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# Federal judge gives Oregon 7 days to find lawyers for defendants or release them from jail


By [Conrad Wilson](#) (OPB)

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A federal judge has ruled that Oregon must provide defense attorneys to anyone in jail, within seven days of their initial court appearance. If not, the sheriff must release them from custody.

U.S. District Court Judge Michael McShane stopped short of issuing a more sweeping injunction, one that could have also applied to unrepresented defendants who are out of custody. But since the case landed in McShane's courtroom, the former public defender turned federal judge has not held back from blistering critiques of the state's chronic failure to uphold a criminal defendant's basic rights.

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"The problem is institutional, and it is statewide," McShane wrote in an order filed late Thursday. "A lasting fix will require systemic change and legislative resolve. And while



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unfortunately, is not something that many Petitioners have when faced with a criminal prosecution.”

Roy Kaufmann, a spokesperson for the Oregon Department of Justice, which is representing the state and local judges, said the agency would appeal McShane’s order. State lawyers also plan to ask the U.S. Ninth Circuit Court of Appeals to block McShane’s ruling from going into effect later this month.

For nearly the last two years, Oregon has continued to charge people with crimes, but left thousands who cannot afford a lawyer forced to navigate the courts on their own. Even though they are facing criminal charges — some of which are serious — they have not been found guilty and are by law considered innocent.



FILE - A woman enters the Oregon Department of Justice building in Salem, Ore., May 28, 2020. Roy Kaufmann, a spokesperson for the Oregon Department of Justice, which is representing the state and local judges, said the agency would appeal Thursday's order.

McShane's ruling does little to help those out of custody, who month after month are called back before a state court judge only to be told there is still not an attorney available to take on their case. "Of greater concern are Petitioners who have been ordered detained in jail and are without an attorney or sufficient process to secure their release or defend their case," McShane wrote.

On any given day, more than 100 people in Oregon's jails are also without lawyers, according to data from the Oregon Judicial Department.

"In essence, they have been locked away without a voice, being too poor to afford an advocate to speak for them in the courtroom," McShane wrote.

In August, [McShane issued a temporary order that anyone held in the Washington County Jail](#) without an attorney must be released after 10 days. This latest order reduces the timeframe and expands it statewide.

The Sixth Amendment of the U.S. Constitution guarantees a right to a lawyer. Courts have said that means people charged with crimes must also be provided with an attorney paid for by the state if defendants cannot afford one.

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Oregon's federal public defender filed the lawsuit in July, arguing the state was failing to meet its constitutional obligations. In court, they pressed for a 48-hour deadline for people to be released and their charges dropped if they have not been assigned a lawyer and said any ruling should also apply to defendants out of custody, too. They would have their charges dropped.

"Judge McShane's order sends a clear message to counties that are illegally holding people in custody without lawyers," Oregon's federal public defender, Fidel Cassino-DuCloux said in a statement after Thursday's ruling. "The U.S. Constitution and Oregon laws require swift appointment of counsel for folks charged with a crime. We are glad the Federal Court acknowledged the grave constitutional violation that is occurring for incarcerated, presumptively innocent people, in jail. Without a lawyer, individuals charged with a crime often feel they have no voice."

Washington County Sheriff Pat Garrett said in a statement Friday that he would comply with McShane's ruling. Failure to do so, he said, would risk putting his office in contempt of court.

“I hope this order will persuade the State and our Legislature to address the systemic failure to provide constitutionally adequate representation for qualified defendants in a prompt and decisive manner,” Garrett’s statement reads. “That issue must be immediately addressed to avoid the public safety risks posed in releasing defendants who would otherwise remain in custody on very serious charges.”

Earlier this year, Oregon lawmakers passed [sweeping changes to the state’s public defense system](#), many that will take years to implement.

Attorneys for the Oregon Department of Justice did not comment beyond announcing their appeal. A spokesperson for Washington County, which is also a defendant in the case, declined to comment because the case was still being litigated.

During oral arguments on Oct. 24, James Aaron, a trial attorney for the state, acknowledged “some individual defendants may have suffered or are suffering constitutional violations.” But he also said McShane lacked the authority to grant sweeping, class action relief for everyone charged with a crime in Oregon but not represented by an attorney. That would put McShane in a position of overriding a ruling from a state court judge who may have ordered someone to remain in custody.

“We don’t think you can order the state court judges to do anything because that’s not within the scope of this court’s habeas jurisdiction,” Aaron said in court.

Julie Vandiver, an attorney with the federal public defender’s office, argued in court McShane could and should do more.

“We’re not here to tell the state of Oregon how to fix this problem — although I will note it seems to be taking them quite a long time to fix it,” Vandiver argued before McShane last month.

“We’re here for one reason, which is to take an option off the table: You may not prosecute poor people without providing them counsel.”

During arguments, Vandiver played audio of people who were appearing before a state court judge without a lawyer. Some defendants expressed confusion, others sounded frustrated or emotional about needing to get out of jail.

“Quite frankly the judge is treating them terribly,” McShane said in response to one of the hearings played in his courtroom. “It’s embarrassing the way the judge is treating them. It’s embarrassing that they don’t have an attorney when their liberties

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