

IN THE
MISSOURI SUPREME COURT

STATE ex rel.)
J. MARTY ROBINSON,)
)
 Relator,)
)
 vs.) No. SC88405
)
 THE HON. RONALD E. TAYLOR &)
 THE HON. RANDALL JACKSON)
 Associate & Circuit Judges,)
 Buchanan County Circuit Court)
)
 Respondents.)

ON PRELIMINARY WRIT OF PROHIBITION
FROM THE MISSOURI SUPREME COURT
TO THE HONORABLE RONALD E. TAYLOR,
ASSOCIATE CIRCUIT JUDGE, AND
THE HONORABLE RANDALL JACKSON,
CIRCUIT JUDGE,
CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
FIFTH JUDICIAL CIRCUIT

RELATOR'S STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This original writ case seeks a writ of prohibition and/or mandamus. Relator, J. Marty Robinson, is the Director of the Missouri Public Defender System. Respondents, the Hon. Ronald E. Taylor and the Hon. Randall Jackson, are, respectfully, Associate and Circuit Judges of the Circuit Court of Buchanan County, Missouri.

After the Missouri Court of Appeals, Western District, denied Relator's petition for a writ of prohibition and/or mandamus without an opinion, Relator filed in this Court an application for a writ to prohibit Judge Taylor's orders of February 2 and 26, 2007, appointing the Public Defender to represent Heather Rich in the criminal case of *State v. Rich* (Buchanan County Case No. 07BU-CR00308), and denying the Public Defender's motion to appoint the private counsel who had been paid to represent Rich. The Public Defender had determined that Rich was not eligible for Public Defender representation under *Section 600.086.1 RSMo. 2000*.¹ While Relator's petition for a writ was pending in the Western District, the case was transferred to Judge Jackson after preliminary hearing.

On May 1, 2007, this Court issued a preliminary writ of prohibition.

This Court has jurisdiction under Article V, Section 4, of the Missouri Constitution, and Rules 84.23, 84.24, 94.01 and 97.01.

¹ Unless otherwise indicated, all further statutory references are to RSMo. 2000.

INTRODUCTION

This case and the companion case of *State ex. rel. J. Marty Robinson v. the Hon. Frank Conley*, No. SC88404, present the issue of private attorneys being hired and paid some money for a criminal case, but when further attorney's fees are not paid, ceasing representation and foisting the burden and cost of the case on the Public Defender and taxpayers.

Relator, the Public Defender, believes that *Section 600.086.1* prohibits this. When courts are faced with private counsel who seek to cease representation due to non-payment of further attorney's fees, courts should either (1) require the private counsel to continue their representation to conclusion of the matters for which they were retained or entered appearances, despite non-payment of further fees, or (2) require the private counsel to return their attorney's fees to the defendants in such a manner that the money can be used to hire another private counsel who will represent them for the amount provided.

The problem of private counsel ceasing representation and foisting cases on the Public Defender is a recurring one, as illustrated by these two cases. With the Public Defender in the midst of a caseload crisis, this is a burden the Public Defender can no longer bear. A judicial remedy is needed.

STATEMENT OF FACTS

On December 19, 2005, Heather Rich, who anticipated that criminal charges might be filed against her for child endangerment, retained private counsel Matthew J. O'Connor to represent her (E-144; A-8).² Rich herself did not have enough money to hire O'Connor (E-49-50), but her mother mortgaged the mother's house to hire him (E-53).

O'Connor and Heather Rich signed a fee agreement (E-144-47; A-8-11). The agreement provided that O'Connor would provide pre-indictment representation, and if Rich were charged, representation through "Trial," "Post-Trial Motions," "Sentencing, if necessary," and "Notice of Appeal" (E-144; A-8).

²References in this brief are as follows: "E" citations are to the exhibits attached to Relator's "Petition For A Writ Of Prohibition And/Or Mandamus, And Suggestions In Support Of The Petition, With Attached Exhibits" filed with this Court on March 26, 2007. Each exhibit was given a separate designation by letter, with the pages numbered consecutively from E-1 ("E" for exhibit) to E-173. This brief refers to these exhibits only by their "E" page numbers. An "Index Of Exhibits Filed By Relator" appears in Relator's petition immediately before page E-1. Citations to the Appendix to this brief are designated pages "A-1," etc. Respondents' Return filed with this Court on May 30, 2007, is referred to as "Respondents' Return."

The agreement provided that O'Connor did not have to represent Rich on appeal (E-144; A-8).

On December 23, 2005, O'Connor sent Heather Rich a retention letter confirming their agreement (E-149-50; A-12-13). The letter stated Heather Rich would pay \$2,000 for pre-indictment representation, and if charges were filed, would pay \$250 per hour for representation thereafter (E-149; A-12). Additionally, if charges were filed, Heather Rich would be required to pay a \$6,000 retainer to O'Connor, and when that retainer dipped below \$1,000, she would have to "refresh" the retainer so that O'Connor could continue billing against it (E-149; A-12). O'Connor's representation was to cover both a family court case involving Rich, and criminal charges that might arise (E-72).³

³ At a February 26, 2007, hearing where the Public Defender was attempting to require O'Connor to continue to represent Rich, O'Connor stated he had billed at the rate of \$200 per hour for the criminal case, and \$175 per hour for the family court case (E-64). The exact hourly rate is not material to this writ, however, since the total that O'Connor was paid appears undisputed. O'Connor was paid \$24,664.29 (E-53), of which he had used \$4,382.10 for expenses, leaving him with \$20,282.19 for his attorney's fee (E-53, E-72). O'Connor is currently owed \$21,559.34 for work he has performed, but for which he has not been paid (E-65, E-148).

On December 28, 2005, the Buchanan County Prosecutor filed a complaint alleging that Heather Rich committed the Class C felony of first-degree endangering the welfare of a child, Section 568.045 RSMo. (A-16) in that “on or about the 12th day of December, 2005 ... the defendant acted knowingly [handwritten] in a manner that created a substantial risk to the life, body and health of minor C.B., a child less than seventeen years old, by violating the terms of a safety plan to which the parties had agreed to abide” (E-20). The probable cause statement stated: “On November 14th, 2005, the defendant entered into an agreement to not have unsupervised visitation with minor child (CB-under the age 5). On December 12th, 2005 while exercising unsupervised visitation the defendant left the child with an unrelated male. The child was subsequently reported to be non-responsive and died from injuries received” (E-21).

This case was ultimately assigned Buchanan County Case No. 05BU-CR03899-01 (E-1).

On December 28, 2005, attorney O’Connor entered an appearance for Rich in case number 05BU-CR03899-01 (E-22).

On February 10, 2006, the State filed an information which charged that Rich committed the Class C felony of first-degree endangering the welfare of a child in that “on or about the 12th day of December, 2005 ... the defendant acted knowingly in a manner that created a substantial risk to the life, body and health of minor C.B., a child less than seventeen years old, by violating the terms of a safety plan to which the parties had agreed to abide” (E-23A).

During 2006, O'Connor filed pretrial motions, conducted depositions, and prepared for trial, which was set to occur on January 29, 2007 (E-1-19).

On January 5, 2007, the State filed a first amended information which charged that Rich committed the Class C felony of first-degree endangering the welfare of a child in that "between December 10 and December 12, 2005 ... the defendant acted knowingly in a manner that created a substantial risk to the life, body and health of a minor Caden Blanton, a child less seventeen years old, by violating the terms of a safety plan dated November 13, 2005, to which she had agreed" (E-24).

On January 19, 2007, the State filed a second amended information which charged that Rich committed the Class C felony of first-degree endangering the welfare of a child in that "between December 10 and December 12, 2005 ... the defendant acted knowingly in a manner that created a substantial risk to the life, body and health of a minor Caden Blanton, a child less than seventeen years old, by violating the terms of a safety plan dated November 13, 2005, by accepting unsupervised contact with Caden Blanton" (E-25).

On the day of trial, January 29, 2007, the State moved to file a third amended information (E-3). An attorney for a co-defendant, who was to be tried with Rich, objected to the third amended information on the basis that the amendment was a material change in the charge and if the amendment was

granted, the planned defense would no longer be available (E-73).⁴ The trial court denied the State leave to file the third amended information (E-3). The State then nolle prossed the charge on that date (E-3).

At the time the charge was nolle prossed, O'Connor had been paid \$24,664.29 (E-53). O'Connor had used \$4,382.10 of this amount for expenses, leaving him with \$20,282.19 for his attorney's fee (E-53, E-72). However, O'Connor was still owed \$21,559.34 for work he had performed, but for which he had not been paid (E-65, E-148). During October and November 2006, O'Connor had discussed the unpaid balance with Rich and her mother, and tried to get them to make arrangements to rectify the situation, but this had been unsuccessful (E-73).

The day after the State had nolle prossed the case, O'Connor contacted the Office of Chief Disciplinary Counsel and asked if he had to enter Rich's case again when the State re-filed (E-73). The Office of Chief Disciplinary Counsel verbally told O'Connor that he was not required to enter (E-73). O'Connor then told Rich that he would not represent her in a re-filed case unless there was a new

⁴ O'Connor testified at the February 26, 2007, hearing that it was the co-defendant's attorney who made the objection and caused the case to be nolle prossed (E-73-74), although the docket sheets appear to indicate both Rich and the co-defendant objected (E-3). Regardless, the case was nolle prossed as a result of an objection to the third-amended information (E-3).

fee agreement executed (E-73). O'Connor contacted a law firm handling debt collection. On February 5, 2007, the debt-collection law firm sent Rich a letter indicating that she still owed O'Connor \$21,559.34 (E-148).

Meanwhile, on January 30, 2007, the Buchanan County Prosecutor filed a complaint alleging Rich committed the Class C felony of first-degree endangering the welfare of a child, Section 568.045, in that "between November 14, 2005 and December 12, 2005 ... Rich knowingly acted in a manner that created a substantial risk to the life, body and health of minor Caden Blanton, a child less than seventeen years old, by failing to protect the child and provide a safe environment after being advised that someone was abusing the child and after observing signs of abuse, to wit: multiple bruises in various locations on the body" (E-31). The attached probable cause statement stated: "On November 14, 2005, the defendant entered into an agreement not to have unsupervised visitation with minor child Caden Blanton, under the age of five. On December 12, 2005, while exercising unsupervised visitation, the defendant left the child with an unrelated male. The child was subsequently reported to be non-responsive and died from injuries received" (E-32). This probable cause statement was, in substance, the same as the probable cause statement filed in 2005 (E-32, E-21). The only difference was that the 2005 statement had used some abbreviations (E-21).

The re-filed case was assigned Buchanan County Case No. 07BU-CR00308 (E-28).

On February 1, 2007, Rich applied for Public Defender representation (E-143). She indicated on her application that attorney O'Connor had represented her until the end of January 2007 (E-143).

On February 1, 2007, the Public Defender filed a notice that Rich was not eligible for Public Defender representation because she had hired private counsel O'Connor (E-34; A-1).⁵

On February 2, 2007, Respondent, the Hon. Ronald E. Taylor, Associate Circuit Judge of the Buchanan County Circuit Court, appointed the Public Defender to represent Rich over the Public Defender's objection (E-35; A-2).

On February 9, 2007, the Public Defender filed a "Motion For Order Setting Aside Appointment Of Public Defender And Requiring Paid Private Counsel To Resume Representation" (E-38-40; A-3-5). The motion asserted that "[t]he charges in this case are for all purposes relevant to Ms. Rich's representation the same as the charges in Buchanan County case number 05BU-CR03899-01," in which O'Connor represented Rich (E-38; A-3). The motion asserted that under *Section 600.086.1 RSMo.*, (A-14), a defendant is ineligible for Public Defender representation where she has the means to obtain counsel, and that Rich had obtained and paid O'Connor to represent her (E-39; A-4). The

⁵The Public Defender also contended that Rich was ineligible because she had previously posted a substantial bond (E-34), but the Public Defender has chosen not to contest Rich's indigence in this current writ proceeding.

motion further stated “it is against the logic of the circumstances, arbitrary and unreasonable to allow private counsel to strip the accused of extraordinary sums for her representation only to abandon the client by exploiting a procedural issue resulting in the dismissal and refiling of the same charge under a new case number” (E-39; A-4). The motion noted that under *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. banc 1981), the court had the power to require O’Connor to represent Rich, and that it would be an abuse of discretion to require the Public Defender and taxpayers to bear the cost of her representation (E-39; A-4).

The motion also noted that the Public Defender System currently suffers from excessive caseloads, a finding which had been confirmed by a Missouri Bar Task Force, an outside consulting firm retained by the Missouri Bar, and a Missouri Senate Interim Committee (E-39-40; A-4-5). The outside consulting firm found that the Public Defender is “operating in a crisis mode,” and that “the probability that public defenders are failing to provide effective assistance of counsel and are violating their ethical obligations to their clients increases everyday” (E-103). The Missouri Senate Interim Committee found that “caseloads of public defenders [are] too large,” and should be reduced (E-140). The motion also noted that ABA Formal Opinion 06-441 indicates that the Public Defender should refuse cases when its caseload is excessive (E-40; A-5).

On February 9, 2007, O’Connor wrote to Judge Taylor to state that the Office of Chief Disciplinary Counsel had informed O’Connor that he was not

required to represent Rich, and that a “conflict of interest is now present as [Rich] is on notice that a suit has been instituted for breach of contract” (E-37).⁶

On February 26, 2007, Judge Taylor conducted a hearing on the Public Defender’s motion. In addition to the above-stated facts, the following relevant facts were adduced at that hearing.

O’Connor testified he was “absolutely” prepared to go to trial on January 29, 2007 (E-74). He testified “[t]he questions are typed and still in the file” (E-75). The trial did not happen on that day because of the objection of a co-defendant to the third amended information (E-73-74). O’Connor disagreed that the re-filed charge is the same as the prior charge because the re-filed charge does not reference the safety plan (E-75). O’Connor stated: “The first charges reference a violation of a safety plan, which in my opinion, my theory, was very vague at best; and the individual Christopher Kerns, who is alleged to have harmed the child in this case, was not written into the safety plan. The current charges do not make reference to the safety plan whatsoever and track more of the jury instructions, the MAI for child endangerment, which makes it a much more difficult case in my opinion” (E-75).

Rich did not have any complaints with how O’Connor represented her (E-67-68).

⁶ The suit was not actually filed until March 9, 2007. The suit is *The O’Connor Law Firm v. Rich*, Buchanan County Case No. 07BU-CV01001.

Rich herself is indigent (E-54, E-68-69).

The Public Defender argued that the re-filed case is the same or similar case, arising out of the same facts as the prior case number, and that as a matter of public policy, an attorney who has been paid as much O'Connor had been for the case should be required to conclude the representation in the matter or return sufficient funds to Rich to allow her to hire another private attorney, rather than have the burden and cost of representation be put on the Public Defender and Missouri taxpayers (E-78-79).

On February 26, 2007, Judge Taylor ruled orally from the bench as follows:

I will make the following comments and the findings: First, I do believe that without having to necessarily decide today, I do believe that the court does have the inherent power to appoint a private attorney to represent the defendant under some circumstances and very possibly in this circumstance.

I also believe in this case Mr. O'Connor does have claims against Mrs. Rich, and Mrs. Rich does have claims against Mr. O'Connor. Perhaps it can be better handled in another form other than in the criminal case, which is the case we're here on today.

The bottom line in all this, as I see it, is Mrs. Rich does not have the means to hire an attorney. She has not posted a bond or been required to [because she is on recognizance bond]. She's testified that she does not have the means nor did she in the first

case, other than through the kindness of family members who had no obligation and have no current obligation to provide her with an attorney. The mother has testified that she no longer has the means to continue – to hire a private attorney. Mr. O’Connor has not entered in this particular case. Based on the evidence that Mrs. Rich gave me in court earlier and today, I see that there’s no possibility of her hiring an attorney through her own means.

Consequently, the motion to set aside the appointment of a public defender is overruled.

(E-84-85; A-6-7).

On March 5, 2007, the Public Defender filed a petition for a writ of prohibition and/or mandamus with the Missouri Court of Appeals, Western District, to prohibit Judge Taylor’s orders of February 2 and 26, 2007, appointing the Public Defender to represent Rich, and denying the Public Defender’s motion to appoint O’Connor (E-170). While this writ petition was pending, Judge Taylor conducted a preliminary hearing, following which Rich’s case was sent to circuit court.⁷ Rich’s case is now pending before the Hon. Randall Jackson, Buchanan County Circuit Judge (E-171).

⁷ The Public Defender was compelled to represent Rich at her preliminary hearing under Judge Taylor’s February 2 and 26 orders.

On March 9, 2007, the State filed an information in circuit court charging that Rich committed the Class C felony of first-degree endangering the welfare of a child, Section 568.045, in that “between November 14th, 2005 and December 12th, 2005 ... Rich knowingly acted in a manner that created a substantial risk to the life, body and health of minor Caden Blanton, a child less than seventeen years old, by failing to protect the child and provide a safe environment after being advised that someone was abusing the child and after observing further signs of abuse, to-wit: multiple bruises in various locations on the body and severe scrotal bruising and swelling” (E-173).

On March 19, 2007, the Western District summarily denied the Public Defender’s petition for a writ (E-170).

On March 26, 2007, Relator filed with this Court a petition for a preliminary writ of prohibition and/or mandamus to prohibit Judge Taylor’s orders of February 2 and 26, 2007, appointing the Public Defender and denying the Public Defender’s motion to require private counsel O’Connor to represent Rich.

On May 1, 2007, this Court issued a preliminary writ of prohibition.

On May 30, 2007, Respondents filed a Return to the preliminary writ.

POINTS RELIED ON

I.

Relator is entitled to a permanent writ of prohibition and/or mandamus prohibiting Respondent from appointing the Public Defender for Rich and not requiring O'Connor to continue representation, because Respondent exceeded his jurisdiction, authority and power, and abused his discretion, in that:

(1) Section 600.086.1 does not authorize appointment of the Public Defender where a defendant has “the means at [her] disposal or available to [her] to obtain counsel,” and Rich had the means to obtain counsel because she actually obtained O'Connor to represent her in anticipated charges of child endangerment; and,

(2) it was against the logic of the circumstances, arbitrary and unreasonable to not require O'Connor to continue representation since he was not hired only in a particular case number or only if child endangerment were charged in a particular way, but was hired to represent Rich in child endangerment charges arising out of the incident and operative facts involving Caden Blanton in Nov.-Dec. 2005, which incident, operative facts and statutory charge are the same in the re-filed case; O'Connor's retention agreement contemplated that O'Connor would represent Rich through conclusion of trial; O'Connor could have protected himself from what he perceives as an inadequate fee by requiring a higher retainer before

representation; OCDC opinions are advisory only; and O'Connor does not have a conflict of interest merely because he has tried to collect fees which Rich owes, since otherwise counsel could always withdraw for unpaid fees; and,

(3) irreparable harm will result to the Public Defender, its existing clients and taxpayers if a writ does not issue because the Public Defender will face further case overload, and taxpayers will bear the cost of the representation.

State ex rel. Shaw v. Provaznik, 708 S.W.2d 337 (Mo. App., E.D. 1986);

State ex rel. Gordon v. Copeland, 803 S.W.2d 153 (Mo. App., S.D. 1991);

United States v. Parker, 439 F.3d 81 (2d Cir.), *cert. denied* 127 S.Ct. 456

(2006);

In re Stuart, 646 N.W.2d 520 (Minn. 2002); and,

Section 600.086.1 RSMo. 2000.

II.

Relator is entitled to a permanent writ prohibiting Respondent from appointing the Public Defender and not requiring O'Connor to continue representation without requiring O'Connor to refund or pay his \$20,282.19 attorney's fee to Rich or to the court to be held in escrow to hire another private counsel, because Respondent abused his discretion in not requiring O'Connor to refund the money and irreparable harm will result if a writ does not issue, in that:

(1) it was against the logic of the circumstances, arbitrary and unreasonable for O'Connor to be allowed to cease representation but keep his fee since O'Connor could have protected himself from what he perceives as an inadequate fee by requiring a higher retainer before O'Connor undertook representation;

(2) O'Connor should not be permitted to profit from his failure to obtain a higher retainer where the result is to shift the cost and burden of the representation to the Public Defender and Missouri taxpayers; and,

(3) the criminal case is the proper forum in which to resolve Rich's claims against O'Connor for not continuing the representation, because otherwise the Public Defender will face further case overload, which will

harm existing clients, and Missouri taxpayers will bear the cost of the representation.⁸

International Materials Corp. v. Sun Corp., 824 S.W.2d 890 (Mo. banc 1992);

In re Marriage of Redmond, 131 P.3d 1167 (Colo. Ct. App. 2005);

Gibbs v. Lappies, 828 F. Supp. 6 (D.N.H. 1993); and,

United States v. Parker, 439 F.3d 81 (2d Cir.), *cert. denied* 127 S.Ct. 456 (2006).

⁸ Point II is raised in the alternative to Point I.

ARGUMENT

I.

Relator is entitled to a permanent writ of prohibition and/or mandamus prohibiting Respondent from appointing the Public Defender for Rich and not requiring O'Connor to continue representation, because Respondent exceeded his jurisdiction, authority and power, and abused his discretion, in that:

(1) Section 600.086.1 does not authorize appointment of the Public Defender where a defendant has “the means at [her] disposal or available to [her] to obtain counsel,” and Rich had the means to obtain counsel because she actually obtained O'Connor to represent her in anticipated charges of child endangerment; and,

(2) it was against the logic of the circumstances, arbitrary and unreasonable to not require O'Connor to continue representation since he was not hired only in a particular case number or only if child endangerment were charged in a particular way, but was hired to represent Rich in child endangerment charges arising out of the incident and operative facts involving Caden Blanton in Nov.-Dec. 2005, which incident, operative facts and statutory charge are the same in the re-filed case; O'Connor's retention agreement contemplated that O'Connor would represent Rich through conclusion of trial; O'Connor could have protected himself from what he perceives as an inadequate fee by requiring a higher retainer before

representation; OCDC opinions are advisory only; and O'Connor does not have a conflict of interest merely because he has tried to collect fees which Rich owes, since otherwise counsel could always withdraw for unpaid fees; and,

(3) irreparable harm will result to the Public Defender, its existing clients and taxpayers if a writ does not issue because the Public Defender will face further case overload, and taxpayers will bear the cost of the representation.

STANDARD OF REVIEW

“The extraordinary remedy of a writ of prohibition is appropriate in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court’s order.” *State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41, 43 (Mo. banc 2004). Prohibition may be used to “‘undo’ acts done in excess of a court’s jurisdiction, as long as some part of the court’s duties in the matter remain to be performed[,]” and may be used to restrain further enforcement of orders beyond or in excess of a court’s authority. *State ex rel. Robinson v. Franklin*, 48 S.W.3d 64, 67 (Mo. App., W.D. 2001)(bracket in original; citation omitted).

A writ of mandamus is appropriate “where a court has exceeded its jurisdiction or authority.” *State ex rel. Leigh v. Dierker*, 974 S.W.2d 505, 506 (Mo. banc 1998). “[A] writ will lie both to compel a court to do that which it is obligated by law to do and to undo that which the court was by law prohibited from doing.” *Id.* A writ of mandamus may issue where a court has abused its discretion. *State ex rel. Charles F. Vatterott Commercial Properties v. Rush*, 572 S.W.2d 864 (Mo. App., St.L.D. 1978)(“To grant this writ of mandamus we must conclude respondent judge abused his discretion....”).

Whether a trial court has exceeded its jurisdiction or authority is a question of law which the appellate court reviews independently of the trial court. *See State ex rel. Teefey v. Bd. of Zoning Adjustment*, 24 S.W.3d 681, 684 (Mo. banc 2000)(determination on appeal of whether administrative body’s action exceeded the authority granted to it is a question of law for the “independent judgment of the reviewing court”); *State ex rel. Beaird v. Del Muro*, 98 S.W.3d 902, 906-07 (Mo. App., W.D. 2003)(determination on appeal of whether habeas court acted within its jurisdiction is a question of law).

Where a trial court exceeds its jurisdiction or authority under Chapter 600 RSMo. in appointing the Public Defender, a writ of prohibition must issue to prohibit or rescind the trial court’s order. *See State ex rel. Tanzey v. Richter*, 762 S.W.2d 857, 858 (Mo. App., E.D. 1989); *State ex rel. Shaw v. Provaznik*, 708 S.W.2d 337, 341 (Mo. App., E.D. 1986).

Where appointment of the Public Defender is statutorily authorized, whether to appoint counsel is within the trial court's discretion. *In re Stuart*, 646 N.W.2d 520, 523 (Minn. 2002). Appellate review is for abuse of discretion. *Id.*

Courts are empowered to require attorneys to continue representation in cases even where the attorneys are no longer being paid. *State ex rel. Public Defender Commission v. Williamson*, 971 S.W.2d 835, 837-39 (Mo. App., W.D. 1998); *State v. Kennell*, 605 S.W.2d 819, 820 (Mo. App., S.D. 1980). Whether to appoint private counsel or allow counsel to withdraw is within the trial court's discretion, and appellate review is for abuse. *See State v. Kennell*, 605 S.W.2d at 820.

Abuse of discretion will be found if a court's ruling is against the logic of the circumstances, or is arbitrary or unreasonable. *Ponce v. Ponce*, 102 S.W.3d 56, 62 (Mo. App., W.D. 2003).

***RESPONDENT EXCEEDED HIS JURISDICTION, AUTHORITY & POWER
UNDER SECTION 600.086.1***

All defendants charged with criminal offenses that may result in incarceration are entitled to appointment of an attorney at taxpayer expense to assist them when and only if they are not financially able to have counsel of their own choosing. *See Argersinger v. Hamlin*, 407 U.S. 25, 37-40 (1972).

The Missouri Legislature answered the call to this constitutionally mandated duty by enacting a state-wide Public Defender System, headed by a Public Defender Commission and State Director, whose duties and responsibilities

are outlined in Chapter 600 RSMo. At the forefront of these duties and responsibilities is to ensure that limited State resources are reserved only for those defendants eligible for taxpayer subsidized representation.

Section 600.086.1 sets forth the standard for eligibility. That Section provides, in relevant part:

A person shall be considered eligible for representation [by the Public Defender] ... when it appears from all the circumstances of the case including his ability to make bond, his income and the number of persons dependent on him for support that the person does not have the means at his disposal or available to him to obtain counsel in his behalf *and* is indigent as hereafter determined.

Section 600.086.1 (E-155; A-14)(emphasis added).

In construing a statute, this Court must give effect to the intent of the legislature, as expressed in the plain and ordinary meaning of the statutory language. *See State v. Grubb*, 120 S.W.3d 737, 739 (Mo. banc 2003). Standard dictionary definitions may be used to define statutory terms. *See Abrams v. Ohio Pacific Express*, 819 S.W.2d 338, 340 (Mo. banc 1991).

The *American Heritage College Dictionary* 50 (3d ed. 1993) defines “and,” in relevant part, as “[t]ogether with; in addition to; as well as.” The word “and” is a conjunctive term which joins different elements.

The use of the word “and” in *Section 600.086.1* shows that there are two requirements, both of which must be satisfied, in order for a defendant to be

eligible for Public Defender representation: (1) the defendant “does not have the means at his disposal or available to him to obtain counsel in his behalf,” *and* (2) the defendant is “indigent.”

That *Section 600.086.1* contains two distinct requirements is illustrated by the holding in *State ex rel. Gordon v. Copeland*, 803 S.W.2d 153 (Mo. App., S.D. 1991). The Public Defender sought to prohibit its appointment to represent a juvenile defendant whose parents were financially able to hire counsel for the juvenile, but had not done so. *Id.* at 154-55. The juvenile himself was indigent. *Id.* at 155 and 159. Relying on *Section 600.086.1 RSMo. 1986* (E-169; A-15) – which language remains the same in *Section 600.086.1 RSMo. 2000* (E-155; A-14) -- the Southern District held:

If a juvenile is himself indigent but his parents have ample financial resources to employ counsel for him *and they do so, the juvenile has the means available to him to obtain counsel. Consequently, such juvenile would be statutorily ineligible for public defender representation.* However, if for any reason the parents refuse to employ counsel for the indigent juvenile, the latter has no means at his disposal or available to him to obtain counsel.

Copeland, 803 S.W.2d at 159 (emphasis added). Since the juvenile’s parents had refused to hire counsel for him, the Southern District held that the juvenile did not have the means at his disposal or available to him to

hire counsel, and thus, the Public Defender was required to represent the juvenile under the statute. *Id.*

Here, although Rich is herself indigent (E-49-50, E-54, E-68-69), Rich's mother paid O'Connor \$24,664.29 to represent Rich, of which O'Connor netted \$20,282.19 as his attorney's fee after deducting expenses (E-53, E-72). When O'Connor was hired and paid to represent Rich, Rich became ineligible for Public Defender representation under *Section 600.086.1* because she had "the means at [her] disposal or available to [her] to obtain counsel," as shown by the fact that she actually obtained O'Connor. *See State ex rel. Gordon v. Copeland*, 803 S.W.2d at 159; *Section 600.086.1*. The Public Defender would not have required Rich's mother to obtain counsel for her. But when she chose to do so, and actually did so, Rich became ineligible for Public Defender representation under *Section 600.086.1* in her child endangerment case.

Relator agrees that Rich satisfies the second prong of *Section 600.086.1* because Rich is indigent (E-54, E-68-69). Indigence alone, however, is not the sole requirement for eligibility for representation. Under the plain language of the first prong of *Section 600.086.1*, Rich is ineligible for a public defense since she obtained counsel. The legislature clearly did not intend indigent defendants who – through whatever means – have the ability to obtain counsel and who, in fact, obtain counsel to be represented by a Public Defender. The clear purpose of *Section 600.086.1* is to provide Public Defender counsel only to those indigent

defendants who cannot obtain counsel by any other means, and to conserve scarce taxpayer funds by limiting Public Defender representation to such defendants.

This interpretation of *Section 600.086.1* best insures the right to counsel to all defendants. As the Minnesota Supreme Court has aptly stated in a case which considered whether to appoint the Public Defender for a defendant who owned some assets:

It is out of this concern for the right to counsel that we must jealously guard the resources of the SPD [State Public Defender] and not provide counsel to those who are able to afford an attorney. The right to counsel necessarily encompasses the right to effective assistance of counsel, which requires time and preparation. When an ineligible defendant is provided with services by the public defender, those finite resources are improperly diverted from the representation of other clients of the public defender. Almost ten years ago we recognized that state funding for the Board of Public Defense has not kept pace with the increased workloads and responsibilities of our public defender system. [Citations omitted]. The SPD asserts that not only has this situation not improved, it has perhaps gotten worse. For these reasons, qualification of applicants is essential so that the resources of the public defender system are not unnecessarily depleted by people who, in their own right, can obtain legal counsel with their own resources.

In re Stuart, 646 N.W.2d at 524-525.

Here, Rich had the resources to obtain O'Connor, and in fact, retained him, *before she was even charged*, to represent her in defending against an anticipated charge of child endangerment (E-144, E-149; A-8, A-12). The fact that her original charge was nolle prossed and re-filed under a new case number does not render Rich eligible for Public Defender representation under the facts of this case. This is because the re-filed charge arises out of the same incident or operative facts as the originally-filed case, and the statutory charge against Rich in the re-filed case remains the same – the Class C felony of first-degree endangering the welfare of a child, **Section 568.045**. Rich did not retain and pay O'Connor to represent her in a particular case number, but instead, to represent her in defending against anticipated charges of child endangerment. Rich could not have retained O'Connor to represent her in a particular case number because she retained O'Connor *before* any charge was actually filed. Nor could Rich have retained O'Connor to represent her against a child endangerment charge that would be charged in any particular manner, because she retained him before any charge was filed. Thus, neither she nor O'Connor could have known the exact manner in which Rich would ultimately be charged, but they could and did know the incident or operative facts concerning which Rich desired -- and contracted for -- representation.

Rich retained O'Connor on December 19, 2005 to defend her against an anticipated charge of child endangerment (E-144, E-149; A-8, A-12). Rich was

subsequently charged on December 28, 2005, in Case No. 05BU-CR03899-01, with the Class C felony of first-degree endangering the welfare of a child, *Section 568.045* (A-16) in that “on or about the 12th day of December, 2005 ... the defendant acted knowingly [handwritten] in a manner that created a substantial risk to the life, body and health of minor C.B., a child less than seventeen years old, by violating the terms of a safety plan to which the parties had agreed to abide” (E-20). The probable cause statement stated: “On November 14th, 2005, the defendant entered into an agreement to not have unsupervised visitation with minor child (CB-under the age 5). On December 12th, 2005 while exercising unsupervised visitation the defendant left the child with an unrelated male. The child was subsequently reported to be non-responsive and died from injuries received” (E-21).

Case No. 05BU-CR03899-01 was ultimately nolle prossed on the day of trial, January 29, 2007, because a co-defendant who was to be tried with Rich objected to a third-amended information (E-73-74), which the trial court then refused to allow the State to file (E-3).

On January 30, 2007, the State re-filed the charge as Case No. 07BU-CR00308 and filed a complaint alleging Rich committed the Class C felony of first-degree endangering the welfare of a child, *Section 568.045* (A-16), in that “between November 14, 2005 and December 12, 2005 ... Rich knowingly acted in a manner that created a substantial risk to the life, body and health of minor Caden Blanton, a child less than seventeen years old, by failing to protect the child and

provide a safe environment after being advised that someone was abusing the child and after observing signs of abuse, to wit: multiple bruises in various locations on the body” (E-31). The attached probable cause statement stated: “On November 14, 2005, the defendant entered into an agreement not to have unsupervised visitation with minor child Caden Blanton, under the age of five. On December 12, 2005, while exercising unsupervised visitation, the defendant left the child with an unrelated male. The child was subsequently reported to be non-responsive and died from injuries received” (E-32). This probable cause statement was, in substance, the same as the probable cause statement filed in 2005 (*Compare* E-32 with E-21). The only difference was that the 2005 statement had used some abbreviations (E-21). The fact that the probable cause statements were identical shows that the re-filed charge arises out of the same incident or operative facts as the originally-filed charge. Furthermore, the statutory charge against Rich remains the same -- the Class C felony of first-degree endangering the welfare of a child, *Section 568.045* (E-31, E-173).

While O’Connor testified that the original charge referenced a “vague” safety plan, and the re-filed charge does not reference the safety plan and “track[s] more of the jury instructions, the MAI for child endangering, which makes it a much more difficult case in my opinion,” this does not make the re-filed charge a different or separate matter from that for which O’Connor was retained. What O’Connor really means is that the re-filed charge is more likely to result in a guilty verdict. But the fact that O’Connor is not as likely to obtain an acquittal should

not relieve O'Connor of the representation for which he was hired and paid, especially where the consequence is to foist the burden and cost of the representation on the Public Defender and Missouri taxpayers. The incident and operative facts remain the same. The statutory charge remains the same. Only the particular manner in which the charge is filed has changed. However, because O'Connor was retained to defend against a child endangerment charge before the exact charge was even filed (E-144, E-149, A-8, A-12), he could not have been – and was not -- hired to represent Rich only if the child endangerment charge were alleged in one particular manner. Thus, under the facts here, the re-filed case must be considered the same or a continuation of the originally-filed case for purposes of determining under *Section 600.086.1* whether Rich had the “means at [her] disposal or available to [her] to obtain counsel in [her] behalf.” Here, Rich had such means since she actually obtained O'Connor to defend against the child endangerment charge.

Respondent Judge Taylor, in appointing the Public Defender, found that “Rich now does not have the means to hire an attorney,” and that “O'Connor has not entered [his appearance] in this particular [re-filed] case” (E-84-85; A-6-7). Respondent's ruling elevates form – i.e., case numbers -- over substance, and ignores the clear intent and purpose of *Section 600.086.1*, which is to provide Public Defender counsel only to those indigent defendants who cannot obtain counsel by any other means, and to conserve scarce taxpayer funds by limiting Public Defender representation to such defendants. Rich paid O'Connor more

than \$20,000 in attorney's fees (E-53, E-72) to represent her in defending against child endangerment charges arising out of a known incident and known operative facts. O'Connor was prepared to go trial the day that the charge was dismissed (E-74). Surely the legislature did not intend a defendant who pays a private counsel such a large sum of money to represent her to then be appointed a Public Defender -- with the resulting burdens and costs to the Public Defender and taxpayers -- merely because of the fortuitous event that a charge was nolle prossed due to a co-defendant's objection (E-73-74) and immediately re-filed under a different case number.

The Court of Appeals, in at least two cases, has issued writs of prohibition to prohibit appointment of the Public Defender when appointment was not authorized under Chapter 600. In *State ex rel. Shaw v. Provaznik*, 708 S.W.2d at 339, the Eastern District granted a writ of prohibition to prohibit a trial judge from appointing the Public Defender to represent a defendant in a case involving only civil contempt because the relevant portions of Chapter 600 did not authorize appointment of the Public Defender in such cases. The Eastern District held that the trial court exceeded its authority in appointing the Public Defender. *Id.* In *State ex rel. Tanzey v. Richter*, 762 S.W.2d at 858, the Eastern District granted a writ of prohibition to prohibit a trial judge from appointing the Public Defender to represent a non-indigent defendant. The Eastern District held the trial court had "no jurisdiction" under *Section 600.086.1 RSMo. 1986* to appoint the Public Defender because the defendant was not indigent. *Id.*

Respondent Judge Taylor exceeded his jurisdiction, authority and power in appointing the Public Defender because Rich is not eligible for representation under the first prong of *Section 600.086.1* since Rich had “the means at [her] disposal or available to [her] to obtain counsel,” and in fact, obtained retained counsel. This Court should make permanent its preliminary writ on this basis and prohibit Judge Taylor’s orders of February 2 and 26, 2007, appointing the Public Defender to represent Rich.

***RESPONDENT ABUSED HIS DISCRETION IN NOT REQUIRING
O’CONNOR TO CONTINUE TO REPRESENT RICH***

That Respondent’s ruling exceeded his jurisdiction, authority and power under *Section 600.086.1* is not the only basis on which this Court should make permanent its preliminary writ, however. This Court should also hold that Respondent abused his discretion in not requiring O’Connor to continue to represent Rich. In addition, assuming, *arguendo*, that Respondent had statutory authority to appoint the Public Defender – and if this Court should find such statutory authority – then this Court should hold that Respondent abused his discretion in appointing the Public Defender. The issues of Respondent appointing the Public Defender and not requiring O’Connor to continue representation are intertwined in this case, since the Public Defender ultimately was appointed to represent Rich because Respondent refused to require O’Connor to continue to do so. Respondent’s orders of February 2 and 26, 2007, are against the logic of the circumstances, arbitrary and unreasonable. ***Ponce v.***

Ponce, 102 S.W.3d at 62. The Public Defender System, its existing clients, and the taxpayers of Missouri will suffer irreparable harm if a permanent writ of prohibition and/or mandamus does not issue.

Respondent had the legal authority to require O'Connor to represent Rich by appointing him in the re-filed case, even though Rich was in arrears on her attorney's fee and O'Connor was not being further paid. *See State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. banc 1981)(holding that courts are authorized to appoint private counsel to represent indigent defendants in criminal cases); *State ex rel. Public Defender Commission v. Williamson*, 971 S.W.2d at 839 ("agree[ing] with" a trial court's order requiring a former Public Defender to continue to represent a murder defendant in a case that had been set for trial, even though the former Public Defender had been terminated from the Public Defender's Office and was no longer being paid). Respondent Judge Taylor recognized that he had the power to appoint O'Connor in Rich's re-filed case (E-84; A-6), but Respondent did not do so. This ruling was against the logic of the circumstances, was arbitrary and unreasonable under the facts of this case.

First, as stated above, the re-filed charge arises out of the same incident or operative facts as the originally-filed case, and the statutory charge against Rich in the re-filed case remains the same. O'Connor was retained to represent Rich against a child endangerment charge anticipated to arise out of this incident, not retained to represent Rich in a particular case number, or to represent her only if child endangerment were charged in a particular manner.

Second, O'Connor's own retention agreement with Rich contemplated that he would represent her through the conclusion of a trial. The agreement provided that O'Connor would provide pre-indictment representation, and if Rich were charged, representation through "Trial," "Post-Trial Motions," "Sentencing, if necessary," and "Notice of Appeal" (E-144; A-8). Rich remains charged with child endangerment, and has not yet had a trial. O'Connor has not completed the representation contemplated by his agreement.

O'Connor's agreement also provided that O'Connor "may seek leave to withdraw entirely from the matters undertaken" if his attorney's fee was not paid in full (E-146; A-10). But while an attorney may move to withdraw where the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, or where the representation will result in an unreasonable financial burden on the lawyer, *Missouri Rules of Professional Conduct 4-1.16(b)(4) and 4-1.16(b)(5)* (E-166-67; A-26-27), the right to withdraw is not unlimited. A lawyer must continue to represent a client upon order of a court, even if the lawyer would have good cause to withdraw, *Missouri Rule of Professional Conduct, 4-1.16(c)* (E-167; A-27).

An attorney who agrees to represent a client assumes a responsibility to the court as well as to the client. *Gibbs v. Lappies*, 828 F. Supp. 6, 7 (D.N.H. 1993). An attorney may protect himself or herself from risk of non-payment of a fee by requiring an adequate retainer be paid as a condition of appearing in the case. *Id.* at 8. However, where an attorney undertakes representation and then the fee is not

paid, that does not necessarily entitle the attorney to abandon his or her own professional obligations. *Id.*

Although O'Connor did not technically "withdraw" from the re-filed case, his refusal to enter that case – which case was based on the same incident and operative facts he was retained for, and which involved the same statutory charge – can be analogized to a withdrawal by counsel. O'Connor's refusal to continue to represent Rich was based on the fact that she had not paid his full attorney's fee; O'Connor told Rich after the case was nolle processed that he would not continue to represent her unless she executed a new fee agreement with him (E-73).

Courts have ruled, however, that private criminal defense counsel should not be permitted to withdraw – i.e., cease representation -- and foist the expense of the cases onto taxpayers merely because the private counsel have not been paid their full attorney's fees. In *United States v. Rodriguez-Baquero*, 660 F. Supp. 259, 260 (D. Me. 1987), criminal defense counsel moved to withdraw from representation because he had only been paid \$3,800 of an expected \$10,000 fee. The attorney had represented defendant from September 1986 to May 1987. *Id.* The trial court denied the motion to withdraw, ruling:

Only a single reason is advanced to permit Mr. Orta to withdraw: that, as privately retained counsel, Mr. Orta made a bad deal in accepting employment by and appearing for the Defendant and now wishes to be relieved of the consequences of that transaction. Such withdrawal, however, could occur only to the

prejudice of Defendant's substantial rights and the interests of the speedy administration of justice and judicial economy, and might, apparently, thrust the burden of the expense of counsel on the public fisc after Mr. Orta had received and spent significant assets of the Defendant which otherwise would have been available to help defray the expense of court-appointed counsel.

Id. at 261.

In *United States v. Parker*, 439 F.3d 81, 84-85 (2d Cir.), *cert. denied* 127 S.Ct. 456 (2006), defendant hired private counsel, and ultimately paid him \$43,000. The attorney entered a full appearance. *Id.* at 85. After “extensive pretrial litigation,” instead of seeking a plea, defendant decided to proceed to trial. *Id.* Defendant, through the attorney, then moved to invoke the federal law – the Criminal Justice Act, or “CJA” -- which allows appointment and payment of counsel for indigent persons. *Id.* at 86. The trial court denied appointment and payment, and the Court of Appeals affirmed. The courts noted that “the purpose of the CJA is not to bail out an attorney who fails to make adequate fee arrangements before accepting representation.” *Id.* at 102. The Court of Appeals noted a history under the CJA where private counsel would undertake representation of defendants until funds ran out, and then seek to withdraw or be appointed and paid under the CJA, *id.* at 102 -- a practice which interferes with the effective administration of justice, requires duplicative legal services, and increases the risk of substandard representation due to non-continuity of counsel,

id. at 107. The Court noted that “[n]on-payment of legal fees, without more, is not usually a sufficient basis to permit an attorney to withdraw from representation” (citation omitted). *Id.* at 104. Finally, the Court noted that CJA funds are a “limited resource” and courts should avoid an interpretation of the CJA that requires use of public funds for ineligible defendants. *Id.* at 109. The Court also noted “the public’s strong interest in how its funds are being spent in the administration of criminal justice” (citation omitted). *Id.*

In *In re Stuart*, 646 N.W.2d at 524-25, the Minnesota Supreme Court found that the trial court abused its discretion in the manner in which it denied the Public Defender’s determination of non-eligibility for services. The Supreme Court held that in order to protect the right to effective counsel for all, courts must “jealously guard” the resources of the Public Defender and “not provide counsel to those who are able to afford an attorney.” *Id.* at 524. The Supreme Court noted that “[w]hen an ineligible defendant is provided with services by the public defender, those finite resources are improperly diverted from the representation of other clients of the public defender,” and that Public Defender resources have not kept pace with increased workloads. *Id.* at 524-25. “For these reasons,” the Supreme Court concluded, “qualification of applicants is essential so that the resources of the public defender system are not unnecessarily depleted by people who, in their own right, can obtain legal counsel with their own resources.” *Id.* at 525.

In *State v. Kennell*, 605 S.W.2d at 820, defense counsel sought to withdraw on the morning of trial because defendant had failed to pay him as agreed. The trial court denied leave to withdraw. *Id.* The Southern District found no abuse of discretion. *Id.* The Court noted that defense counsel had represented defendant at the preliminary hearing and all circuit court proceedings, and that the case had been set for trial for two months. *Id.*

Here, O'Connor may have made what he perceives as a "bad deal" for himself in undertaking to represent Rich for less money than O'Connor had hoped, but O'Connor should not be permitted to shift the consequences of his perceived "bad deal" onto Public Defender attorneys and the taxpayers of Missouri. *See United States v. Rodriguez-Baquero, supra; United States v. Parker, supra.* Moreover, O'Connor's situation was not objectively "bad" in that O'Connor has already received more than \$20,000 in net attorney's fees for representation in a Class C felony (E-53, E-72). O'Connor was prepared to go to trial when the charge was dismissed (E-74). It would hardly be an unreasonable financial burden to require O'Connor to complete Rich's criminal case in the trial court.

Taxpayer and Public Defender funds should not be used for those who are not eligible. *See State ex rel. Tanzey v. Richter*, 762 S.W.2d at 858 (issuing writ of prohibition to prohibit trial court from appointing the Public Defender to represent a non-indigent defendant who was not eligible for representation under *Section 600.086.1 RSMo. 1986*). The Public Defender and taxpayers are not financial rescue plans for attorneys who make perceived "bad deals" for

themselves in undertaking representation with a lower retainer than they would have liked.

Judge Taylor recognized that he had the power to appoint O'Connor to the case, and that "Rich does have claims against Mr. O'Connor" (presumably for not completing the representation), but Judge Taylor found this was "better handled in another form other than in the criminal case" (E-84; A-6). It is against the logic of the circumstances, arbitrary and unreasonable to shift the burden and cost of Rich's representation to the Public Defender and taxpayers. The criminal case is the proper place to resolve this matter, by requiring O'Connor to continue to represent Rich. Otherwise, the Public Defender, its existing clients, and taxpayers will all be irreparably harmed. It is against the logic of the circumstances, arbitrary and unreasonable that when an attorney has received more than \$20,000 in net attorney's fees (E-53, E-72) for representation against a charge, that the burden and cost of the representation be shifted to the Public Defender and taxpayers merely because the original charge was nolle prossed and immediately re-filed. An attorney should not be permitted to take such substantial resources of a defendant, only to abandon the representation and foist the burden and cost on the public.

Despite the fact that the Office of Chief Disciplinary Counsel verbally told O'Connor that he did not have to enter the re-filed case (E-73), OCDC opinions are advisory only, and courts must reach their own independent conclusions of facts and law. *See In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. banc 2004). Judge

Taylor's ruling focused on the "bottom line" of Rich's indigence (E-84; A-6). But, as shown above, indigence is not the sole test of eligibility under *Section 600.086.1*. It was not statutorily authorized, and was against the logic of the circumstances, arbitrary and unreasonable to shift the burden and expense of Rich's representation to the Public Defender, when O'Connor had been paid more than \$20,000 to represent Rich against the child endangerment charge (E-53, E-72).

Respondents' Return contends that under Relator's "theory and logic ... O'Connor would be obligated to represent Heather Rich on any charge filed in the future by the State of Missouri" (Return at p. 12). Relator is making no such contention. Relator believes O'Connor is only required to represent Rich against the anticipated incident and charge of child endangerment for which he was retained and paid. If Rich were charged in the future with a different crime – such as burglary – based on a different incident or a different set of operative facts, O'Connor should not be required to represent Rich. That would be a truly new or different case or matter.

Nor does the fact that O'Connor is attempting to collect the amount that Rich still owes him justify not appointing O'Connor to the case (E-82-83; E-148). If that were the rule, when clients had not paid full fees, attorneys could always abandon representation merely by seeking to collect the amount they are owed.

IRREPARABLE HARM WILL RESULT IF A WRIT DOES NOT ISSUE

Finally, Respondent Judge Taylor’s ruling is against the logic of the circumstances, arbitrary and unreasonable since the ruling only worsens the Public’s Defender’s serious caseload crisis (E-39-40, E-103, E-140; A-4-5), and irreparably harms existing clients by requiring already-burdened Public Defender attorneys to undertake representation in yet another case. *See In re Stuart* , 646 N.W.2d at 524-25. O’Connor served as Rich’s attorney for more than one year, and is familiar with her case (E-144, E-3; A-8). He was ready for trial (E-74). This Court – and all Missouri courts -- should recognize that the Public Defender System faces a caseload crisis (E-39-40, E-103, E-140; A-4-5). Missouri courts should recognize that the Public Defender cannot bear the burden of having cases being forced on the Public Defender, when private counsel are available in those cases. The Public Defender has a financial obligation to conserve scarce State funds by representing only those persons who are eligible under *Section 600.086.1*. *See In re Stuart*, 646 N.W.2d at 524-25.

Moreover, the Public Defender has a professional, ethical obligation to ensure that its caseload does not exceed a level that can competently be handled by its attorneys. *See American Bar Association Standing Committee On Ethics And Professional Responsibility Formal Opinion 06-441* (May 13, 2006)(E-157-165; A-17-25); *see also Comment to Missouri Rule of Professional Conduct 4-1.3* (“A lawyer’s workload should be controlled so that each matter can be handled adequately”)(A-29). The Public Defender’s “primary ethical duty is owed to

existing clients.” *American Bar Association Standing Committee On Ethics And Professional Responsibility Formal Opinion 06-441 at 4* (emphasis added)(E-160; A-20). The Public Defender cannot accept cases such as Rich’s in which representation is not authorized, and which will only further over-burden the Public Defender and irreparably harm existing clients by consuming attorney time and resources that would otherwise be devoted to existing clients.

CONCLUSION

A writ of prohibition is appropriate to prevent usurpation of judicial power when the trial court lacks jurisdiction, to remedy an excess of jurisdiction or abuse of discretion whether the lower court lacks the power to act as intended, or where a party will suffer irreparable harm if relief is not made available. *State ex rel. T.W. v. Ohmer*, 133 S.W.3d at 43. A writ of mandamus is appropriate to compel a court to do that which it is obligated by law to do, *State ex rel. Leigh v. Dierker*, 974 S.W.2d at 506, and to remedy an abuse of discretion, *State ex rel. Charles F. Vatterott Commercial Properties v. Rush*, 572 S.W.2d 864.

As shown above, Relator’s request for a writ meets each of these tests. Therefore, this Court should make permanent a writ of prohibition and/or mandamus to prohibit Judge Taylor’s orders of February 2 and 26, 2007, appointing the Public Defender and not requiring O’Connor to continue the representation.

Respondents’ Return suggests that this Court cannot order any relief because Judge Taylor is no longer the judge in this case since the preliminary

hearing has already been held, and Circuit Judge Jackson has made no rulings or orders in this case (Return at p. 12). However, a writ may be directed to a successor judge than the one who made the actual ruling at issue. *State ex rel. Tuller v. Crawford*, 211 S.W.3d 676, 679 (Mo. App., S.D. 2007); *State ex rel. St. Louis County v. Enright*, 729 S.W.2d 537, 541 (Mo. App., E.D. 1987). This is because the “judge denominated as respondent is merely a nominal figure.” *Enright*, 729 S.W.2d at 541. A writ action involves a legal issue in question -- not a ruling made by one judge or another. *Id.* The Public Defender sought a writ against Judge Taylor over his appointment of the Public Defender while the case was still pending in Associate Circuit Court. The fact that Judge Taylor would not wait for the writ action to be concluded before holding a preliminary hearing and sending the case to Judge Jackson in Circuit Court should not deprive the Public Defender of an opportunity to seek appellate review of Judge Taylor’s ruling appointing the Public Defender – which ruling remains in effect. The issues here are the power of any judge to appoint the Public Defender to this case, and who should represent Rich. *Enright*, 729 S.W.2d at 541.

This Court should make permanent a writ of prohibition and/or mandamus to prohibit the orders of February 2 and 26, 2007, appointing the Public Defender and not requiring O’Connor to continue the representation.

II.

Relator is entitled to a permanent writ prohibiting Respondent from appointing the Public Defender and not requiring O'Connor to continue representation without requiring O'Connor to refund or pay his \$20,282.19 attorney's fee to Rich or to the court to be held in escrow to hire another private counsel, because Respondent abused his discretion in not requiring O'Connor to refund the money and irreparable harm will result if a writ does not issue, in that:

(1) it was against the logic of the circumstances, arbitrary and unreasonable for O'Connor to be allowed to cease representation but keep his fee since O'Connor could have protected himself from what he perceives as an inadequate fee by requiring a higher retainer before O'Connor undertook representation;

(2) O'Connor should not be permitted to profit from his failure to obtain a higher retainer where the result is to shift the cost and burden of the representation to the Public Defender and Missouri taxpayers; and,

(3) the criminal case is the proper forum in which to resolve Rich's claims against O'Connor for not continuing the representation, because otherwise the Public Defender will face further case overload, which will harm existing clients, and Missouri taxpayers will bear the cost of the representation.

Relator contends that for the reasons stated in Point I, *supra*, this Court should make permanent a writ of prohibition and/or mandamus and prohibit Judge Taylor's orders appointing the Public Defender and not requiring O'Connor to continue to represent Rich. Alternatively, however, if this Court does not grant the relief requested in Point I, this Court should make permanent its preliminary writ and hold that Respondent abused his discretion in not requiring O'Connor to return or pay his attorney's fees to Rich to allow her to hire another private counsel.⁹

At the February 26 hearing, the Public Defender requested that the court order O'Connor to continue representation in the re-filed case (E-79). Alternatively, however, the Public Defender requested that the court order the "return [of] sufficient funds or somehow provide for Heather Rich to have an attorney rather than imposing that burden on the tax payers of the State of Missouri and the public defender" (E-79).

Respondent Judge Taylor found that "Mr. O'Connor does have claims against Mrs. Rich, and Mrs. Rich does have claims against Mr. O'Connor" (presumably for not continuing the representation), but Judge Taylor ruled that

⁹ In the interest of brevity, Relator will not repeat his full argument for why Respondent exceeded his jurisdiction, authority and power, or abused his discretion, in appointing the Public Defender.

those matters “can be better handled in another form than in the criminal case” (E-84; A-6).

When a private counsel seeks to withdraw for non-payment of further fees, Missouri taxpayers and the Public Defender should not have to bear the cost and burden of the representation when private counsel is retaining any money for representation in the matter but not completing the case. In these situations, returning or paying the money to the defendant to hire another private attorney -- or to the court to be held in escrow for this purpose¹⁰ -- will restore the defendant to a similar position he or she was in before the original private counsel was hired, and importantly, also protect the taxpayers and the Public Defender. The available money can then be used by the defendant to hire another private counsel willing to do the case for the amount available, or if the money is insufficient for the defendant to find other private counsel and the Public Defender must ultimately undertake representation, the money can go to the Public Defender as part of a limited cash contribution or to pay Public Defender liens. *See Section 600.090.1(1) and .2 RSMo. 2000* (authorizing the Public Defender to collect a limited cash contribution toward the cost of representation from persons able to

¹⁰ The Public Defender expressly requested this escrow option in the companion case of *State ex rel. J. Marty Robinson v. the Hon. Frank Conley*, No. SC88404.

pay, and requiring the Public Defender to effectuate liens for services).¹¹ Without such a rule, any private bar business in a criminal case can be shifted to taxpayers and the Public Defender at no cost to the private attorney. Such a result gives private attorneys an incentive to enrich themselves without producing completed legal services that have significant value. If attorneys are at least required to return money in situations in which the taxpayers may have to cover the cost of the representation, this will provide incentive that if private counsel believe they must withdraw, they will do so at the earliest opportunity in a case. This will help ensure that if the Public Defender is ultimately required to represent the defendant, the case will not be old, and the Public Defender will have more time to work on

¹¹ In Rich's case, the more than \$20,000 which O'Connor was paid in attorney's fees (E-53, E-72) would undoubtedly be sufficient for Rich to hire another private attorney to represent her in her Class C felony case. In cases where a defendant could not find another private attorney, however, the Public Defender could use the money to hire contract counsel, if the Public Defender were ultimately appointed and the money came to the Public Defender. Thus, Public Defender attorneys would not be further overburdened, existing clients would not be harmed, and taxpayers would not bear the cost of the representation. Even if the money were insufficient to hire contract counsel, the money would still defray some of the cost of public representation as required by *Sections 600.090.1(1) and .2.*

the case and prepare it; more time to obtain contract counsel if the Public Defender needs to contract the case out; and more ability for the Public Defender to manage its overwhelming caseload.

STANDARD OF REVIEW

“The extraordinary remedy of a writ of prohibition is appropriate in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court’s order.” *State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41, 43 (Mo. banc 2004).

A trial court’s decision regarding attorney’s fees is within its discretion. *Granat v. Scott*, 766 S.W.2d 748, 749 (Mo. App., E.D. 1989). Appellate review is for abuse of discretion. *Id.* Abuse of discretion will be found where a court’s ruling is against the logic of the circumstances, or is arbitrary or unreasonable. *Ponce v. Ponce*, 102 S.W.3d 56, 62 (Mo. App., W.D. 2003).

O’CONNOR SHOULD BE REQUIRED TO REFUND OR PAY HIS ATTORNEY’S FEES TO RICH TO ALLOW HER TO HIRE ANOTHER PRIVATE COUNSEL

Missouri has a fiscal and public policy interest in ensuring that private counsel are not allowed to cease representation in criminal cases, and then foist the expense and burden of the cases on taxpayers and the Public Defender --- while

keeping the profits for themselves. *See United States v. Rodriguez-Baquero*, 660 F. Supp. 259, 261 (D. Me. 1987)(denying private defense attorney leave to withdraw from criminal case where full fee was not paid, since allowing withdrawal would “thrust the burden of the expense of counsel on the public fisc after [attorney] had received and spent significant assets of the Defendant which otherwise would have been available to help defray the expense of court-appointed counsel”); *United States v. Parker*, 439 F.3d 81, 102 and 109 (2d Cir), *cert. denied*, 127 S.Ct. 456 (2006)(noting that purpose of federal statute allowing appointment and payment of counsel in criminal cases “is not to bail out a[] [private] attorney who fails to make adequate fee arrangements before accepting representation” and noting “the public’s strong interest in how its funds are being spent in the administration of criminal justice”).

“A lawyer should not accept representation in a matter unless it can be performed ... to completion.” *Comment to Missouri Rule of Professional Conduct 4-1.16* (E-167; A-27). An attorney who agrees to represent a client assumes a responsibility to the court as well as to the client. *Gibbs v. Lappies*, 828 F. Supp. 6, 7 (D.N.H. 1993). An attorney may protect himself or herself from risk of non-payment of a fee by requiring an adequate retainer be paid as a condition of appearing in the case. *Id.* at 8. However, if an attorney undertakes representation and the fee is not paid, the attorney is not necessarily entitled to abandon the representation. *Id.*; *Missouri Rule of Professional Conduct 4-1.16(c)*(A-19).

While O'Connor performed work for Rich, O'Connor has not completed his defense of the incident, operative facts and charge for which he was hired, and he should not be permitted to cease representation where the consequence is to shift the cost of completing the representation to the Public Defender and taxpayers. O'Connor's work has little or no value to Rich if O'Connor is not required to finish the re-filed case. Nor does O'Connor's work have substantial value to successor counsel. This is because any new counsel in the case will have to learn the case from scratch. The fact that O'Connor may have spent hours reading police reports, for example, is of no value to successor counsel since the new counsel will have to read the police reports, too – thus, duplicating what O'Connor has done. It is against the logic of the circumstances, is arbitrary and unreasonable for O'Connor to be able to keep a fee for work that has no value to Rich or successor counsel. *Cf. Missouri Rule of Professional Conduct 4-1.16(d)*(upon termination of representation, an attorney shall refund any advance payment of fee that has not been earned)(E-167; A-27).

Requiring counsel to refund a fee is not unprecedented, and is justified by the logic of the circumstances in the instant case.

A trial court “has the inherent power and responsibility to supervise and regulate the conduct of attorneys who appear and practice before it.” *Terre Du Lac Prop. Owners' Ass'n v. Shrum*, 661 S.W.2d 45, 47 (Mo. App., E.D. 1983). In *In re Marriage of Redmond*, 131 P.3d 1167, 1170 (Colo. Ct. App. 2005), the Colorado Court of Appeals held that a trial court may order an attorney to refund

his or her fees under the court's inherent supervisory powers where the attorney violated the Colorado Rules of Professional Conduct. The Colorado court analogized to bankruptcy cases in which courts have ordered refund of attorney's fees where the attorney operated under a conflict of interest. *See id.* (citing various bankruptcy cases); *see, e.g., In re 765 Associates*, 14 B.R. 449, 452 (Bankr. D. Hawaii 1981).

This Court has stated that “[t]he question of compensation for the lawyer when the client-lawyer relationship ends before the lawyer has completed the services turns upon a determination of whether there has been ‘just cause’ for the lawyer’s withdrawal.” *International Materials Corp. v. Sun Corp.*, 824 S.W.2d 890, 894 (Mo. banc 1992). An attorney may have “just cause” to withdraw where there has been “refusal to pay fees” owed, *id.*, although this right is limited by the fact that courts may still order the attorney to complete the representation despite non-payment of fees, *see, e.g., United States v. Rodriguez-Baquero, supra; United States v. Parker, supra; State v. Kennell*, 605 S.W.2d 819, 820 (Mo. App., S.D. 1980)(counsel not permitted to withdraw on eve of trial for non-payment of fee); *Missouri Rule of Professional Conduct 4-1.16(c)* (E-167; A-27).

Important to the instant case, this Court has noted that, under some circumstances, an attorney may be required to forfeit a right to compensation. *International Materials Corp. v. Sun Corp.*, 824 S.W.2d at 895. This may occur if the attorney deliberately breached a duty to the client. *Id.* This Court further

defined when forfeiture would be appropriate by giving an example of when it is not appropriate. This Court stated:

Forfeiture is generally inappropriate when the lawyer has done nothing willfully blameworthy, for example, where a conflict of interest arises after the lawyer accepts the client's case and the conflict *could not have been discovered at the time the attorney accepted the case*....Forfeiture serves no purpose when the relationship terminates as a consequence of *events beyond the lawyer's reasonable control*.

Id. (emphasis added).

In the instant case, O'Connor could have easily protected himself from non-payment of his total fee merely by requiring a higher retainer be paid before O'Connor undertook representation. *See Gibbs v. Lappies*, 828 F. Supp. at 7. O'Connor is solely responsible for failing to obtain a higher retainer before commencing representation. This was not an event beyond his reasonable control. O'Connor's own failure to obtain a higher retainer has resulted in him refusing to continue representation in the re-filed case, and foisting the cost of representation on the Public Defender and taxpayers. O'Connor is not blameless in this matter. O'Connor was free to make a "business decision" to undertake representation of Rich for a small retainer, and hope for future fees and payments later. But by undertaking representation under such circumstances, O'Connor should bear the risk of loss when further fees were not paid – not put the burden on the public.

Requiring him to refund or pay his attorney's fee to Rich would serve the legitimate purpose of not rewarding O'Connor for failing to obtain a higher retainer, and, importantly, would protect the Public Defender and taxpayers from bearing the burden and cost of O'Connor's business decision.

If attorneys like O'Connor would not accept representation in the first place without what they would regard as an adequate retainer, defendants would be able to use what money they have to hire different private attorneys in the first instance who are willing to do the case for the amount of money the defendants have; thus, the problem of counsel seeking to withdraw or cease representation might be avoided entirely.¹² In Rich's case, there can be little doubt that Rich would have

¹² Attorneys should remain free to accept cases for partial fees with promises to pay more later, but if further fees are not forthcoming, attorneys should understand that they bear the risk of loss in the representation, and cannot shift the burden and cost to the Public Defender. Such attorneys are not without remedy, however, for non-payment of fees. They may seek a civil remedy against their clients – or the persons who contracted to pay the attorneys -- to collect money owed. That might not always provide immediate financial recovery to the attorneys. But requiring attorneys to seek a civil remedy – rather than allowing the attorneys to cease representation and appointing the Public Defender -- would protect the Public Defender and taxpayers, who should not bear the burden for private attorneys' failure to get what they would regard as an adequate fee arrangement. O'Connor

been able to find an attorney other than O'Connor to represent her in her Class C felony case for the more than \$20,000 which she had available (E-53, E-72).

Respondent's ruling appointing the Public Defender and not requiring O'Connor to refund his attorney's fees to Rich is against the logic of the circumstances, arbitrary and unreasonable because O'Connor could have readily protected himself from non-payment of his total fee by requiring a higher retainer be paid before O'Connor undertook representation. O'Connor should not benefit or profit at the expense of the Public Defender and taxpayers, since it was O'Connor himself who made what he now believes to be an inadequate fee arrangement.

Relator recognizes that the money in this case was paid to O'Connor by Rich's mother (E-53). However, Relator contends that a refund can be made directly to Rich herself -- or paid into court to be held in escrow for hiring another attorney. This is because the money was, in effect, a gift to Rich to be used for hiring counsel for her defense. The money went to O'Connor for the purpose of providing a defense for Rich. That purpose would continue to be fulfilled if the money is refunded to Rich -- or to the court -- for use in hiring another counsel.

is seeking a civil remedy (E-82-83, E-148). He should not be permitted to cease representation, and thrust the cost and burden of the representation on the Public Defender due to his own error in failing to obtain a higher retainer. He should have to stay in the case, or pay back the money.

Cf. Obermeyer v. Bank of America, 140 S.W.3d 18, 23 (Mo. banc 2004)(discussing that when it is no longer possible to carry out a charitable gift exactly as a donor specified, the gift should be carried out as nearly as possible as the donor intended).

Relator also recognizes that the “refund” remedy which Relator seeks may seem novel, even though requiring counsel to refund money in other situations is not unprecedented.¹³ *See, e.g., In re Marriage of Redmond, supra*. Just because a remedy is novel, however, does not mean it is inappropriate. If courts permit counsel to cease representation, they should fashion a remedy to prevent harm to the Public Defender, its existing clients and taxpayers. *See, e.g., May Dept. Stores Company v. County of St. Louis*, 607 S.W.2d 857, 870 (Mo. App., E.D. 1980)(courts may fashion remedy to fit the particular facts, circumstances and

¹³ In situations where private counsel seek to cease representation and have the Public Defender appointed, courts seeking to avoid harm to the Public Defender and taxpayers typically require counsel to continue to represent the defendant, even though counsel was not paid his or her desired or full fee. *See, e.g., United States v. Rodriguez-Baquero, supra; United States v. Parker, supra*. This may be considered the “traditional” remedy to the problem of private counsel foisting cases on the Public Defender, and it is the remedy Relator seeks in Point I, *supra*. However, the “refund” remedy is an appropriate alternative.

equities of a case). Respondent abused his discretion in not fashioning a remedy appropriate to the situation.

If O'Connor were required to return the money, Rich could use it to hire another private counsel. Thus, the Public Defender, its existing clients, and taxpayers would not be burdened and harmed. Respondent Judge Taylor ruled that although "Mr. O'Connor does have claims against Mrs. Rich, and Mrs. Rich does have claims against Mr. O'Connor" (presumably for not continuing the representation), this "can be better handled in another form other than in the criminal case" (E-84; A-6). This is against the logic of the circumstances, arbitrary and unreasonable. The criminal case is the proper place to resolve these matters, so that Rich may hire another private counsel, and the burden and cost of her representation not be thrust on the Public Defender and taxpayers. Irreparable harm will result to the Public Defender, its existing clients and taxpayers if O'Connor is not required to refund the \$20,282.19 in net attorney's fees which he received and retains after deducting for expenses (E-53, E-72), since the Public Defender will face further case overload (E-39-40, E-103, E-140; A-4-5), and taxpayers will bear the cost of the representation.

Thus, if this Court does not make permanent its preliminary writ and prohibit Respondent's order appointing the Public Defender and not requiring O'Connor to continue to represent Rich as requested in Point I, then this Court should hold that Respondent abused his discretion in not requiring O'Connor to return or pay his attorney's fees to Rich or the court to allow her to hire another

private counsel. In either event, this Court should make permanent its preliminary writ prohibiting Respondent from appointing the Public Defender.

CONCLUSION

For the reasons stated in Point I, Relator respectfully requests that this Court make permanent a preliminary writ of prohibition and/or mandamus to prohibit the orders of February 2 and 26, 2007, appointing the Public Defender and not requiring O'Connor to continue the representation.

Alternatively, for the reasons stated in Point II, Relator respectfully requests that this Court make permanent its preliminary writ of prohibition on grounds that Respondent Judge Taylor abused his discretion in not requiring O'Connor to return or pay his attorney's fees of \$20,282.19 to Rich or the court to allow her to hire another private counsel.

In either event, this Court should make permanent a writ prohibiting Respondents from appointing the Public Defender.

Respectfully submitted,

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Certificate of Compliance and Service

I, J. Gregory Mermelstein, hereby certify to the following:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 14,100 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief contains a complete copy of this brief. It has been scanned for viruses using the McAfee VirusScan Enterprise 7.1.0 program, which was updated in June, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 28th day of June, 2007, to Ronald R. Holliday, Assistant Prosecuting Attorney, Buchanan County Courthouse, 411 Jules, St. Joseph, MO 64501, and one true and correct copy and a floppy disk containing a copy of this brief was mailed, postage prepaid this 28th day of June, 2007, to Hon. Ronald E. Taylor, Associate Circuit Judge, 411 Jules, St. Joseph, MO 64501; Hon. Randall Jackson, Circuit Judge, 411 Jules, St. Joseph, MO 64501; Mary Beattie, Circuit Clerk, Buchanan County Circuit Court, 411 Jules, Room 331, St. Joseph, MO. 64501; Matthew O'Connor, The O'Connor

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J. Gregory Mermelstein