take any steps to develop a viable defense to the charges against him.

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 was accused of violating his probation and he applied for public defender services shortly after his arrest. Though he was found eligible for the services of the MSPD, Mr. Jones was placed on a waiting list for representation and denied access to counsel. As such, Mr. Jones alleges that he was left to navigate the court system without the assistance of an attorney and was unable to take any steps to develop a viable defense to the charges against him.

FINDINGS

Under Missouri law, a class is properly certified if the evidence in the record, taken as true, satisfies the requirements of Rule 52.08(a)(1) – (a)(4) and the requirements of either Rule 52.08(b)(1), 52.08(b)(2) or 52.08(b)(3). Because the text of Rule 52.08 is essentially the same as Federal Rule of Civil Procedure 23 ("FRCP 23"), Missouri courts recognize that federal court interpretations of FRCP 23 are relevant and may be considered in the determination of class certification questions. *See State ex rel. Union Planters Bank, N.A. v. Kendrick*, 142 S.W.3d 729, 735 n.5 (Mo. banc 2004); *Koehr v. Emmons*, 55 S.W.3d 859, 864

n.7 (Mo. Ct. App. 2001) ("Because Missouri Rule 52.08 and Federal Rule 23 are identical, we consider federal interpretations of Rule 23 [as] interpreting (sic) Rule 52.08").

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

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

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

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

In determining whether class certification is proper, the allegations in the petition are assumed to be true. *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d 215, 224 (Mo. App. W.D. 2007) (holding that "in class certification determination, the court assumes the named plaintiffs' allegations are true."). In close cases, courts should err towards certification, as the class can be modified if necessary. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 715 (Mo. 2007) ("[C]ourts should err

in close cases in favor of certification because the class can be modified as the case progresses.").

(A) Rule 52.08(a)

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

(1) Numerosity

As Respondents have conceded, this case easily satisfies the requirement under Rule 52.08(a)(1) that the class be "so numerous that joinder of all members is impracticable." The Proposed Class comprises thousands of indigent criminal defendants across the state, who have been placed on waiting lists for legal representation. Moreover, Petitioners allege that many more indigent criminal defendants are placed on waiting lists in Missouri every day. Both the number of class members and the nature of the action make joinder of all members of the Proposed Class implausible. *See Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559-60 (8th Cir. 1982) (noting that in addition to class size, the court may

consider the "nature of the action" and "any other factor relevant to the practicability of joining all the putative class members").

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

Additional considerations also weigh in favor of finding that Petitioners have satisfied the Rule 52.08(a)(1) criteria. First, the Proposed Class is fluid—members will frequently join and leave the class. *See Barrett v. Claycomb*, 2011 WL 5822382, *2 (W.D. Mo. Nov. 15, 2011) (finding numerosity requirement satisfied in light of not only the "large initial number of potential plaintiffs," 1,100, but also "the fluid nature of this class," which included "an unknown number of future students"). Indeed, only one of the named Petitioners—Travis Herbert—remains on the waiting list as of today. But new Proposed Class members are being added to the class every day as Respondents continue to place or authorize the placement of indigent criminal defendants on waiting lists.

Second, members of the Proposed Class are, by definition, financially unable to hire counsel and fund litigation themselves; joinder in this context is thus not only impracticable, it is virtually impossible. *See* William Rubenstein,

Newberg on Class Actions § 3:11 (5th ed. 2011). Third, the Proposed Class members are dispersed across the State of Missouri. *See Darling v. Bowen*, 685 F. Supp. 1125, 1127 (W.D. Mo. 1988) (noting geographic dispersion of class members as a contributing factor to the finding that joinder is impractical). Finally, many individuals will enter the Proposed Class—by being charged with a crime, qualifying for MSPD services, and being placed on the waiting list—only after certification of the class is complete. For these reasons, joinder of future class members is impracticable. *See Weaver v. Reagen*, 701 F. Supp. 717, 721 (W.D. Mo. 1998) (potential future members made seven-member class sufficiently "numerous").

(2) Commonality

Commonality is satisfied when "there are questions of law or fact common to the class." Rule 52.08(a)(2). However, Courts have interpreted this requirement as being satisfied as long as there is at least one question of law or fact that is common to the class. *Elsea v. U.S. Engineering Co.*, 463 S.W.3d 409, 419 (Mo. App. W.D. 2015) ("[E]ven a single [common] question will do." (brackets in original)) (citing *Newberg on Class Actions, supra,* § 3:20). Further, the commonality requirement "is written in the disjunctive, and hence, the common question may be one of fact *or* law and need not be one of each." *Elsea*, 463 S.W.3d, at 418 (emphasis in original).

The commonality requirement is "easily met in most cases because it 'requires only that the course of conduct giving rise to a cause of action affects all

class members, and that at least one of the elements of that cause of action is shared by all class members.'" *Egge v. Healthspan Services Co.*, 208 F.R.D. 265, 268 (D. Minn. 2002). The determination of whether a question is "common" or, in the alternative, "individual" is based on the nature of the evidence that will suffice to resolve the question. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 175 (Mo. App. W.D. 2006). "If, to make a *prima facie* showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a *prima facie* showing, then it becomes a common question." *Id.* (citing *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 382 (Mo. Ct. App. 2005).

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

the nature of the pending charges or potential penalties at stake for each member of the Proposed Class.

Respondents argue that commonality is not satisfied because whether and when the right to counsel has attached will vary among each member of the Proposed Class, and therefore any injuries in this case are speculative and will vary depending on the stage of their criminal prosecution. But the existence of additional questions with respect to claims of class members does not preclude the formation of a class so long as the class is seeking to remedy a common grievance. *Elsea*, 463 S.W.3d, at 419 ("[T]he fundamental question is whether the group aspiring to class status is seeking to remedy a common legal grievance. A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.") (internal quotation marks and citation omitted). Here, Petitioners contend that, pursuant to *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), the right to counsel attaches at a defendant's initial appearance before the court where the defendant learns of the pending charges. Petitioners allege that each member of the proposed class will have already had such an initial court appearance and that thus the right to counsel with respect to each class member has attached. Petitioners claim that the State of Missouri is violating this right to counsel by refraining from furnishing counsel, and instead intentionally placing each proposed class member on a waiting list.

The question of whether some members of the Proposed Class have suffered a legally-cognizable harm goes to the merits of the Petitioners' claims and does not preclude class certification. The issue for class certification purposes is whether a common question exists—not whether the Proposed Class has proven that it is entitled to relief on the merits. *Hale v. Wal-Mart Stores, Inc.*, 231 S.W.3d at 222 ("[T]he courts do not conduct an inquiry into the merits of the lawsuit when class certification is at issue.").

(3) Typicality

The requirement that the named Petitioners' claims be typical of the Proposed Class' claims is "fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995). "Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996). Petitioners' claims in this case stem from the same course of conduct as the class claims—namely the State's alleged failure to provide constitutionally adequate legal representation by placing indigent criminal defendants on waiting lists—and give rise to the same claim for prospective injunctive relief under provisions of the state constitution guaranteeing the right to counsel.

Respondents argue that because some of the named Petitioners are no longer on the waiting list, they are not typical of the class and the case is

therefore moot. This fact does not render the named Petitioners' atypical or incapable of representing the Proposed Class under the public interest exception. The public interest exception to mootness applies where "a case presents an issue that (1) is of general public interest and importance, (2) will recur and (3) will evade appellate review in future live controversies." *Gurley v. Mo. Bd. of Private Investigator Examiners*, 361 S.W.3d 406, 414 (Mo. banc 2012). This doctrine permits a court to decide an issue "[e]ven though [it] may appear to be moot ... if 'there is some legal principle at stake not previously ruled as to which a judicial declaration can and should be made for future guidance.'" *State ex rel. Mo. Public Defender Comm'n v. Pratte*, 298 S.W.3d 870, 885 n.33 (Mo. banc 2009); *see U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 407 (1980) (holding that the class plaintiff was a "proper representative for the purpose of representing the class on the merits" even though "no class as yet has been certified").

All three requisites for the application of the public interest exception to mootness are present in the instant case. First, the State's alleged reliance on waiting lists is of general public interest and importance because it affects the fundamental constitutional rights of indigent criminal defendants and impacts the fairness, or perceived fairness, of the criminal justice system. *See State ex rel. Mo. Public Defender Comm'n v. Waters*, 370 S.W.3d 592, 603 (Mo. banc 2012) (noting that the public defender caseload issue "is one of general public interest and importance"). Second, the issue is recurring because thousands of indigent defendants allegedly remain on the waiting lists, and new indigent criminal

defendants are consistently being added. Third, the constitutionality of MSPD's waiting list policy will evade appellate review in future controversies because of the waiting lists' temporary nature. *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) (observing that "[p]retrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted. The individual could nonetheless suffer repeated deprivations, and it is certain that other persons similarly situated will be detained under that allegedly unconstitutional procedure.")

When the public interest exception to mootness applies, a proposed class representative is not "atypical" even if his claims are mooted before class certification or during the pendency of the class action. *See e.g., Williams v. City of Philadelphia*, 270 F.R.D. 208 (E.D. Penn. 2010) (refusing to render a named class representative as atypical or inadequate even though his claims became moot prior to class certification). Here, the named Petitioners are not atypical or inadequate simply because they have been removed from the waiting list.

Further, Petitioners contend that they have suffered the same harms that are allegedly inflicted on all indigent criminal defendants placed on a waiting list in Missouri—significant delay in the provision of counsel, extended and unnecessary pretrial detention, potential loss of exculpatory evidence or witness testimony, lack of consistent or meaningful communication with an attorney, and the absence of representation at critical stages of their cases. Petitioners allege that the harm they suffer, like the harms inflicted on other members of the class,

stem directly from being placed on a waiting list after being charged with a crime in Missouri. *Id.*; *Cf. Claycomb*, 2011 WL 5822382, at *3 (assessing "legal significance of varying degrees" of impact of challenged policy "would require resolution of the merits[,] which is not properly done at the class certification stage"). Petitioners' claims are thus typical of the Proposed Class as a whole and meet the requirements of Rule 52.08(a)(3).

(4) Adequacy

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

Petitioners satisfy the first requirement because the Proposed Class will be represented by counsel from the American Civil Liberties Union, MacArthur Justice Center, and the global law firm of Orrick Herrington & Sutcliffe, all of whom are competent, experienced and clearly qualified. Petitioners satisfy the second requirement because their interests are not antagonistic to the rest of the Proposed Class. Petitioners allege harm, along with all members of the proposed class, by the State's denial of counsel via the mechanism of a waiting list. Taking

the allegations articulated in the petition as true, each Petitioner alleges significant harm, giving each Petitioner a material interest in vindicating both his or her rights, and the rights of other indigent defendants currently on a waiting list in Missouri.

(B) Rule 52.08(b)

A class must satisfy at least one of the requirements laid out in Rule 52.08(b). Here, two independent subsections of Rule 52.08(b) are satisfied: subsection (1)(B) and subsection (2). Satisfying either would be sufficient to warrant certification, and Petitioners have met the criteria for both.

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

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

> [A]djudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests[.]

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

In "common fund" cases such as this, where the State has designated limited resources to spend on the public defender program, "the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999). In the instant

case, if multiple members of the Proposed Class were to file suit separately, some might succeed in being removed from a waiting list and have an attorney assigned to their case, but others likely would not. Indeed, a victory for one would "substantially impede" the ability of other indigent criminal defendants to obtain adequate counsel and be removed from a waiting list, because there would be even fewer public defender resources available as a result of the individual relief granted. The success by some defendants in obtaining removal from the waiting list would further lengthen the delay of other defendants waiting for the State to furnish counsel.

(2) Rule 52.08(b)(2)

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

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]

Rule 52.08(b)(2).

Here, Rule 52.08(b)(2) is satisfied because a single injunction or declaratory judgment would provide relief to each member of the class. *See Ebert v. Gen. Mills, Inc.*, 823 F.3d 472, 480 (8th Cir. 2016). Among other things, the injunction requested by Petitioners seeks to: (1) suspend the application of Missouri Revised Statute § 600.063.3(5) as unconstitutional; (2) stop Defendants from placing indigent criminal defendants charged with a crime in Missouri on a

waiting list; (3) immediately remove all indigent criminal defendants currently on a waiting list for counsel in Missouri by appointing competent counsel to all such indigent criminal defendants or by immediately dismissing the charges against all such indigent criminal defendants. In addition to this injunctive relief, Petitioners also seek to recover their costs, expenses, and reasonable attorneys' fees. Because this does not constitute damages, it does not disrupt the requirements of a Rule 52.08(b)(2) class. In determining whether to certify a class, this Court does not decide whether any of the above relief requested will be granted. If granted, however, it would appear that a single injunction or declaratory judgment could provide relief to each member of the class.

Respondents argue that Rule 52.08(b)(2) is not satisfied because there is no certainty that a single injunction will benefit all members of the Proposed Class equally since members of the Proposed Class have been charged with different crimes and are at different stages of their criminal proceedings, suggesting that a single injunction will provide greater benefit to certain members of the Proposed Class. But Rule 52.08(b)(2) does not preclude class certification due to the differing circumstances of each Proposed Class member's criminal case. Petitioners seek injunctive and declaratory relief requiring the State to cease its practice of allegedly depriving defendants of their timely right to counsel through the use of a waiting list, and thus the relief sought is aimed at one policy Petitioners allege that the State has instituted. *See B.K. v. Snyder*, 922 F.3d 957, 971 (9th Cir. 2019) (finding that Fed. R. Civ. P. 23(b)(2)'s requirements were

"unquestionably satisfied when members of a putative class seek uniform injunctive or declarative relief from policies or practices that are generally applicable to the class as a whole"). Even if particular members of the Proposed Class require more particularized relief, a court may still grant class-wide injunctive relief. *See id.* (holding that even though members of the class may have suffered varying degrees of harm as a result of the defendant's centralized policy, an injunction on carrying out the policy or declarative judgment that the policy is unlawful would be a uniform remedy for the entire class).

CONCLUSION

For the reasons contained herein, Petitioners' Motion for Class Certification is GRANTED. The Court HEREBY ORDERS and CERTIFIES a class of Petitioners defined as follows: 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.

Date: July 14, 2020

William E. Hickle, Judge