IN THE SUPREME COURT OF MISSOURI

NO. SC100170

ROBERT WOOLERY
Appellant,

v.

STATE OF MISSOURI
Respondent.

Appeal from the Circuit Court of Pettis County
The 18th Judicial Circuit
The Honorable Robert Koffman

BRIEF OF MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (MACDL) AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL)

IN SUPPORT OF APPELLANT

FILED WITH CONSENT OF ALL PARTIES

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ATTORNEYS FOR *AMICI CURIAE*

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JURISDICTIONAL STATEMENT

Amici adopt the jurisdictional statement as set forth in Appellant's brief.

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Missouri Association of Criminal Defense Lawyers (MACDL) and the National Association of Criminal Defense Lawyers (NACDL) are organizations dedicated to protecting the rights of persons accused of crimes and to fostering and enhancing the ability of lawyers to represent those persons effectively. Our statewide and national membership includes both private attorneys and public defenders as well as affiliated defense investigators, law professors, and other defense professionals. MACDL and NACDL have an interest both in preserving and protecting the rights of the criminally accused and assuring that the law is sufficiently clear that defense attorneys may accurately advise their clients in the course of representing them.

Amici write this brief in order to assist the Court not only in this case, but in several pending cases dealing with very similar issues.[1]

STATEMENT OF FACTS

Amici adopt the statement of facts in appellant's opening brief.

STATEMENT OF CONSENT

This brief is being filed with the consent of all parties.

[1] *See State v. Phillips* (No. SC100247), *State v. Logan* (No. SC100265), and *State v. Mills* (No. SC100303).

ARGUMENT AND AUTHORITIES

I. ARRAIGNMENTS ARE "CRITICAL STAGES" IN MISSOURI (Related to Point One of Appellant's Brief)

The Sixth Amendment right to counsel guarantees that counsel be present at any "critical stage" in a criminal proceeding. *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). Failure to have counsel not just appointed, but present at a critical stage, amounts to error. *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 606 (Mo. banc 2012). Because the opportunity to assert certain rights—such as change of judge or change of venue—is irrevocably lost within ten days after a defendant is arraigned, arraignment is a "critical stage" in Missouri. The cases cited by appeals courts that hold that arraignment was *not* a critical stage were decided when the rules regarding the defendant's assertion of certain rights imposed less strict time limits—if they imposed real limits at all. And consideration has to be given to the importance of counsel any time a defendant enters a plea, including even a "not guilty" plea. Mr. Woolery, who is indigent, was without counsel during his arraignment after indictment. State v. Woolery, No. WD 85530, 2023 WL 4188250, at *1 (Mo. Ct. App. June 27, 2023). As a result, his right to counsel was violated and reversal is required.

A. Missouri arraignment procedure.

Arraignments in Missouri can happen at different points in a criminal proceeding. If a misdemeanor is charged, the initial appearance can also be when the defendant is arraigned, after the prosecutor has filed an information. Mo. Sup. Ct. R. 21.10; Mo. Sup. Ct. R. 24.01. *See* § 8:6. Initial proceedings before a judge, 19 Mo. Prac., Criminal Practice & Procedure § 8:6 (3d ed.) ("When the offense charged is a misdemeanor, arraignment may occur" at the time of the initial appearance). In *State v. Logan*, for example, the defendant's initial appearance was also when he was arraigned on the charges against him. *State v. Logan*, No. WD 85831, 2023 WL 5918635, at *2 (Mo. Ct. App. Sept. 12, 2023), *reh'g denied, transfer ordered* (Oct. 3, 2023) ("Logan's initial court appearance was on August 18, 2022, during which he was arraigned" on a misdemeanor charge).

In a felony, if a grand jury issues an indictment, the defendant will be arraigned after the indictment is presented, as happened with Mr. Woolery. *See also State ex rel. McKee v. Riley*, 240 S.W.3d 720, 723 (Mo. banc 2007) (arraigned in September 2006 after being indicted by a grand jury in August); *State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409, 410 (Mo. banc 2007) ("The grand jury's indictment of Johnson was filed on November 20, and Johnson was arraigned on December 13."). If the state elects to proceed by means of a complaint and preliminary hearing, then the defendant will be arraigned after the defendant is bound over and an information is filed by the prosecution. *State v. Green*, 389 S.W.3d 684, 689 (Mo. App. S.D. 2012) ("At the conclusion of the preliminary hearing, the judge found probable cause and the case was 'bound over for arraignment in Circuit Court on August 14, 2009[.]' The felony information was filed on

August 13, 2009, the day before Defendant's arraignment."); *State v. Newman*, 256 S.W.3d 210, 214 (Mo. W.D. App. 2008) (preliminary hearing in August 2001, arraigned in September 2002). If a defendant waives the preliminary hearing, then arraignment will occur after the filing of the information. *See Saunders v. State*, 140 S.W.3d 175, 176 (Mo. App. S.D. 2004) (defendant arraigned in December 1999 after he waived preliminary hearing in November 1999).

For felonies, arraignment cannot happen at an initial appearance, although the initial appearance is sometimes referred to as an arraignment (or as a "informal arraignment" or "initial arraignment") and a defendant may be mistakenly asked to enter a plea. *State v. Closser*, 687 S.W.2d 657, 657–58 (Mo. App. S.D. 1985) (referring to defendant being "informally arraigned"); § 9:3. Time of arraignment, 28 Mo. Prac., Mo. Criminal Practice Handbook § 9:3 ("In some jurisdictions, however, the defendant is entering a plea of not guilty at first appearance following arrest on a warrant."). This seems to have caused some confusion in a recent case before the Eastern District Court of Appeals. *See State v. Heidbrink*, 670 S.W.3d 114, 134 (Mo. App. E.D. 2023) ("Heidbrink notes that Rule 24.01 provides that an arraignment shall only consist of reading the indictment or information to the defendant and calling on him or her to plead thereto. *See* Rule 24.01. Thus, the trial court could not have held a proper arraignment in October 2015 given that the State had only filed the initial complaint and had not yet filed

the Information. *See id*."). Defendants cannot—and should not—be arraigned on a complaint for a felony.[2]

Whenever an arraignment occurs, it amounts to the same thing. The court will read the indictment or information to the defendant, and the defendant will be asked to enter a plea of guilty or not guilty, or the court will enter a plea of not guilty on behalf of the defendant. Mo. Sup. Ct. R. 24.01; RSMo. §546.020. For misdemeanors, this can happen as early as the defendant's initial appearance; for felonies, it should happen after the grand jury issues an indictment, or the defendant is bound over after a preliminary hearing and an information is filed. Crucially, and as discussed later, the arraignment also starts the clock running for the assertion of various claims as regards change of venue and change of judge.

B. Arraignment in Missouri is a "critical stage" for which counsel's presence is required.

1. The test for a "critical stage" is whether some right or privilege is irretrievably lost if not asserted at arraignment.

In *Hamilton v. Alabama*, the Supreme Court held that arraignments in Alabama counted as a "critical stage" in a criminal prosecution. *Hamilton v. Alabama*, 368 U.S.

[2] *Amici* submit that what happened in *Heidbrink* was not an isolated occurrence and is a source of continuing confusion among judges and lawyers. Under the rules, there is no such thing as an "initial arraignment" on a complaint—there is only arraignment for a felony on an information or indictment. *See State v. Phillips*, No. SD 37382, 2023 WL 5815843, at *3 (Mo. Ct. App. Sept. 8, 2023) ("Regardless of the 'arraignment' label, a trial court cannot hold a proper arraignment until after the state has filed an information or indictment.").

52, 54-55 (1961). *Hamilton* is sometimes cited in support of the proposition that arraignments as such are critical stages,[3] but this is not now the consensus interpretation. Instead, attention has been focused on the Court's qualification that in Alabama, certain defenses had to be asserted (such as an insanity defense) at arraignment, or else they would be "irretrievably lost." *Hamilton*, 368 U.S. at 54. The test for arraignments being "critical stages" thereby became whether there was something (some right or privilege) that defendants might lose if they did not have counsel to guide them at arraignment, putting their right to a fair trial in jeopardy. *See United States v. Wade*, 388 U.S. 218, 227 (1967) (critical stage inquiry requires that courts "scrutinize any pretrial confrontation of the accused to determine" whether the presence of counsel is necessary).

Applying that test here shows that arraignment counts as a critical stage in Missouri, a conclusion previously reached by some Missouri courts. *See State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 606-07 (Mo. banc 2012) (critical stages include arraignments); *State v. Heidbrink*, 670 S.W.3d 114, 133 (Mo. App. E.D. 2023) ("Missouri courts have specified that arraignments constitute a critical stage for purposes of the right to counsel."); *id*. at 134 (defendant represented by counsel at her arraignment, which was "the first 'critical-stage' of her case"); *State v. Scott*, 404 S.W.2d 699, 702

[3] *See, e.g.*, *People v. Lindsey*, 772 N.E.2d 1268 (Ill. 2002) ("This court and the United States Supreme Court have long recognized that arraignment is a critical stage of the criminal proceedings. Arraignment is the first step in the criminal prosecution and, as such, far from a mere formalism.") Some courts have also pointed to the Supreme Court's decision in *Missouri v. Frye* [566 U.S. 134 (2012)] as holding that all arraignments are now "critical stages." *See Gonzalez v. Comm'r of Correction*, 68 A.3d 624, 635 (Conn. 2013) (citing *Frye* and commenting that "it seems that more recent Supreme Court cases have not limited only certain arraignments to be 'critical stages'").

(Mo. 1966) ("[B]y both rule and statute, Missouri has always recognized that arraignment is indeed 'a critical stage' in a criminal proceeding requiring the appointment of counsel not only in homicide cases but upon arraignment for any 'felony.'"); *but see State v. Douglas*, 464 S.W.2d 26, 28 (Mo. 1971) ("There may be some confusion as to whether arraignment is a critical stage."). Arraignments in Missouri, like other critical stages, are events that "show[] the need for counsel's presence ," *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008), because defendants stand to lose certain rights if they do not assert them at or shortly after arraignment, such as the right to change judge or venue. Importantly, the prejudice results not because the defendant loses something he was in fact going to later assert, but only that he lost the opportunity to assert something. The analysis in *Hamilton* did not turn on whether Hamilton had planned to enter into a plea of not guilty by reason of insanity. Rather, it turned on whether Hamilton made a plea without knowing what defenses were, in principle, available to him. As the Court wrote in *Hamilton*:

> When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted. … In this case, as in those, the degree of prejudice can never be known. *Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently.*
>
> *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) (citations omitted) (emphasis added).

2. If defendants do not move for a change of judge or venue at or within ten days of arraignment, this right is "irretrievably lost."

Under the current rules, a defendant must ask for a change of venue as of right or for cause, or a change of judge as of right within ten days of being arraigned. Mo. Sup. Ct. R. 32.02 (change of venue by agreement shall be filed "not later than ten days after the initial plea is entered"); Mo. Sup. Ct. R. 32.03(a) (change of venue in certain counties as a matter of right must be made no later than ten days after entry of plea); Mo. Sup. Ct. R. 32.04(b) (same ten day window for change of venue for cause); Mo. Sup. Ct. R. 32.07(b) (same time limit for change of judge as of right "unless designation of trial judge occurs more than ten days after initial plea"). These time limits admit of no exceptions, as other defenses do.[4] *See, e.g., State ex rel. Richardson v. May*, 565 S.W.3d 191, 193 (Mo. banc 2019) (timely application of a change of judge must be granted but "[a]n untimely application should be denied"); *State v. Harris*, 670 S.W.2d 73,77 (Mo. App. W.D. 1984) (application for change of judge and change of venue untimely and denied "on that basis alone"); *State ex rel. Director of Revenue v. Scott*, 919 S.W.2d 246, 247 (Mo. banc 1995) (right to change judge must be "timely exercised"). In other words, unless a defendant asks for a change of venue or change of judge as of right within that specified time period, the ability to request a change of venue or change of judge is (in the words of *Hamilton*) "irretrievably lost."

[4] The rule regarding making defenses and objections "based on defects in the institution of the prosecution" may also present difficulties for the uncounseled defendant. Mo. Sup. Ct. R. 24.04. These must be made "before the plea is entered." Mo. Sup. Ct. R. 24.04(b)(3). At the same time, a trial court can permit a motion on these grounds provided it is made "within a reasonable time" after the plea is entered (however long a "reasonable time" is). *Id.*

3. Losing the right to move for change of judge or change of venue is a "significant consequence."

There is no question that losing the ability to request a change of judge or venue is a "significant consequence" for a defendant. *See Bell v. Cone*, 535 U.S. 685, 696 (2002) (critical stage "denote[s] a step of a criminal proceeding, such as arraignment" that holds "significant consequences for the accused"). Missouri courts have emphasized how the right to a change of judge—and especially to disqualify that judge *without cause*—is a fundamental right. *See, e.g., State ex rel. Director of Revenue v. Scott*, 919 S.W.2d 246, 247 (Mo. banc 1996) (right to change judge is a "highly praised right"); *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692, 694 (Mo. App. E.D. 1990) (right to disqualify judge as a "keystone[] of our legal administrative edifice"); *Breazeale v. Kemna*, 853 S.W.2d 631, 632 (Mo. App. W.D. 1993) (right to disqualify a judge without cause as "keystone to our judicial system."). As one court summarized, "This 'virtually unfettered right to disqualify a judge without cause on one occasion' is a 'keystone of our judicial system, and Missouri courts follow a liberal rule construing it.'" *Joshi v. Ries*, 330 S.W.3d 512, 515 (Mo. App. W.D. 2010) (internal citation omitted). When a defendant timely requests a change of judge, there is nothing for the court to do but grant the motion. *Id.*

The right to change venue similarly protects an important right: the right to a fair trial by an impartial jury. *See, e.g., State ex rel. Union Elec. Light & Power Co. v. Bruce*, 334 Mo. 312, 317, 66 S.W.2d 847, 849 (1933) ("This right [to a jury trial] means a trial by an impartial jury and, therefore, of necessity the right to a change of venue because of the prejudice of the inhabitants of the county."); *State v. Hayes*, 81 Mo. 574, 590 (1884)

(right to change of venue predicated upon "the ground that [a community biased against the defendant] will prevent a fair trial"); *Firestone v. Crown Ctr. Redevelopment Corp.*, 693 S.W.2d 99, 103 (Mo. 1985) (superseded by statute on other grounds) (reason for change of venue provision "is that a party is entitled to an impartial jury to hear and decide his case"); *Simmons v. Lockhart*, 814 F.2d 504, 510 (8th Cir. 1987), *on reconsideration, Simmons v. Lockhart*, 915 F.2d 372 (8th Cir. 1990) ("A change of venue is the available mechanism for protecting the accused's fundamental right to fair trial."); *see generally Patton v. Commonwealth*, 159 S.W.2d 1006, 1008 (Ky. 1942) ("The right to a change of venue is a privilege founded upon the fundamental right of a trial by an impartial jury"). A trial that proceeds with a biased judge or jury "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Ash*, 413 U.S. 300, 309-10 (1973); *see also Maine v. Moulton*, 474 U.S. 159, 170 (1985) (same). Because Lincoln County is under 75,000 residents, Mr. Woolery's change of venue would also be as of right, provided the motion was timely made. *See* Mo. Sup. Ct. R. 32.03(a).

4. Decisions about arraignment as a "critical stage" that deal with earlier versions of the Rules of Criminal Procedure should not be followed, as the rules regarding change of venue and change of judge have undergone numerous revisions.

Many cases cited by the courts of appeals said that arraignments were not a critical stage. Notably, these cases also uniformly said that preliminary hearings were also *not*

critical stages.[5] But the rules regarding changes of judge and venue were different when these cases were decided. The ten-day time limit did not exist. Instead, the restrictions that existed *then* to ask for a change of judge or change of venue either had no effective time limit or gave defendants much more time to assert these rights.

RSMo. § 545.430 (1929) provided effectively no time limit for requesting a change of venue, indicating that it could be requested "whenever it shall appear, in the manner provided in section 545.490, that the minds of the inhabitants of the county in which the cause is pending are so prejudiced against the defendant that a fair trial cannot be had therein." This was qualified by RSMo. § 545.470 (1939), which stated that the motion had to be filed "during the term the indictment if found," if the defendant was in custody or "on recognizance" or if not in custody, the motion could be made by the defendant at the "first term after the defendant shall have been arrested." But RSMo. § 545.480 (1929) allowed filing a motion to change venue out of time if the defendant swore an oath that that he only knew facts related to the motion "since the last preceding continuance of the cause," effectively expanding the time within which to apply for a change of venue. And as regards a change of judge, RSMo. § 545.660.4 (1939) there were seemingly no time limits on when a defendant could "make and file an affidavit,

[5] *See, e.g., State v. Ussery,* 452 S.W.2d 146, 148 (Mo. 1970) (preliminary hearing not a critical stage); *see also Fleck v. State*, 443 S.W.2d 100, 101 (Mo. 1969) (collecting cases). After *Coleman v. Alabama* was decided (which required the presences of counsel at preliminary hearings), the Missouri Supreme Court recognized that, if anything, preliminary hearings in Missouri were even "more critical" than the Alabama hearing a at issue in *Coleman*. *See, e.g., State ex rel. Thomas v. Crouch*, 603 S.W.2d 532, 541 (Mo. 1980).

supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial." These statutes are now superseded by the Rules of Criminal Procedure. *See, e.g., State v. Harris*, 670 S.W.2d 73, 77 (Mo. App. W.D. 1983) (rules control if promulgated later in time).

The rules regarding changes of judge and venue have undergone numerous changes since the first half of the twentieth century (the date the original statutes regarding judge and venue were passed). From the 1950s to 1970s, the change of venue rules mostly mirrored the previous—and very lax—statutory scheme. Mo. Sup. Ct. R. 30.03 (1952, 1979). For a change of venue from a county with a population of less than 75,000, however, notice now had to be given "no less than five days before the day the case has been set for trial." Mo. Sup. Ct. R. 30.04 (1952, 1979). The change of judge rules underwent more substantive changes, and time limits (still very generous ones) started to be introduced in the 1950s. For a change of judge, an affidavit had to be filed stating that the defendant could not get a fair trial from the judge "not less than five days before the day the case has been set for trial." Mo. Sup. Ct. R. 30.12 (1952, 1979). If a judge had not been set, the affidavit had to be filed before the jury panel was sworn for voir dire. Mo. Sup. Ct. R. 30.12 (1952, 1979). For misdemeanor cases, the defendant had to file an affidavit that he could not have a fair and impartial trial "before the jury is sworn or the trial is commenced." Mo. Sup. Ct. R. 22.05 (1979, 1952).

In the early 1980s, the rules regarding changes of venue and judge were modified, and stricter time limits were introduced. A change of venue by agreement had to be

requested at least ten days before the trial date. Mo. Sup. Ct. R. 32.02 (1982). For a change of venue as a matter of right for a county of 75,000 or fewer, an application had to be made within thirty days of the arraignment for felonies, but only ten days before trial was set for misdemeanors. Mo. Sup. Ct. R. 32.03 (1982). For change of venue for cause and for change of judge, those same time limits applied. Mo. Sup. Ct. R. 32.04 (1982); Mo. Sup. Ct. R. 32.07 (1982).

Finally, in the 1990s the rules for changes of venue and judge were amended yet again, giving defendants even stricter time limits. For change of venue by agreement, the stipulation now had to be filed "not later than ten days after the initial plea [was] entered." Mo. Sup. Ct. R. 32.03 (1995). For change of venue as of right for counties under 75,000 inhabitants the application also had to be filed "not later than ten days after the initial plea [was] entered." Mo. Sup. Ct. R. 32.03 (1995). For change of venue for cause, application had to be made not later than ten days after the initial plea for both felonies and misdemeanors. Mo. Sup. Ct. R. 32.04 (1995). That same ten-day limit also governed motions for changes of judge for felonies and misdemeanors. Mo. Sup. Ct. R. 32.07 (1993). These ten day limits on changes of venue and judge mirror the rules currently in effect.

In other words, the rules that make arraignment a critical stage are (relatively) new. What is true *now* is that there are rights that a defendant has to assert within a brief time after arraignment or they will be irretrievably lost. That makes arraignment in Missouri *now* a "critical stage" under the relevant Supreme Court precedent because, in the absence of counsel, defendants can lose a right or a privilege at arraignment (or

shortly thereafter), whatever the earlier rules said. Although there are a few cases that find arraignment not to be a critical stage decided after changes in the rules, they all rely on much *earlier* cases, and show no awareness of the rule changes regarding venue and judges—and they importantly do not postdate the most significant changes in the rules in the 1990s. *See, e.g.*, *State v. Barnard,* 820 S.W.2d 674, 679 (Mo. App. W.D. 1991) (relying on *Parks v. State*, 518 S.W.2d 181, 184 (Mo. App. K.C. 1974) in support of its conclusion); *Gilmore v. Armontrout*, 861 F.2d 1061, 1070 (8th Cir. 1988) (citing *McClain v. Swenson*, 435 F.2d 327, 330 (8th Cir. 1970)). The Court of Appeals in *Woolery* provided a long list of older cases, nearly all of them from the 1960s and 1970s. *See State v. Woolery*, No. WD 85530, 2023 WL 4188250, at *5 (Mo. Ct. App. June 27, 2023). Again, these cases should not be followed as they reference an earlier and different set of rules.

5. The events at arraignment make Missouri arraignments a critical stage requiring the presence of counsel.

The Supreme Court has said that we must look at the particular event at issue in order to determine whether that event is a "critical stage" under the Sixth Amendment. *United States v. Ash*, 413 U.S. 300 313 (1973) ("[t]his review of the history and expansion of the Sixth Amendment counsel guarantee demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary"); *United States v. Wade,* 388 U.S. 218, 227 (1967) (critical stage inquiry

requires that courts "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial"). That means looking at what a defendant stands to lose at (or very close after) arraignment under the current rules. In particular, it means considering whether when a defendant enters a plea, the defendant is aware of the consequences of that plea—and whether "the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently." *Hamilton*, 368 U.S. at 55. A defendant who does not have counsel at arraignment will have no idea of the "possible rights, pleas, or defenses" he may stand to lose in a short period of time if he enters a plea. *Cf. State v. Benison*, 415 S.W. 2d 773, 775 (Mo. 1967) (stating that no rights, pleas, or defenses are lost to criminal defendants at arraignment).

The fact that the defendant still has ten days after arraignment to invoke their rights regarding change of judge and change of venue should not change the critical stage analysis. Simply as a practical matter, there is no guarantee that a defendant will receive an appointed attorney within that ten-day period, much less that the appointed attorney will have time to determine, in less than ten days, whether a change of judge or venue should be sought.[6] *See* Douglas Colbert, *Prosecution without Representation*, 59 Buff. Law Rev. 333, 406 n. 375 (2011) (noting that appearance of counsel can range from one day to twenty-one days in some counties in Missouri); *see also* When and how counsel

[6] Mr. Woolery's attorney entered an appearance on his behalf seven days after Mr. Woolery was arraigned. His attorney did not file any motion on the case until eleven days after that. *State v. Woolery*, No. WD 85530, 2023 WL 4188250, at *1 (Mo. Ct. App. June 27, 2023).

enters or is appointed, 28 Mo. Prac., Mo. Criminal Practice Handbook § 10:3 (citing "frustrating delays" in the Missouri Public Defender system); § 2:3. Law and practice notes, 28 Mo. Prac., Mo. Criminal Practice Handbook § 2:3 (indicating that given the "rules of the Public Defender System, mandating an application process," it is "unlikely" that applicants to the public defender will be determined eligible for an attorney "for as long as 30 days after first appearance."). Thus, in actual practice, ten days usually will not matter if a public defender is not already appointed at the time a defendant is arraigned. Meanwhile, "[c]ritical stage opportunities may pass without a defendant's knowledge, and even if they can be revisited, the opportunity to develop them as fully had counsel been available may be impaired." *Lavallee v. Justs. In Hampden Superior Ct.*, 812 N.E.2d 895, 904 (Mass. 2004).

Second, the extra ten days does not change the importance of arraignment as a conceptual matter. It is the *arraignment* that starts the clock on the assertion of the right, and the defendant who does not have the guidance of counsel at that point risks losing the ability to request a change of judge or venue. At this point, a defendant needs the advice of counsel to determine whether to request either of these things when deciding tow plea. *United States v. Ash*, 413 U.S. 300, 311 (1973) (finding proceeding was a critical stage when defendant "was required, with definite consequences, to enter a plea"). This makes the arraignment a point at which "defendants cannot be presumed to make critical decisions without counsel's advice." *Lafler v. Cooper* 566 U.S. 156, 165 (2012).[7]

[7] Mo. Sup. Ct. R. 32.09(c) allows a judge to order a change of venue or change of judge when required by "fundamental fairness." It is not clear what this standard amounts to,

6. Even the fact of having to enter a plea when being arraigned by itself suggests that arraignments may be "critical stages."

More generally, an arraignment is a critical stage in the proceeding because of the adversarial nature of the proceedings themselves and the requirement that a defendant must make a decision as to whether to plead guilty or not guilty. In a per curium opinion in *White v. Maryland*, the Supreme Court found that reversal was required where "petitioner entered a plea before the magistrate and that plea was taken at a time when he had no counsel." *White v. Maryland*, 373 U.S. 59, 60 (1963). This Court has distinguished *White* on the basis that the petitioner in that case entered a plea of *guilty*. *Montgomery v. State*, 461 S.W.2d 844, 846 (Mo. 1971) (finding that where the person had entered a plea of not guilty and therefore the lack of counsel did not result in any disadvantage to defendant or advantage to the State). Though this Court may have been correct in *Montgomery*[8] that the petitioner at issue in *White* had entered and the court had accepted a plea of guilty without counsel, in reality, that is a distinction without a difference. As the Supreme Court has correctly pointed out: "[B]y the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has

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or the coherence of leaving a judge to determine *sua sponte* whether a change of judge should be ordered. In any event, this does not change the fact that the *defendant's* ability to change judge or venue as of statutory right is irretrievably lost after the ten-day window passes. *See State v. McElroy*, 894 S.W.2d 180, 189 (Mo. App. S.D. 1995) ("Mo. Sup. Ct. R. 32.09(c) is not a rule designed 'to obtain a second peremptory change of judge, but is a safety net to provide an option for any successor judge to recuse himself' when 'fundamental fairness' so requires.") (internal citation omitted). *Cf. State v. Rulo*, 173 S.W.3d 649, 651 (Mo. App. E.D. 2005) (right to change judge is "virtually unfettered" if timely exercised).

[8] Of course, *Montgomery* was decided prior to the rule changes regarding venue and judges, discussed *supra*.

restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial." *Rothgery*, 554. U.S. at 202. In other words, the "solidly adversarial" nature of the relationship between the State and the Defendant at that point in proceedings suggests the need for counsel. Even Justice Thomas's dissent from the Court's decision in *Rothgery* acknowledged that *White* was distinguishable because it did not involve entry of a plea, suggesting that the invitation to enter a plea is what makes a proceeding a "critical stage." *Id.* at 227 (Thomas, J., dissenting).[9]

Nor should the requirement that counsel be present at a hearing where a defendant pleads turn on what decision the defendant would make when uncounseled. Rather, a major purpose of counsel being to give guidance to criminal defendants on critical decisions in the context of a complex and confusing process, the right to counsel should lean on whether the decision before the person is critical enough to be one that requires the guidance of counsel. The decision to plead guilty or not guilty is among the most critical of decisions that a criminal defendant can make in his case.

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[9] *Rothgery* decided only that the right to counsel attaches for purposes of Sixth Amendment at an initial appearance, not that an initial appearance was a "critical stage." Justice Alito, in a concurrence joined by Chief Justice Roberts and Justice Scalia, suggested that merely finding that the right attaches does not indicate that there is a right to appointed counsel. *Rothgery*, 554 U.S. at 213-214 (Alito, J., concurring). The majority deferred consideration of this issue, and the Court has not addressed this particular issue since that time. *See id. at* 212 n. 15. Thomas's dissent in *Rothgery* would seem to suggest that the Court should not make a distinction between when the right attaches and when counsel must be appointed, and that a narrower view of when the right attaches is appropriate. *Id. at* 227. In reality, such a distinction would harm only of those in need of appointed counsel because they could not afford to pay private counsel, and therefore serve only to create further inequities in our criminal justice system.

The importance of the presence of counsel even when a plea of not guilty is entered was recognized in a footnote in *Hamilton v. Alabama*, 368 U.S. at 55 n.4. The Court noted that arraignments under federal law involve the defendant being informed of the charges against him ("thereby formulating the issue to be tried") but also involve the court taking a plea. *Hamilton*, 368 U.S. at 55 n. 4 (1961). Under the Missouri rules, this is exactly what happens and what distinguishes an "arraignment" in Missouri from an "initial appearance." *Compare* Mo. Sup. Ct. R. 24.10, Mo. Sup. Ct. R. 22.08 *with* Mo. Sup. Ct. R. 24.01. It is also what makes the arraignment in Missouri (as under federal law) "part of the trial itself." *United States v. Ash*, 413 U.S. 300, 310 (1973); *see also Pointer v. Texas*, 380 U.S. 400, 402 (1965) ("Since the preliminary hearing there, as in *Hamilton v. State of Alabama*, 368 U.S. 52 … was one in which pleas to the charge could be made, we held in *White* as in *Hamilton* that a preliminary proceeding of that nature was so critical a stage in the prosecution that a defendant at that point was entitled to counsel.").

Nor should the question of whether a defendant has a right to counsel turn on whether one is rich enough to afford a lawyer or savvy enough to request one. While any lawyer knows that the invitation to enter a plea at arraignment is generally an opportunity to enter a plea of not guilty, this is not so obvious for unrepresented litigants, some of whom may be stepping into a courtroom for the first time in their lives. As lawyers representing criminal defendants in courtrooms across the state and country, *Amici* are particularly attuned to the fact that the Defendants who appear in court at an arraignment or bail hearing without an attorney are almost universally not rich. They are often not

employed and do not enjoy the support of friends or family members familiar with the legal system. Many, if not most, lack sophistication in their understanding of and interactions with the legal system and the world as a whole. They often suffer from considerable mental health issues and/or are intellectually disabled. In short, they are the people most likely to say or do the wrong thing, and those most vulnerable to abuse, neglect, or honest mistakes by the system that can have serious consequences. They are the people perhaps most in need of an attorney at this critical stage.

II. BAIL HEARINGS ARE "CRITICAL STAGES" IN MISSOURI (Related to Point Two of Appellant's Brief)

A bail hearing is one that holds "significant consequences" for the accused, such that a defendant needs help and guidance from counsel. *Bell v. Cone*, 535 U.S. at 696. As the recent changes in rules regarding bail in Missouri acknowledge, the determination of bail by the trial court is a decision of enormous significance for a defendant. A decision that holds a defendant on "no bond" can mean that a defendant spends months in jail, pre-trial, and can result in the loss of a job or a home. It can mean that defendants will rush into a plea to avoid prolonged detention. When defendants are not assisted by the presence of counsel at trial, in short, the consequences can be devastating. These consequences make a bail hearing a "critical stage" as it is a point in a criminal proceeding where "potential substantial prejudice to defendant's rights inheres in the particular confrontation" and where counsel can "help avoid that prejudice." *United States v. Wade*, 388 U.S. 218, 227 (1967). Here, as with arraignments, what makes a stage "critical" is "what shows the needs for counsel's presence." *Rothgery v. Gillespie County*, 554, U.S. 191, 212 (2008). Mr. Woolery was detained after arraignment and did not receive a hearing on bond within seven days (in violation of Mo. Sup. Ct. R. 33.05), something which *if counsel were present*, counsel would have almost certainly demanded. *State v. Woolery*, No. WD 85530, 2023 WL 4188250, at *6 (Mo. Ct. App. June 27, 2023).

A. Missouri bail procedure.

Bail hearings can occur at various points in a criminal prosecution. A defendant has a right to appear before a judge for an initial appearance within 48 hours of being detained, and at this time bail may be set. Mo. Sup. Ct. R. 22.07; Mo. Sup. Ct. R. 33.01; *see* § 8:6. Initial proceedings before a judge, 19 Mo. Prac., Criminal Practice & Procedure § 8:6 (3d ed.) ("It is also quite common at that time [*i.e.*, at the initial appearance] for the court to consider bail and any factors affecting pretrial release."). If the defendant is still detained after that bail hearing, he has a right to a hearing to review bail within seven days. Mo. Sup. Ct. R. 33.05. The prosecution or the defense (and even the court on its own motion) can later move to modify the conditions of release. Mo. Sup. Ct. R. 33.06.

B. Bail hearings are "critical stages" for which counsel's presence is required.

1. Bail hearings are adversarial and can adversely impact important interests of a defendant and should count as "critical stages."

Several state and federal courts have found that bail hearings are critical stages. *Booth v. Galveston County*, 352 F. Supp. 3d 718, 738 (S.D. Tex. 2019) ("There can really be no question that an initial bail hearing should be considered a critical stage of trial."); *see also at id.* (collecting cases); *State v. Logan*, No. WD 85831, 2023 WL 5918635, at *6 (Mo. Ct. App. Sept. 12, 2023) (collecting cases on bail as a critical stage). Some courts have also found in the Supreme Court's decision in *Coleman v. Alabama* a right to counsel at bail hearings. *See Coleman v. Alabama*, 399 U.S. 1, 10 (1970) ("counsel can

also be influential at the preliminary hearing in making effective arguments for the accused on such matters as … bail"); *see also Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018) (reading *Coleman* as making a bail hearing a "critical stage"); *Higazy v. Templeton,* 505 F.3d 161, 172 (2d Cir. 2007) (Supreme Court found bail hearing to be a critical stage in *Coleman*). Bail hearings are, after all, "trial-like" confrontations in which the prosecutor confronts the defendants, and makes arguments, in part, that turn on the strength of the State's case against the defendant.[10] *See Rothgery v. Gillespie County,* 554 U.S. 191, 212 n.16 (2008) (defining 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"); *see also United States v. Abuhamra*, 389 F.3d 309, 323 (2nd Cir. 2004) (bail hearings "fit comfortably within the sphere of adversarial proceedings closely related to trial").

A bail hearing thus involves the defendant "meeting his adversary" and is a place where the defendant requires—and can benefit from—aid from counsel in "coping with

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[10] As one scholar has put it:

> In states where the judicial officer must consider the weight of the evidence against the accused or the likelihood of conviction when determining conditions of pretrial release, the initial appearance is clearly a trial-like confrontation. If a prosecutor happens to be present, or is able to communicate to the judicial officer the prosecutor's position regarding appropriate conditions of pretrial release, then it would seem equally clear that the accused would be entitled to the assistance of counsel.

John P. Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release,* 69 Fla. L. Rev. 831, 865–66 (2017).

legal problems," which are hallmarks of a "critical stage." *United States v. Ash*, 413 U.S. 300, 313 (1973) (a proceeding or event is a critical stage if "the accused require[s] aid in coping with legal problems or assistance in meeting his adversary."); *id.* at 309 (importance of counsel when accused "confronted with both the intricacies of the law and the advocacy of the public prosecutor"). A failure to get a successful decision at a bail hearing will almost certainly harm the defendant's interests, making it an event "where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *see also Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018) ("There is no question that the issue of pretrial detention is an issue of significant consequence for the accused.").

Recent changes to the Missouri rules regarding the setting of bail have highlighted the importance of these hearings for defendants. *See* Mo. Sup. Ct. R. 33.03. In adopting those rules, this Court "ordered *significant* changes to its rules governing pretrial release." Hon. Zel M. Fischer, *State of the Judiciary, Jefferson City, January 2019*, MO. COURTS (Jan. 24, 2018). Those changes addressed the problem that when a person is not able to obtain release pre-trial "even for low-level offenses" will "remain in jail awaiting a hearing." *Id*. When awaiting trial, those who are detained "lose their jobs [and] cannot support their families," even though they are presumed to be innocent. *Id.*; *see also id*. (rule changes help to ensure that "those accused of crime are fairly treated according to the *law*, and not their pocket books."). The high stakes involved in a bail hearing point to a strong *prima facie* case that bail hearings are indeed "critical stages." Two general interests stand out.

2. Bail hearings implicate defendants' interest in liberty before trial, as a negative bail determination can result in prolonged detention.

The first and most obvious interest at stake when bail is considered is a defendant's interest in their liberty. "[B]ail certainly has a significant effect on a defendant's liberty interest." *State v. Charlton*, 515 P.3d 537, 545 (Wash App. 2022); *see also id.* (noting harm to defendant at second bail hearing where "[u]nless modified later, the bail the trial court set would remain until trial. And unless [defendant] could post bail, he would remain in jail until the time of trial.").[11] "There is nothing more critical than the denial of liberty, even if the liberty is one day in jail." *Gonzalez v. Comm'r of Correction*, 68 A.3d 624, 637 (Conn. 2013). The longer a defendant is held prior to trial, the more the collateral consequences of detention add up. A defendant who is incarcerated for a lengthy period prior to trial risks not just losing their liberty, but also a job, a home, and the ability to support dependents.[12] These, too, are "significant consequences," which are relevant to a critical stage analysis.

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[11] This case is currently on appeal before the Washington State Supreme Court. *State v. Charlton*, 523 P.3d 1182 (Wash. 2023).

[12] *See State v. Fann*, 239 N.J. Super. 507, 519 (Law. Div. 1990):

> The setting of bail certainly is a 'critical stage' in the criminal proceedings. It is an action that occurs after adversary criminal proceedings have been commenced. Its importance to [the] defendant in terms of life and likelihood cannot be overstated. The effect on family relationships and reputation is extremely damaging. Failure of pretrial release causes serious financial hardship in most cases. Jobs and therefore income are lost. The immediate consequence of the absence of bail or the inability to make bail–deprivation of freedom–standing alone, is critically consequential.

In this respect, it is worth pointing out that a bail hearing is very different from a *Gerstein* "probable cause" hearing when it comes to the defendant's liberty interests, and which the Supreme Court has held is not a "critical stage." *See Gerstein v. Pugh*, 420 U.S. 103 (1975). A *Gerstein* hearing is designed to make up for the fact that a suspect was arrested without a warrant, *i.e.*, it is aimed primarily at justifying the arrest and the *initial* pretrial detention of the defendant before any additional proceedings. *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975) ("The sole issue [at the probable cause hearing] is whether there is probable cause for detaining the arrested person pending further proceedings.")[13] But Mo. Sup. Ct. R. 33.03(a) gives defendants an entitlement "to be released from custody pending trial or other stage of the criminal proceedings." The *Gerstein* probable cause inquiry is a "prerequisite" to continued detention: it is not the final word in Missouri, because under Missouri rules, the probable cause hearing authorizes detention only until there is a subsequent determination of whether the person is to be released on bail. *Compare Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (determination of probable cause "prerequisite" to continued detention) *with* Mo. Sup. Ct. R. 33.03(a) (right to release on bail pending trial). Moreover, bail determinations in Missouri courts are complex and adversarial in a way a *Gerstein* hearing is not. *See* Mo.

See also Hurrell-Harring v. State, 15 N.Y.3d 8, 20 (2010) (pretrial detention may mean "the loss of employment and housing, and inability to support and care for particularly needy dependents.").

[13] In Missouri, the requirement of a *Gerstein* or probable cause hearing is satisfied by getting a warrant after an arrest. *See In re Green*, 593 S.W.2d 518, 518 (Mo. 1979) (describing procedure); *see also* RSMo. § 544.170 (offenders held must be released after twenty-four hours "unless they shall be charged with a criminal offense by the oath of some credible person, and be held by warrant to answer to such offense.").

Sup. Ct. R. 33.03(e) (court must consider various factors in determining defendant's eligibility for release). An unfavorable decision on bail may mean that the accused is not just briefly detained, but "may have to live in a grim prison environment for months and months before trial." *United States v. Edwards*, 430 A.2d 1321, 1354 (D.C. 1981) (Nebeker, J., dissenting).

The consequence of extended detention because of an unfavorable ruling on bail, coupled with the fact that the assistance of counsel can make a difference to whether a defendant will be released, make bail hearings a critical stage. Studies confirm what common sense would guess to be true: when defendants are represented by counsel at bail hearings, they are either not detained pre-trial at all, or detained for less time. *See* Shamena Anwar et al., *The Impact of Defense Counsel at Bail Hearing*, RAND RESEARCH BRIEF 2 (2023) (presence of a public defender at bail hearing "decreased the use of monetary bail and pretrial detention"); 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, 1783 (2002) (having a lawyer at a bail hearing means that the accused is "considerably more likely to be released"); *id.* at 1773 ("legal representation at bail often makes the difference between an accused regaining freedom and remaining in jail prior to trial"); § 12.1(c) Counsel at bail hearing, 4 Crim. Proc. § 12.1(c) (4th ed.) ("[if] a defendant is represented at a bail hearing 'this greatly improves his chances for either bail set in a modest amount or release on his own recognizance.' (internal citation omitted)). Counsel at a bail hearing can point out to the judge relevant facts about a

defendant's background, keep defendants from incriminating themselves,[14] and argue appropriate conditions for release. § 12.1(c) Counsel at bail hearing, 4 Crim. Proc. §12.1(c) (4th ed.); *see also* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan L. Rev. 711, 776 (2017) ("[D]efense counsel should be able to advocate for release by providing the judicial officer charged with pretrial custody determinations with a fuller picture of the accused's financial resources, connections to the community, and, if necessary, appropriate conditions of release.").

3. Those represented at bail hearings have better case outcomes than those who are not represented by counsel.

Representation at bail hearings has a direct impact on how a defendant's case will go—and whether it will go *well*, an obvious further interest. Defendants who are not held for lengthy periods prior to trial are more likely to get favorable outcomes in their cases. *See Booth v. Galveston County*, 352 F. Supp. 3d 718, 739 (S.D. Tex. 2019) ("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

[14] As one article observes, "During bail review hearings, it is common to hear an unrepresented defendant make an inculpatory statement while attempting to convince a judge to lower bail or order a release based upon recognizance." 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, 1793 (2002); *see also id*. (citing cases where such comments were used against defendants at trial).

those who are released pending trial."). In other words, there is a correlation between being successful at a bail hearing and getting successful results in one's case, either in a plea or at trial. *See* Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J. L. Econ. & Org. 511, 512–13, 534–35 (2018) (finding that Philadelphia defendants who were detained pre-trial were 13% more likely to be convicted and had a 42% longer average maximum sentence length than defendants who were released pre-trial); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from NYC Arraignments*, 60 J. L. Econ. 529, 529 (2017) (finding that pretrial detention in New York City increased the probability that a person charged with a felony would be convicted by 13%); *see generally* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 777 (2017) (collecting sources). Put simply, being detained pretrial increases the likelihood of conviction. *See* Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 224-26 (2018).

It is not hard to see why defendants who are not detained pre-trial get better outcomes. When they are not detained, defendants can better assist their attorney in making a defense. 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) (pretrial incarceration "impedes preparation of a defense"). Defendants also face less pressure to "plead out" when they are not detained pre-trial. Megan Stevenson & Sandra

G. Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 21, 22 (Erik Luna ed., 2017) (noting the "plea-inducing effect of detention"). This makes a bail hearing a critical stage in the more conventional sense in that whether a person is released prior to trial will substantially prejudice their ability to succeed later at trial, as well as influence their willingness to go to trial.

4. Some jurisdictions in Missouri have already recognized the critical nature of bail hearings.

There has already been some movement in Missouri toward recognizing bail hearings as the critical stages that they are. Some local governments, notably those in St. Louis City and St. Louis County, already afford representation at bail hearings for defendants although not necessarily subsidized by public resources. *Dixon v. City of St. Louis*, No. 4:19-CV-0112-AGF, 2021 WL 4709749, at *3 (E.D. Mo. Oct. 8, 2021) (detailing system of contract attorneys hired to represent defendants at bail hearings in St. Louis); *see also MacArthur Foundation awards $1.3 million to St. Louis County, UMSL to continue local justice system reforms*, USML Daily (Feb. 9, 2021) (money to St. Louis County for "providing early defense representation to defendants at arraignment and bond review hearing"); *see generally* Brianna Coppersmith, Note, *What Cash Bail Left Behind: St. Louis' Bail System, Three Years After Reform*, 67 St. Louis U. L.J. 655 (2023) (discussing bail reforms in St. Louis City). These courts have recognized the critical nature of bail hearings, although representation at these hearings can sometimes be less

than ideal. Significantly, one lower court in Missouri has also held that bail hearings are "critical stages" where counsel needs to be appointed and present for defendants. *David v. Missouri*, Case No. 20AC-CC0093 (Cole County, Mo., February 18, 2021) (finding that bail hearing "is a critical stage for which defendant has the right to counsel" and collecting cases). It is obvious even to the casual observer at bail hearings in St. Louis City and St. Louis County that representation can make a vital difference as bail hearings are (in the words of one federal court) "frequently hotly contested and require a court's careful consideration of a host of facts about the defendant and the crimes charged." *United States v. Abuharmra*, 389 F.3d 309, 323 (2nd Cir. 2004).

Mr. Woolery was denied counsel at a hearing where bail was determined and as a result, was held in jail. Reversal is therefore required.

III. CONCLUSION

WHEREFORE, and for the above reasons, this Court should hold that both arraignments and bail hearings are critical stages in Missouri for which defendants have a constitutional right that counsel be present to aid in their defense, and remand for proceedings consistent with that determination. The requirement that counsel be present at every critical stage can be satisfied by tasking the public defender with "provid[ing] legal services" to those eligible for their services at each and every critical stage. RSMo. § 600.042.4(1), (2).

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify the foregoing complies with the limitations contained in Rule 84.05(f). It was completed using Microsoft Word in double-spaced Times New Roman size 13-point font, other than headings, blockquotes, and footnotes, which are single spaced. Relying on Microsoft Word's word count feature, this brief, excluding caption, signature block and this Certificate, contains approximately 10,500 words.

I further certify that on November 14, 2023, a true and correct copy of the foregoing was electronically filed and service to all parties was effected via the Missouri electronic filing system on:

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