

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

STATE ex rel
St. Louis City Trial Office
Missouri State Public Defender System Cause No.
Relator

vs.
Division No.

Kimberly Gardner,
Circuit Attorney, City of St. Louis,
Respondent

PETITION FOR WRIT OF MANDAMUS

Comes now Relator, St. Louis City Trial Office of the Missouri State Public Defender System, and requests this court to issue a Writ of Mandamus directing the Respondent, the Circuit Attorney of the City of St. Louis, to perform her ministerial duty of complying with Rule 25 as required by law.

STATEMENT OF FACTS

THE PARTIES

1. Relator is the St. Louis City Trial Office of the Missouri State Public Defender System. Pursuant to Chapter 600 of the Missouri Revised Statutes the office is directed to provide legal services to indigent persons charged with eligible criminal cases in the City of St. Louis.

2. Respondent Kimberly Gardner is the elected Circuit Attorney of the City of St. Louis. Pursuant to §56.450 RSMo. Respondent is directed to manage and conduct

all criminal cases, business and proceedings of which the circuit court of the City of St. Louis has jurisdiction. *Id.*

3. Relator currently is counsel of record for defendants in over twelve hundred felony and misdemeanor cases pending in the Twenty-Second Judicial Circuit in which the Office of the Circuit Attorney is prosecuting the case.

4. Respondent, or an Assistant Circuit Attorney from Respondent's office, is counsel of record for the State in those cases. Pursuant to §56.550 RSMo. the duties of the assistants shall be "to assist the circuit attorney generally in the conduct of his office, under his direction and subject to his control."

THE DISCOVERY PROCESS

5. Pursuant to Rule 25 Relator has timely filed a written request for discovery in each of those cases and served that request upon Respondent. Respondent is required, upon that written request of defendant's counsel, to comply with the directives of Rule 25 and to disclose to that defense counsel the items provided for in Rule 25.

a. Under the current Rule 25.02 "Discovery may commence upon the filing of the indictment or information. Requests or motions for discovery shall be made not later than twenty days after arraignment in the court having jurisdiction to try the offense charged. Requests shall be answered within ten days after service of the request. The court may enlarge or shorten the times herein specified."

b. Under the Twenty-Second Judicial Circuit Local Court Rule 67.5, arraignments on felony cases are conducted in the associate circuit court division. Rule 67.5 specifies Division 25; which historically has been the associate division that

handled felony cases, but in 2016 that responsibility was divided between Associate Divisions 25 and 26.

c. Pursuant to an Administrative Order issued on April 22, 2015 by the presiding judge of the Twenty-Second Judicial Circuit Court, requests for discovery in felony criminal cases may be e-filed while a felony case is pending in the associate circuit court and will be considered valid in both the associate and the circuit court cause number for the case. See Exhibit A.

PRIOR WRIT OF MANDAMUS AGAINST CIRCUIT ATTORNEY

6. On August 31, 2016 a Writ of Mandamus was issued against Respondent's predecessor, Jennifer Joyce, directing the Circuit Attorney to immediately comply with Missouri Supreme Court Rule 25.03 by the Honorable Gael D. Wood. *State of Missouri ex rel St. Louis City Trial Office v. Jennifer Joyce, Circuit Attorney, City of St. Louis*, Cause No. 1522-CC10021. See Exhibit B.

7. Judge Wood made a finding in that order that the Circuit Attorney is a public official and that she has a non-discretionary duty to comply with Rule 25.03. Judge Wood also found that Joyce's failure to comply with Rule 25.03 caused manifest injury to Relator and those whom Relator defends.

8. In January of 2017 Gardner was sworn in as the Circuit Attorney of the City of St. Louis following the completion of Joyce's term on December 31, 2016 and the election and installation of Gardner. Rule 52.13(d) provides:

"When a public officer is a party to an action in an official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and

the successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. When a public officer sues or is sued in an official capacity, the officer may be described as a party by official title rather than by name, but the court may require the name to be added.”

9. On February 9, 2017 Gardner signed and agreed to a Consent Order substituting Gardner for Joyce in *St. Louis City Trial Office v. Joyce*; agreeing to the issuance of the writ which mandates her compliance with Rule 25.03, with modification as directed by the Court of Appeals, and dismissing the appeal of *St. Louis City Trial Office v. Joyce*, cause no. ED104807, filed by the Circuit Attorney. See Exhibit C.

CIRCUIT ATTORNEY’S FAILURE TO COMPLY WITH RULE 25

10. Respondent has failed to comply with Rule 25. Upon installation as the Circuit Attorney for the City of St. Louis Respondent assumed responsibility for the provision of discovery to Relator. Respondent has routinely failed to provide the discovery she is mandated to disclose in a timely fashion resulting in Relator filing multiple motions to compel and motions for sanctions to obtain Rule 25 discovery.

11. Upon information and belief the Respondent has failed to create any process or procedure within her office to insure that her ministerial duty of providing discovery, as required both by Rule 25 and the consent order, be completed in a timely manner.

12. Upon information and belief Respondent has failed to provide any training within her office to insure that she and the Assistant Circuit Attorneys are cognizant of and attentive to their responsibilities under Rule 25.

13. Felony cases in the Twenty-Second Judicial Circuit are assigned to a docket that is managed by the judicial officer in Division 16, the criminal assignment division. Those cases rotate on a six week rotation, resulting in all of the criminal cases pending in circuit court at one time being assigned to one of six dockets. A case that first appears on the docket is automatically continued by the court. All other cases that are not announced ready or for a plea of guilty, will only be continued upon request of counsel. An analysis of the St. Louis City Trial Office cases on the six felony dockets from January 8, 2018 until February 13, 2018 reveals that over 45% of cases were continued from the trial setting because of the failure of the State to provide discovery mandated by Rule 25.03. Those continuance requests were the result of the State of Missouri not providing to Relator the names and last known addresses of persons the state intends to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements; written or recorded statements made by the defendant or by a co-defendant; and reports or statements of experts, documents and photographs

A call docket is held ten days prior to every trial docket and Respondent and the defendant are requested to make an announcement as to the status of the case. Respondent has on a regular basis announced ready for trial at that call docket, even

when Rule 25 discovery has not been provided to the defense and when motion to compel orders have been issued by the court but not complied with Respondent.

14. Motions to Compel and/or Motions for Sanctions are also assigned to the criminal assignment division, Division 16. Those motions are scheduled for hearing once a week on Thursdays. An analysis of those motion dockets also show that Relator litigates a significant number of motions because of the failure of Respondent to comply with her Rule 25 ministerial duties. The litigation in the cases below are descriptive of the discovery violations that Relator faces daily, but do not constitute a complete list.

a) In *State v. Flentrus Lowe*, Cause No. 1722-CR02654-01, the following discovery violation occurred:

i) The defendant was charged by indictment filed on August 23, 2017 with Robbery 1st degree and Resisting Arrest. Defendant was arraigned on September 19, 2017. The complaining witness of the robbery was Andy Abdallah and the complaining witness of the resisting arrest was Police Officer Lucas Brockmeyer. The only witness listed on the Indictment was Lucas John Brockmeyer, DSN 11264 despite the requirement of §545.070 RSMo. that the names of all the materials witnesses must be affixed to the indictment.

ii) The State of Missouri, through Assistant Circuit Attorney Christopher Klaverkamp, initially answered the defendant's request for discovery on October 5, 2017 by providing the defense with a redacted police report that redacted the

address of Officer Brockmeyer and Abdallah. The State provided to the defendant a letter stating “Pursuant to Missouri Supreme Court Rule 25.03, the State of Missouri has disclosed below the names and last known addresses of the persons the State intends to call as witnesses at any hearing or at trial: Lucas Brockmeyer Address: 1915 Olive Street, Saint Louis, MO 63103.” On that same date Klaverkamp filed a pleading with the court stating that “The names and last known addresses of persons the State intends to call as witnesses at any hearing or at trial...have been provided to Defense Counsel.”

iii) On February 13, 2018 defense counsel filed a motion to compel pointing out that Mr. Abdallah was not endorsed by the State of Missouri, but was a necessary witness for the robbery charge and that the State had in fact not provided a last known address for Mr. Abdallah. The trial court granted the motion to compel and ordered that the State of Missouri provide defense counsel with either unredacted discovery or the last known address of all witnesses the State intended to call at trial by March 15, 2018. Respondent did not comply with this order and the compelled information was not provided by March 15, 2018. On April 3, 2018 a second motion to compel was filed requesting an additional order to Respondent to provide defendant the names and last known addresses of those witnesses Respondent intended to call at any hearing or trial. On April 5, 2018 the State filed a State’s Endorsement of Additional Witnesses listing Mr. Abdallah as a witness and listing his address as “c/o The Circuit Attorney’s Office.” On that same date, immediately before the second motion to

compel was to be heard, the State provided defense counsel with an unredacted copy of the police report page listing Mr. Abdallah's address. That discovery had been printed on June 20, 2017.

iv) On April 5, 2018 the court continued the case and charged the continuance to the defendant, even though the necessity for the continuance was the direct result of the failure of Respondent to perform her ministerial duty under Rule 25 of providing the address of that witness.

v) The *Lowe* case demonstrates how Respondent's actions place Relator between Scylla and Charybdis. Relator could have ignored the fact that Respondent failed to endorse the complaining witness and hoped that the trial court would exclude that person because of that discovery violation. The reality of practicing in the Twenty-Second Judicial Circuit, however, is that the trial court would have either granted that late endorsement resulting in the necessity of a defense continuance or the State would have filed a memorandum of nolle prosequi in the original case and then charged the defendant again, lengthening the defendant's pretrial incarceration. Neither option is good for Relator's clients. Mr. Abdallah's name and address, which should have been provided on September 2, 2017 was not provided to Relator until April 5, 2018, two hundred and fifteen days after Respondent's duty to provide that information. Respondent offered no explanation for the discovery violation and the court imposed no sanction against the State of Missouri.

b) In *State v. Morgan*, Cause No. 1722-CR03697-01, the following discovery violation occurred:

i) Defendant was charged by indictment filed on September 27, 2017 with three counts of assault first degree, three counts of armed criminal action and unlawful possession of a firearm. The indictment alleged that the allegations occurred on September 1, 2017 and identified the victims of those allegations only by initials, T.D.C., J.C. and M.S. Defendant was arraigned on those charges on October 16, 2017. The only witness listed on the indictment was Police Officer Steven Burle, who was not an alleged victim. The listing of the witnesses in the charging language, only by initials, was again a violation of §545.070 RSMo as well as a violation of §595.226 RSMo. which authorizes the use of initials only in specific categories of cases, not including this case.

ii) The defendant properly filed a request for discovery, but Respondent filed no response to that request. On December 15, 2017 the State provided the defendant with some lab reports. On January 4, 2018 the defendant filed a supplemental request for discovery outlining the missing discovery. Defendant received no response from the State of Missouri. On January 17, 2018 the defendant filed a motion to compel, which was heard on January 25, 2018. On that date the trial court ordered that the State should produce all requested discovery within thirty days. The court further ordered that the discovery already in the State's possession should be produced immediately.

iii) The State failed to produce any discovery in compliance with the court order and on February 27, 2018 the State filed a Motion to Reconsider the Court's Disclosure Order. The State informed the court that a police report could be ready for publication by March 1, 2018, and the State provided defendant with the first seven pages of the narrative section draft of the police report. The State made no response concerning the remainder of the mandated discovery which had not been provided. On March 1, 2018 the police report still had not been produced and the court set a hearing on that motion to reconsider for March 20, 2018.

iv) On March 20, 2018 a hearing was conducted on the record. Police Officer Steven Burle, the only endorsed witness for the State in this case, was called as a witness at the hearing. Burle, a member of the Force Investigation Unit, had been assigned to prepare the police report in the case; but had not done so. Burle did testify at that hearing, however, that he had presented the Circuit Attorney with a DVD of a witness, Kendrick Abrams, at the time of his warrant application on 9/2/2017. Burle also testified that any evidence seized in the investigation of the case, which did not go to the police laboratory for analysis, was maintained in the police department's property unit, which is accessible to the Circuit Attorney. That property would include any recordings of witness statements, written memoranda, dash cam videos, 911 recordings, photospreads, and photographs of the scene. Burle testified that the police department would have had the names and last known addresses of the witnesses. Burle also

testified that he had created a narrative on his investigation, which was not complete, and that it had been provided to the assigned Assistant Circuit Attorney, Alex Polta. None of those items, other than the draft narrative, had been provided to defense counsel at the time of the hearing on March 20, 2018.

v) At the conclusion of the March 20, 2018 hearing the court ordered the State of Missouri to provide within thirty days the completed police report, the DVD of witness interview, officer memos, 911 recordings, dispatch recordings, in car camera recordings, all photographs, witness names and their last known addresses, line up documents, photospread, ileads documents, the draft narrative, the spreadsheet prepared for the case and any other discovery the defendant is entitled to. The State was also ordered to provide an accounting of evidence pending in the lab, including fingerprint, DNA and gunshot residue.

vi) On April 11, 2018 the State of Missouri provided audio recordings and transcriptions of interviews with Officer Macy Schwartz and Officer Joshua Cobb. Those interviews occurred on September 14, 2017. The State also provided consent to search forms and three suspect photos initialed by a witness, all of which were completed on September 1, 2017. Additionally, the State provided dash camera recordings from September 1, 2017 and a copy of Officer Burle's flash drive, which only contained downloaded music and videos.

On April 10, 2018 the State provided written memos prepared on September 1, 2017 by Probationary Police Officer Jeffrey Gavin, Probationary Police Officer James Wooten, Police Officer Richard Schicker, Probationary

Police Officer Ally Kubel, Police Officer Alexander Klein, Police Officer John Moton, Police Officer Christine Wright, Probationary Police Officer Edward Napier, Detective Kyle Chandler, Detective Michael Betz, Detective Christopher Childers, Lt. Paul Piatchek, Detective Jarred Thacker, Detective James Bain, Detective Thomas Strode, Detective Scott Sailor, Detective Mark Biondolino, Detective Gregory Klipsch, Police Officer Robert Stuart, Sgt. Charles Wall, and Detective James Wilcox. The State also provided lineup viewing forms and photographs. On April 11, 2018 the State also provided the defendant with an audio interview of Herkl Ivory, Mia Caldwell, Police Officer Macy Schwartz and Police Officer Joshua Cobb, 911 recordings, dispatch recordings, and dash cam videos. All of this evidence was available long before April 10, 2018 for the State to turn over to the defendant in a timely manner in compliance with Rule 25.

To date, the State still has not provided all of the mandated discovery, including a list of endorsed witnesses or their last known addresses, DNA analysis or gun shot residue analysis.

vii) Respondent's discovery violation in *Morgan* demonstrates several ongoing discovery violation practices. First, by failing to timely endorse witnesses the State evades the duty to provide names or addresses for relevant witnesses delaying defense investigation. Second, the Assistant Circuit Attorney assigned to prosecute the *Morgan* case advised the court that he did not know how to obtain police reports from the office computer system, confirming a lack of

training by Respondent of her assistants. A copy of the transcript of a portion of that hearing is attached as Exhibit D. (T 15) Finally, the Assistant Circuit Attorney also informed the Court that office policy was to not pull evidence for provision to the defense until the State is preparing for trial closer to the trial date. (T 22) Again, this evidences a lack of understanding of, appropriate policies and procedures or training of Rule 25 requirements by Respondent. These consistent discovery violations continue to harm Relator and their clients by preventing Relator from fulfilling their obligations to their clients.

c) In *State v. Tyrik Holmes*, Cause No. 1722-CR00307-01 continual discovery violations occurred with no imposition of sanctions by the court. This case is typical of the many cases in which court ordered compliance with Rule 25 is ignored.

i) Defendant was charged by an indictment filed March 28, 2017 with two counts of Assault in the First Degree, and two counts of Armed Criminal Action. An attorney from Relator's office entered her appearance and filed a request for discovery on May 10, 2017.

ii) The following motions were filed by the defense on discovery related issues in this case. On June 13, 2017, defense counsel filed a Supplemental Request for Discovery, requesting additional police reports, 911 calls, and all other discovery that had not been provided to Defendant. After not receiving a response to various emails, defense counsel filed a Motion to Compel on July 7, 2018, requesting an order for the State to provide 911, dispatch recordings and Incident Report 16-061397. The incident report was provided immediately, and 911 and

dispatch was ordered to be provided by August 10, 2017. On October 3, 2017, defense counsel filed another Motion to Compel for 911 calls and dispatch as well as the last known addresses of endorsed witnesses because the State had not provided them for depositions. After depositions were held of the victims, defense counsel requested additional discovery from the State by email on multiple occasions. After no response to the emails, defense counsel filed another Motion to Compel on January 16, 2018. On January 25, 2018, the Court ordered the State to provide a shot-spotter recording and documentation, Facebook messages, ballistics lab notes and images, and Calvin Hill's medical records on or before February 21, 2018. On March 1, 2018, defense counsel filed a Motion for Sanctions because none of the additional discovery was turned over by the date ordered by the Court. The Court ordered the shot-spotter and ballistics discovery be turned over by March 16, 2018. At the date of this filing defense counsel has not received either item. The Court also ordered that Facebook messages and medical records be provided by April 6, 2018. All requests for sanctions were denied and on April 19, 2018 the court again extended the time for the provision of discovery to the defendant to June 8, 2018.

iii) Respondent's assistants too often fail to even respond to Relator's requests for discovery resulting in the need for formal motions to pursue discovery that should be provided by Respondent without any court order.

d) In *State v. Derrie Williams*, Cause No. 1722-CR00212, a discovery violation occurred.

i) Defendant was charged by an indictment filed on January 12, 2017 with two counts of Murder in the first degree and two counts of armed criminal action.

ii) Respondent endorsed forty witnesses on that indictment, but failed to provide addresses for any of those witnesses and redacted all address information from the police reports. Relator filed a Supplemental Request for discovery on March 22, 2017 requesting a number of items, including the last known addresses for those forty endorsed witnesses. Because of failure to comply with that request, Relator filed three different motions requesting the court to compel discovery, to issue sanctions, to exclude evidence and to dismiss the charges. On April 19, 2018 Respondent had still not provided a means for Relator to make contact with those endorsed witnesses or to subpoena them for deposition, had not provided supplemental police reports and had not provided information concerning lineups in which the defendant was identified. Relator's Motion to Exclude or Dismiss was denied and Respondent was granted a continuance of the case

iii) Fifteen months after the filing of the indictment Respondent has still not provided the mandated discovery under Rule 25.03 prohibiting Relator from properly preparing a defense for the defendant.

e) In *State v. Stephfen Dickens-Abrams*, Cause No. 1722-CR04261-01, a discovery violation occurred.

- i) The defendant was charged by an indictment filed on January 9, 2018 with one count of stealing.
 - ii) On April 14, 2018 Relator filed a Motion for Sanctions since it had been ninety-five days since indictment and Respondent had provided absolutely no discovery to Relator.
 - iii) Respondent informed the court at docket call that all discovery had been provided to Relator. At the hearing on the Motion for Sanctions, set for April 19, 2018, however, the State admitted that discovery was not provided until that day, one hundred days after the indictment, however, the court imposed no sanctions.
- f) In *State v. David Harvey*, Cause No. 1722-CR03124 a discovery violation occurred.
- i) Harvey was initially charged by indictment in 2015 with Murder in the First degree, armed criminal action and four additional charges. The case was initially charged as Cause No. 1522-CR03930-01, but was dismissed without prejudice by an order of nolle pros and reissued under the current cause number.
 - ii) The case proceeded to trial the week of April 16, 2018 and Respondent's First Assistant Robert Steele prosecuted the case. Steele was asked by defendant if a video tape existed of the police crime scene investigation. Steele informed defendant that it did not. On cross examination, however, in the midst of trial, Respondent's witness testified that there was a video tape and that it was in the evidence property section, as was all evidence collected by the police

department. Within one hour the video was produced and provided to defense counsel.

iii) That production was made thirty months after Respondent's duty to provide that video to the defense began. That production of discovery, after an initial response that no video existed, was made the same week that Respondent was chastised by the Court in *State v. Greitens* for failing to fulfill her discovery obligations.

FAILURE OF THE CIRCUIT ATTORNEY TO COMPLY WITH THE WRIT OF
MANDAMUS, CONSENT ORDER AND *JOYCE V. MULLEN* AS TO THE
PROVISION OF LAST KNOWN ADDRESSES OF ENDORSED WITNESSES

15. The directives of the writ and consent order referenced in paragraphs six through nine above are that the State of Missouri will comply with Rule 25.03. The writ provides that the Circuit Attorney "will fully comply with Missouri Supreme Court Rule of Criminal Procedure 25.03 and, absent a protective order authorizing you to do so, shall provide Relator the last known addresses of all persons endorsed as witnesses for Respondent."

16. The consent order signed by Respondent mirrors the language of the writ and mandates the Circuit Attorney to comply with Rule 25.03 and, inter alia, provide last known addresses of the witnesses to the defendant.

17. The Court of Appeals also addressed the responsibility of the Circuit Attorney for the provision of last known addresses as required by Rule 25.03. The

Court of Appeals stated “Rule 25.03 explicitly requires the State to disclose last known addresses. The Circuit Attorney's practice of routinely withholding this information is in direct contravention of the mandates of the Rule.⁶ This practice should stop immediately.” *State ex rel. Joyce v. Mullen*, 503 S.W.3d 330, 337 (Mo.App. E.D. 2016).

18. In each of the cases below the State of Missouri provided a response to discovery that listed a lay witness' last known address either as the address for the Office of the Circuit Attorney or the headquarters for the St. Louis Metropolitan Police Department. These cases are a small sample of the many cases in which this violation of the writ and consent order have occurred.

a. In *State v. Troy Miles*, Cause No. 1522-CR05273-01 a discovery violation has occurred.

- i) An indictment was filed and a warrant issued on February 2, 2016 charging the defendant with two counts of forgery and two counts of stealing.
- ii) The indictment listed U.S. Bank, Michelle May, William Summers and Police Officer Scott A. Wilmot as witnesses, however, no addresses were provided for those witnesses on that indictment.
- iii) On January 2, 2018 the warrant was served upon the defendant and on January 30, 2018 Assistant Public Defender Alexa Hillery entered her appearance as attorney for defendant and e-filed a proper Request for Discovery. The defendant was arraigned on February 5, 2018.

- iv) On February 14, 2018 Assistant Circuit Attorney Richard Harper filed the State's Response to the Defendant's Request for Disclosure stating that the State of Missouri disclosed "...the names and last known addresses of persons the State intends to call as witnesses...". On that same date the State provided the defendant with a police report in which the addresses of the endorsed witnesses were redacted.
- v) On March 14, 2018 the State of Missouri filed a State's Endorsement of Additional Witnesses listing the same four witnesses listed on the indictment and that their last known address was c/o The Circuit Attorney's Office.
- b) In *State v. Joshua Barton*, Cause No. 1722-CR00426-01, a discovery violation has occurred.
- i) An indictment was filed on April 25, 2017 charging defendant with felony property damage and misdemeanor resisting arrest and stealing. The State of Missouri listed Police Officer Stephen Ogunjobi and the Circuit Court Clerk as witnesses on the indictment, but provided no address information.
- ii) On May 4, 2017 the State of Missouri, through Assistant Circuit Attorney Joshua Lubatkin, filed a response to the defendant's Request for Discovery. The State's Response to the Defendant's Request for Disclosure stated that the State of Missouri disclosed "...the names and last known addresses of persons the State intends to call as witnesses..."

- iii) On May 4, 2017 the State provided the defendant with a redacted police report in which Rashaad Baldwin is listed as a victim of the allegations of counts 1 and 3 of the indictment. His address is redacted in the police report.
 - iv) On July 31, 2017 the State of Missouri requested a continuance because essential witness Rasaad Baldwin was unavailable. The defendant objected to that continuance in that Baldwin was not an endorsed witness. The court overruled Relator's objection and granted Respondent's request for a continuance.
 - v) The State filed State's Endorsement of Additional Witnesses on September 11, 2017, listing both Baldwin and Chad Anzilotti as witnesses. The addresses for both of those witnesses were redacted in the police reports. The addresses listed in the endorsement was "c/o The Circuit Attorney's Office." Only after a motion to compel were the correct last known addresses provided.
- c) In *State v. Kimberly Mitchell*, Cause No. 1722-CR01637-01, a discovery violation occurred.
- i) The defendant is charged by an information filed on May 4, 2017 with one count of Unlawful Use of a Weapon- Exhibiting. The witnesses, who were listed on that information without address information, were Bernard Brackett, Jessica Brackett, Termaine Brackett, Patricia Simmons and Police Officer Phillip Anderson.

- ii) Assistant Circuit Attorney Wyatt Dameron provided a police report on May 11, 2017 in which the addresses of the endorsed and unendorsed witnesses to the charged allegations were redacted.
 - iii) The defendant filed both a motion to compel and a motion for sanctions, but were not provided the last known addresses of any witnesses.
- d) In *State v. Colin Stroehler*, Cause No. 1722-CR02755-01, a discovery violation occurred.
- i) The defendant's case proceeded to a preliminary hearing on September 25, 2017, the case was bound over and defendant pled not guilty to the charge of Possession of a Controlled Substance.
 - ii) The State of Missouri filed an Information on September 25, 2017 and listed witnesses Police Officers Kristin Chelucci and Timothy Strain, as well as Michael Ingersoll and Nicole Twelker on the information
 - iii) On October 4, 2017 the State of Missouri, through Assistant Circuit Attorney Laceshionna Cline, provided the defendant with police reports in which the addresses of those lay witnesses were redacted.
 - iv) On January 9, 2018 ACA Cline filed State's Endorsement of Additional Witnesses listing three additional police officers, with all three listed as c/o The Circuit Attorney's Office. On April 12, 2018, after defendant filed a motion to compel, the State finally provided those witness addresses.
- e) In *State of Missouri v. Izel Perryl Nash*, Cause No. 1722-CR03740-01, a discovery violation occurred.

- i) The defendant was charged by an indictment filed October 26, 2017 with one count of Assault 1st degree, two counts of armed criminal action, one count of unlawful use of a weapon and one count of unlawful possession of a firearm.
 - ii) The witnesses listed on the indictment include police officers Bartney Coats, Nadja Curt, Jennifer Nemeth, William Wethington and Tina Williams; the circuit court clerk, and lay witnesses Courtney Bluiett, Damjond Hall, Kimberly Morgan and Yuanita Salone.
 - iii) The State of Missouri provided the addresses for all of the witnesses other than Kimberly Morgan, whose address was listed as the Circuit Attorney's Office.
 - iv) The State of Missouri, through Assistant Circuit Attorney Christopher Desilets, filed a Response to Defendant's Request for Discovery stating that all last known addresses had been provided.
- f) In *State v. Amber Lawrence*, Cause No. 1722-CR04550-01, a discovery violation occurred.
- i) The defendant was charged by information filed on February 22, 2018 with two counts of possession of a controlled substance and misdemeanor unlawful possession of drug paraphernalia. The defendant pled not guilty and was arraigned on those charges that same day.
 - ii) Police officers Brandon Gubricky and Charles Woodcock as well as lay witnesses Jessica Conaway, Karissa Morris and Jonathan Schweighauser were listed as witnesses on the information with no address information provided.

- iii) On March 6, 2018 the State of Missouri, through Assistant Circuit Attorney Kimberly Arshi, filed a Response to the Defendant's Request for Discovery stating that the State had provided a list of witnesses and last known addresses.
 - iv) On March 7, 2018 the State of Missouri provided defense counsel with a redacted copy of the police reports redacting those witness addresses and a list of witness addresses which stated that the address for each of the witnesses was "c/o The Circuit Attorney's Office".
 - v) Defense counsel filed a motion to compel and set it for hearing on April 12, 2018. On April 12, 2018 ACA Arshi provided defense counsel an unredacted copy of the police report, which had been printed on March 1, 2018 listing those witness addresses.
- g) In *State v. Viron Ganaway*, Cause No. 1722-CR04593-01, a discovery violation occurred.
- i) The defendant was charged by an indictment filed on February 1, 2018 with Robbery 1st degree, Assault 2nd degree, Tampering with a Motor Vehicle, Resisting Arrest and two counts of Armed Criminal Action.
 - ii) On the indictment the State of Missouri listed Police Officers Jaclyn Griffin and Lesley Holloman as well as Kayla McIntosh and Armando Valenzuela as witnesses with no addresses.
 - iii) The defendant was arraigned on February 7, 2018 and on February 23, 2018 the State of Missouri provided defendant with a redacted police report and a last

known address sheet listing the last known addresses for McIntosh and Valenzuela as the Circuit Attorney's Office.

iv) On that same day the State of Missouri, through Assistant Circuit Attorney Christopher Klaverkamp, filed with the Court a Response to Defendant's Request for Discovery stating that last known addresses of witnesses had been provided to the defense.

h) In *State of Missouri v. Correy Stokes*, Cause No. 1722-CR04653-01, a discovery violation occurred.

i) The defendant was charged by an indictment filed on February 1, 2018 with tampering with a motor vehicle 1st degree.

ii) On the indictment the State of Missouri listed Police Officers James Bain and Jarred Thacker, the circuit court clerk and Demi Ellis, Darell Johnson, and Isaiah Gholson as witnesses.

iii) The defendant was arraigned on February 21, 2018 and on March 13, 2018 the State of Missouri provided the defendant with a redacted police report and a list of last known addresses in which the addresses of Demi Ellis, Isaiah Gholson, and Darrell Johnson were listed as the Circuit Attorney's Office.

iv) On that same date the State of Missouri, through Assistant Circuit Attorney Jeremiah Nixon, filed a pleading with the Court stating that the last known addresses of the witnesses had been provided to the defense.

i) In *State of Missouri v. Tilwana S. Williams*, Cause No. 1722-CR04737-01, a discovery violation occurred.

- i) The defendant was charged by an information filed March 5, 2018 with one count of possession of cocaine base.
 - ii) Police Officers Katlyn Alix and Callahan Hereford, as well as Elisi Sanchez and Erskine Vanderbilt were listed as witnesses on the information.
 - iii) On March 6, 2018 the State of Missouri, through Assistant Circuit Attorney Brian Hall, provided the defendant with a redacted police report and a list of last known addresses listing the addresses for witnesses Sanchez and Vanderbilt as the Circuit Attorney's Office.
 - iv) On that same date Hall filed with the Court a Response to Defendant's Request for Disclosure that stated he had provided the last known addresses of the witnesses to the defense.
- j) In *State of Missouri v. Cortez Fleming*, Cause No. 1722-CR04825-01, a discovery violation occurred.
- i) The defendant was charged by an indictment filed February 6, 2018 with Tampering with a Motor Vehicle, Resisting Arrest and Armed Criminal Action.
 - ii) Police Officer Bradford Ellis as well as Complete Cleaning LLC, Raquea Harris and Derreck Jackson were listed as witnesses on the indictment.
 - iii) On March 1, 2018 the State of Missouri, through Assistant Circuit Attorney Alexander Polta, provided the defendant with a redacted police report and a list of last known addresses listing the addresses for Raquea Harris and Derreck Jackson as the Circuit Attorney's Office.

- iv) On that same date the State of Missouri filed a pleading with the Court stating that they had provided the last known addresses of the witnesses to the defendant.
- v) After that violation, upon a subsequent request for discovery from Relator, Respondent did comply and provide those last known addresses which it had previously withheld.
- k) In *State of Missouri v. Dante Panichi*, Cause No. 1722-CR04884-01, a discovery violation occurred.
- i) The defendant was charged by information filed on February 8, 2018 with one count of Tampering with a Motor Vehicle.
 - ii) On that information Bradly Bosak, Richard Thurston and Police Officer Corey Zinkl were listed as witnesses with no address information.
 - iii) On February 22, 2018 the State provided the defendant with a redacted police report and a list of last known addresses which listed the address for Bosak as the Circuit Attorney's Office.
 - iv) On that same date the State of Missouri, through Assistant Circuit Attorney Laceshionna Cline, filed a response that the defendant had been provided with the last known addresses of all endorsed witnesses.
- l) In *State of Missouri v. Jarmond Johnson*, Cause No. 1722-CR04976-01, a discovery violation occurred.

- i) The defendant was charged by indictment filed on February 27, 2018 charging defendant with Robbery 1st degree, assault 2nd degree and armed criminal action.
 - ii) On that indictment Police Officer Benjamin Bayless and Ronald Watkins were listed as witnesses with no addresses.
 - iii) On March 7, 2018 the State of Missouri, through Assistant Circuit Attorney Christopher Klaverkamp, provided the defendant with a redacted copy of the police report as well as a list of last known addresses which listed the address for Ronald Watkins as the Circuit Attorney's Office.
 - iv) On that same date the State of Missouri filed a pleading with the Court stating that they had provided the defendant with the witness last known addresses.
- m) In *State of Missouri v. Nicholas Tate*, Cause No. 1822-CR00011-01, the following discovery violation occurred.
- i) The defendant was charged by indictment filed on February 13, 2018 with Stealing a motor vehicle, unlawful use of a weapon-exhibiting, and leaving the scene of an accident.
 - ii) Police Officer Ryan Malone, Frank Edmond, Diana Hutson, and Russell Johnson were listed as witnesses on that indictment, with no address information.

- iii) On March 21, 2018 the State of Missouri, through Assistant Circuit Attorney Brian Hall, provided the defendant with a redacted police report and a list of last known addresses that provided no addresses for Edmond, Hutson and Johnson.
 - iv) On March 19, 2018 the State of Missouri filed a pleading with the Court stating that they had provided the witness last known addresses to the defendant when in fact they had not. After a subsequent request Respondent provided one of the mandated addresses to Relator, which had been available to be provided in a timely manner.
- n) In *State of Missouri v. Cortez Brown*, Cause No. 1822-CR00040-01, a discovery violation occurred.
- i) The defendant was charged by indictment with Tampering with a Motor Vehicle, Possession of a Controlled Substance, Property Damage in the first degree, Resisting arrest, and armed criminal action.
 - ii) The State of Missouri listed police officers Orié Figgs, Paul Piatcheck, Kyle Santa, and Stephen Walsh as well as witnesses Jacqueline Smith and Timmy Smith on the indictment with no address information provided.
 - iii) On March 14, 2018 the State of Missouri provided the defendant with redacted police reports and a last known address sheet which listed the Circuit Attorney's Office as the address for the Smiths.
 - iv) On April 3, 2018 the State of Missouri, through Assistant Circuit Attorney Devon Vincent, filed a pleading with the court stating that all last known addresses had been provided to the defendant.

o) In *State of Missouri v. Joshua Fowler*, Cause No. 1822-CR00144-01, the following discovery violation occurred.

i) The defendant was charged by indictment with Resisting Arrest and Tampering with a Motor Vehicle.

ii) The defendant was charged in the same indictment with Taylor Gries and Police Officer Marc Wasem, Sheneica Johnson, Ray Shepard, Charles Starks and Ly Vu were listed as witnesses on the indictment with no addresses provided.

iii) On March 27, 2018 the State of Missouri provided the defendant with a redacted police report and a witness list with Ly Vu and Marc Wasem listed as the only witnesses, both with an address of the St. Louis Metropolitan Police Department.

iv) On that same date the State of Missouri, through Assistant Circuit Attorney Christopher Klaverkamp, filed a pleading with the Court stating that the witness last known addresses had been provided to the defendant.

p) In *State v. Taylor Gries*, Cause No. 1822-CR00148-01, a discovery violation occurred.

i) The defendant was charged by an indictment filed on March 14, 2018 with Assault 2nd degree, Tampering with a motor vehicle, Resisting arrest, Armed Criminal Action, and two counts of Assault in the third degree.

ii) The defendant was charged in the same indictment with Joshua Fowler and Police Officer Marc Wasem, Sheneica Johnson, Ray Shepard, Charles Starks and Ly Vu were listed as witnesses on the indictment with no addresses provided.

- iii) On March 27, 2018 the State of Missouri provided the defendant with a redacted police report and a witness list which listed the Circuit Attorney's Office as the last known address for all of the witnesses.
 - iv) On that same date the State of Missouri, through Assistant Circuit Attorney Christopher Klaverkamp, filed a pleading with the Court stating that the witness last known addresses had been provided to the defendant.
- q) In *State of Missouri v. David Miller*, Cause No. 1822-CR00196-01, a discovery violation occurred.
- i) The defendant was charged by an indictment filed on March 14, 2018 with robbery in the first degree.
 - ii) The indictment listed Police Officer Timothy Torrence, as well as Dollar General, Darryl Howlett, Isis Knighten and the Circuit Court Clerk as witnesses on the indictment.
 - iii) On March 28, 2018 the State of Missouri provided the defendant with a redacted police report and a last known address list in which the headquarters for the St. Louis Metropolitan Police Department was listed as the address for all of the witnesses.

THE RELIEF SOUGHT

Relator requests that this Court issue a writ of mandamus directing Respondent and her assistants to comply with her duties under Rule 25 in all current and prospective cases in which Relator is counsel for the defendant. Because Respondent has repeatedly violated Rule 25₂, and because compliance has not improved

since the issuance of the writ by Judge Wood or the order from the Court of Appeals in *Joyce v. Mullen*, Relator also requests:

1. That this Court issue a Show Cause order to Respondent to determine whether the actions of Respondent in the cases set out in paragraph 18 above, and in all other cases, are in violation of the Writ of Mandamus previously issued against Respondent and the Consent Order entered into by Respondent and whether Respondent should be held in contempt of that order.

2. That as part of that writ of mandamus, this Court direct Respondent to create written policies and procedures for the compliance with Rule 25 and share those policies and procedures with the Court for approval and monitoring.

3. That as part of that writ of mandamus, this Court direct Respondent to create a training curriculum for all staff of the Office of the Circuit Attorney on compliance with Rule 25 and share that training curriculum as well as the provision of that training with the Court for approval and monitoring.

REASONS THE WRIT SHOULD ISSUE

A writ of mandamus is the proper remedy to direct a public official to perform a required duty. If a statute or rule imposes a duty as a matter of law, mandamus is the means to prevent violation of that duty. *Peach v. Calvin*, 753 S.W. 2d 82, 83 (Mo. Ct. App. 1988). Relator has a clear and unequivocal right to the relief requested. Rule 25 governs disclosure and depositions in misdemeanor and felony cases in which Relator is counsel to indigent defendants, and Rule 25.03 sets out those items which shall be provided by the State to the defense without a court order. Because of the indisputable

duties owed by Respondent to Relator under Rule 25, mandamus is the appropriate remedy for enforcing those duties.

In addition, and as set forth below, no adequate remedy to appeal is available to Relator, making mandamus the appropriate vehicle. *State ex rel McNary v. Stussie*, 518 S.W. 2d 630, 632 (Mo. en banc 1974). Rule 25 requires prompt and full disclosure, and *ad hoc* attempts to remedy continuing disclosure violations through litigating motions to compel cannot act as a substitute for that disclosure. The appropriate remedy is not ineffectually sanctioning Respondent long after disclosure is due and defendants have long since suffered prejudice—the remedy is consistent compliance with the clear dictates of the law. Only mandamus can assure Relator and its clients this relief.

Relator has the authority and responsibility to bring this action. Pursuant to §600.019 RSMo., the Missouri State Public Defender System was created and established as an independent department of the judicial branch of the state government. Standing to sue is based on whether Relator has an interest in the subject matter of the action. The threshold requirement for that interest is extremely low when Relator is seeking to enforce a nondiscretionary duty required of a public official. “[P]ublic officers are required to perform ministerial duties without any request or demand, and the entire public has a right to that performance. Even the slightest interest is sufficient to support standing to bring mandamus in such circumstances.” *State ex rel Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo en banc 1992).

Relator has an obligation under §600.019 RSMo. and §600.042 RSMo. to provide quality legal services to any eligible person in felony and misdemeanor cases.

The St. Louis City Trial Office has been designated to provide that representation to defendants in felony and misdemeanor cases in the Twenty-Second Judicial Circuit. Relator has an ethical responsibility to represent eligible clients in a competent manner and with reasonable diligence and promptness. Rule 4-1.1 and Rule 4-1.3. That duty requires inquiry into and analysis of the factual elements of the case, including investigation into the prosecution's endorsed witnesses, review of all discovery and retention of necessary experts. Rule 4-1.1, Comment 5; *Thomas v. Wyrick*, 535 F.2d 407, 414 (8th Cir. 1976). None of those duties can be fulfilled when Respondent violates her duty of disclosure.

Since assuming office in January, 2017 Respondent has failed to provide last known addresses for witnesses, redacted police reports and otherwise routinely failed to comply with her obligations under Rule 25. An evaluation of the cases set out in the Statement of Facts above demonstrates that Respondent's practice results in a failure to comply with the nondiscretionary duty imposed by Rule 25.03. Respondent's practice has hindered Relator's ability to fulfill its statutory duty to represent its clients and to comply with responsibilities outlined in Chapter 600 and Rule 4.

As a result of Respondent's refusal to comply with Rule 25.03, clients represented by Relator have been denied their ability to prepare and present a defense and their due process right to fundamental fairness and a fair and speedy trial as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 and 18 (a) of the Missouri Constitution.

SUGGESTIONS IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

As the elected prosecutor for the City of St. Louis, Respondent is a public official obliged to comply with the statutes and rules that govern her office. Failure to comply with those statutes and rules subjects Respondent to mandamus. *State ex rel Twenty- Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo en banc 1992). Respondent is required by statute to manage and conduct all criminal cases in the circuit court of the city of St. Louis. §56.450 RSMo. That duty encompasses not only filing and prosecuting criminal cases, but also complying with the rules of criminal procedure as established by the Missouri Supreme Court.

The rules of criminal procedure are set out in rules 19 through 36 of the Supreme Court rules. Rule 25 governs disclosures and depositions. Rules 25.01 through 25.16 apply to all criminal cases and authorize the process of discovery to commence upon the filing of the indictment or information. *Rule 25.01*. Rule 25.02 provides that defense requests for discovery shall be made not later than twenty days after arraignment and shall be answered within ten days of making the request. *Rule 25.02*. Once that request for discovery is made, the State is obligated to provide certain items of discovery to the defense without a court order. Rule 25.03 provides:

“(A) Except as otherwise provided in these Rules as to protective orders, the state shall, upon written request of defendant's counsel, disclose to defendant's counsel such part or all of the following material and information within its possession or control designated in said request: (1) The names and last known addresses of persons whom the state intends to call as witnesses at any hearing

or at the trial, together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements; (2) Any written or recorded statements and the substance of any oral statements made by the defendant or by a co-defendant, a list of all witnesses to the making, and a list of all witnesses to the acknowledgment, of such statements, and the last known addresses of such witnesses; (3) Those portions of any existing transcript of grand jury proceedings which relate to the offense with which defendant is charged, containing testimony of the defendant and testimony of persons whom the state intends to call as witnesses at a hearing or trial; (4) Any existing transcript of the preliminary hearing and of any prior trial held in the defendant's case if the state has such in its possession or if such is available to the state; (5) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons; (6) Any books, papers, documents, photographs, or objects, which the state intends to introduce into evidence at the hearing or trial or which were obtained from or belong to the defendant; (7) Any record of prior criminal convictions of persons the state intends to call as witnesses at a hearing or the trial; (8) If there has been any photographic or electronic surveillance (including wiretapping), relating to the offense with which the defendant is charged, of the defendant or of conversations to which the defendant was a party or of his premises; this disclosure shall be in the form of a written statement by counsel

for the state briefly setting forth the facts pertaining to the time, place, and persons making the same; (9) Any material or information, within the possession or control of the state, which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment.

(B) The request provided for by this Rule shall be made by serving a copy of the request upon counsel for the state and each defendant to be tried jointly with the defendant. The original of such request shall be filed in the court having jurisdiction to try the case.

(C) If the defense in its request designates material or information which would be discoverable under this Rule if in the possession or control of the state, but which is, in fact, in the possession or control of other governmental personnel, the state shall use diligence and make good faith efforts to cause such materials to be made available to the defense counsel, and if the state's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court, upon request, shall issue suitable subpoenas or orders to cause such material or information to be made available to the state for disclosure to the defense.” *Rule 25.03*

Relator’s claim focuses on Respondent’s repeated failure to comply with the mandatory requirements of Rule 25.03. Respondent’s failure to provide the items set out in Rule 25.03 is a violation of her official duty as Circuit Attorney.

The courts have recognized that compliance with criminal discovery rules is

mandatory and not discretionary. *State v. Zetina-Torres*, 400 S.W. 3d 343 (Mo. App. W.D.) 20130, *State v. Scott*, 943 S.W. 2d 730, 735 (Mo. App. W.D. 1997), *State v. Childers*, 852 S.W. 2d 390 (Mo. App. E.D. 1993). The court in *Scott* recognized that the rules of discovery have a “constitutional underpinning rooted in due process” and were created to “foster informed pleas, expedited trials, a minimum of surprise, and the opportunity for effective cross-examination.” *Scott* at 735. Pretrial discovery was established to assist in the truth-finding aspect of the criminal justice system and to prevent surprises at trial. *State v. Whitfield*, 837 S.W. 2d 503 (Mo en banc 1992).

Rule 25.03 is designed to require the timely disclosure of evidence by the State to the defendant. Rule 25.03 does not assume that the defendant has any knowledge of what information the State has or intends to use and the rule mandates the disclosure of what information the State has and intends to use, even if it appears obvious that the State has that information. *State v. Johnson*, 513 S.W.3d 360, 366 (Mo.App. E.D. 2016). Rule 25 also mandates timely compliance and does not condone trial by ambush. *Johnson* at 365-66.

As a prosecutor, Respondent is also required to comply with the special responsibilities set out in Rule 4-3.8. The comment to Rule 4-3.8 states that “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” The rule also requires timely disclosure of evidence to the

defendant.

Because of Respondent's failure to perform her duty as set out in Rule 25, Relator has been forced to litigate motions to compel for its indigent defendants on a regular basis to obtain the discovery that Respondent is mandated to provide without a court order under Rule 25.03. Litigating a motion to obtain what is rightfully due Relator places an unreasonable burden on Relator and its indigent clients.

When evaluating violations of discovery rules on a case by case basis, the courts must first determine if there is a violation of Rule 25, and then, if so, fix the appropriate sanction. *Zetina-Torres* at 353. Appropriate sanctions may include a continuance of a trial setting, exclusion of a witness or dismissal of the case. All of those sanctions, however, place an undue burden on the defendant despite being intended to address the continued violations of Respondent.

Relator's clients should not need to request a continuance to obtain items mandated by Rule 25. Rule 25 establishes a timeline for the provision of discovery mandating that discovery should begin upon the filing of the indictment or information. As clearly demonstrated by the cases discussed above, discovery violations are a routine part of Respondent's practice. Every hour spent by Relator's attorneys addressing discovery violations is an hour not spent reviewing with the client the discovery they ought to already have, and another hour not spent preparing a case strategy. For Relator's clients who are awaiting trial, being granted the right to wait another six weeks for trial is hardly a welcome remedy for the violation of their rights. Yet, a continuance is nothing more than that—an agreement by the court to delay the

defendant's day in court rather than forcing defendant to go to trial without the discovery to which he is entitled.

Exclusion of witnesses not yet interviewed could result in the exclusion of exculpatory evidence. To sanction the Respondent by excluding a witness that Relator has been unable to interview because of the failure of Respondent to provide contact information is unreasonable. Relator should be allowed to interview any witness that has knowledge of the charges to decide whether that witness's testimony is harmful or helpful. Simply put, exclusion is a blunt instrument that is not appropriate for all situations. Discovery is the process by which a defendant learns about the case against him. It is illogical to remedy a discovery violation by closing off avenues to gathering information about the case.

The dismissal of a case by the court based on the discovery violation again results in a burden to the defense if that dismissal is without prejudice. Unless the dismissal is with prejudice, the defendant faces the burden of being arrested again and having to post a bond a second time when the prosecution issues a new case. Dismissal also does nothing to ensure the defendant will not suffer the same discovery violations in the re-issued case. Individual sanctions such as continuances, exclusion and dismissal granted on a case by case basis are an insufficient remedy for Relator and its clients. A mandamus order, however, will compel the Respondent to fulfill her mandatory duty set out in Rule 25.

Relator does not have an adequate remedy at law to resolve the repetitive pattern of discovery violations from Respondent. For a remedy to be an adequate remedy at

law, it must be equally adequate, convenient, beneficial, and effective as the extraordinary remedy; it must also be efficient. *State ex rel. Nesbit v. Lasky*, 546 S.W.2d 51, 53 (Mo. Ct. App.1977), *State ex rel. Reis v. Nangle*, 349 S.W.2d 508, 512 (Mo. Ct. App.1961). In *Nesbit*, the Court found a currently pending appeal inadequate to reinstate a pendent lite order of child support set aside by the trial court. “We feel that the question of child support marks the present dispute with an inherent need for celerity sufficient to render appeal an inadequate remedy and thus to justify use of mandamus.” *Nesbit*, 546 S.W.2d at 53.

In *Reis*, the Court found an appeal an inadequate remedy and detrimental to the interest of justice in a trial *de novo* of a probate proceeding. The Court considered the costs of an appeal and the need after the appeal for an additional hearing, and concluded that mandamus was the judicially efficient remedy. 349 S.W. 2d at 513. In both *Nesbit* and *Reis*, the Court evaluated the harm to the litigant in determining if mandamus was appropriate. Litigating individual motions to compel is far from equally adequate, convenient, beneficial or effective. Each litigant suffers the harm of delayed discovery. Each litigant is a victim of Respondent’s repetitive violations of Rule 25.03. Relator bears the burden of litigating those motions only because of Respondent’s violations concerning mandated discovery. The inefficiency discussed in *Nesbit* and *Reis* is miniscule in comparison to the inefficiency of having to litigate a motion to compel in every criminal case in which Relator is counsel for the defendant. Like the child in *Nesbit* who would be without support during the litigation of an appeal, a criminal defendant in the 22nd Judicial Circuit is without discovery during the litigation of those

motions to compel. Because of the unreasonable burden litigating individual motions to compel places on Relator, it is not an adequate remedy at law.

Like mandamus, injunction is also an improper remedy if there is an adequate remedy at law. *Glenn v. City of Grant City*, 69 S.W.3d 126, 130 (Mo. App. W.D. 2002). Injunction has been found to be proper when there are repeated trespasses, a multiplicity of suits would be necessary to address the trespasses individually and the threat of future trespasses may be inferred from their frequency and pattern. *Reprod. Health Services v. Lee*, 712 S.W.2d 718, 720 (Mo. App. E.D. 1986).

Respondent's recurring violation of Rule 25 is no different than a recurring trespass. In a recurring trespass the remedy of a multiplicity of suits is inadequate. The frequency and pattern of Respondent's violations of Rule 25, along with the repeated harm to the defendants, should be resolved by an all-encompassing remedy of mandamus.

Respondent's duties to provide discovery under Rule 25.03 are ministerial, and therefore subject to a writ of mandamus. A ministerial duty is a duty "of a clerical nature which a public officer is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed." *Rustici v. Weidemeyer*, 673 S.W.2d 762, 769 (Mo. banc 1984). (citing *Jackson v. Wilson*, 581 S.W. 2d 39, 43 (Mo App 1979)). *Rustici's* discussion of whether a duty was discretionary or ministerial arose in the context of a whether a police officer making an arrest was immune from a civil rights action. The court found that the action of an

officer making an arrest was a ministerial action. “It is nevertheless difficult to conceive of an act which is more circumscribed by law, and less susceptible to individual initiative than is the arrest of a citizen by a peace officer.” 673 S.W. 2d at 769. Much less complex is the clerical provision of those items set out in Rule 25.03 to the defendant.

An order in mandamus against a public official is intended to force the official’s compliance with a ministerial duty he has refused to perform. Respondent has the duty to comply with Rule 25.03. That compliance may require the exercise of some judgment by Respondent. The fact that the public official is required to exercise judgment in the execution of that ministerial duty, however, does not exempt the official from a mandamus order. *State ex rel. Folkers v. Welsh*, 124 S.W.2d 636, 639–40 (Mo. App. 1939).

In *Folkers*, the trial court issued a writ of mandamus against a public official who refused to issue a building permit. The issuance of the permit required compliance by the requesting party with certain regulations and requirements; however, once those regulations and requirements were fulfilled, the permit must be issued. The building commissioner’s failure to perform that ministerial duty did not become discretionary because there were objections to the issuance of the permit. Third parties objected to the permit, but the appellate court found that the objections did not justify the commissioner’s refusal and could be the subject of another suit. Because the requestor of the permit had fulfilled the statutory obligations, the building commissioner was

obligated to issue the permit, and the trial court's issuance of a writ of mandamus was therefore appropriate. *Folkers*, 124 S.W. 2d at 641.

Respondent, a public official, has continually violated her ministerial duty under Rule 25.03. Respondent has failed to comply with the Writ of Mandamus issued by Judge Wood. Respondent has failed to comply with the consent order that she signed. Respondent's actions have harmed Relator and the clients Relator serves. Respondent's actions can only be cured by the issuance of a writ of mandamus.

CONCLUSION

Relator respectfully requests that this court issue a writ of mandamus directing Respondent and her assistants to comply with her duties under Rule 25 in all current and future cases in which Relator is counsel in a timely manner. Because Respondent has repeatedly violated Rule 25, and because compliance has not improved since the issuance of the writ by Judge Wood or the order from the Court of Appeals in *Joyce v. Mullen*, Relator also requests:

1. That this Court issue a Show Cause order to Respondent to determine whether the actions of Respondent in the cases set out above, and in all other cases, are in violation of the Writ of Mandamus previously issued against Respondent and the Consent Order entered into by Respondent and whether Respondent should be held in contempt of that order.
2. That as part of that writ of mandamus, this Court direct Respondent to create written policies and procedures for the compliance with Rule 25 and share those policies and procedures with the Court for approval and monitoring.

3. That as part of that writ of mandamus, this Court direct Respondent to create a training curriculum for all staff of the Office of the Circuit Attorney on compliance with Rule 25 and share that training curriculum as well as the provision of that training with the Court for approval and monitoring.

Respectfully submitted,

/s/ Mary Fox

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PROOF OF SERVICE

On this 23rd day of April, 2018 a copy of this Petition for Writ of Mandamus was served upon Respondent, Kimberly Gardner, by delivering a copy to the Office of the Circuit Attorney, 1114 Market, Room 401, St. Louis, MO. 63101.

//s// Mary Fox

Mary Fox
Attorney for Relator

