

Summary of SC89882, *State ex rel. Missouri Public Defender Commission, J. Marty Robinson, and Wayne Williams v. The Honorable Kenneth W. Pratte*, consolidated with

SC90195, *State ex rel. Missouri Public Defender Commission, J. Marty Robinson, and Kevin O'Brien v. The Honorable Gene Hamilton and the Honorable Gary Oxenhandler*

SC89882 is an original proceeding from St. Francois County, Judge Kenneth W. Pratte; SC90195 is an original proceeding from Boone County involving two cases, one before Judge Gene Hamilton and the other before Judge Gary Oxenhandler

Opinion issued Dec. 8, 2009

Attorneys: In Case No. SC89882, the public defender commission, state public defender and county public defender were represented by Daniel J. Gralike of the public defender's office in Columbia, (573) 882-9855; and the county prosecutor was represented by Wendy W. Horn and Patrick L. King of the St. Francois County prosecuting attorney's office in Farmington, (573) 756-1955.

In Case No. SC90195, the public defender commission, state public defender and district defender were represented by J. Gregory Mermelstein of the public defender's office in Columbia, (573) 882-9855, and Antwaun L. Smith of Shook Hardy & Bacon LLP in Kansas City, (816) 559-2452; and the county prosecutor was represented by Stephanie Morrell of the Boone County prosecutor's office in Columbia, (573) 886-4100.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The constitution requires that the state provide attorneys for indigent persons facing criminal charges that may result in incarceration. An adequate supply of lawyers available to represent indigent defendants is as important to the functioning of the criminal justice system as are adequate resources for law enforcement, prosecutors and courts. To address the problem that the resources the state provides for indigent defense are inadequate, the public defender commission adopted rules under which caseload limits were established for each office and, when the caseload was exceeded, the office would be certified as having "limited availability." This opinion addresses three challenges to courts' appointments of the public defender to represent certain criminal defendants where the commission's rule did not allow the appointment. In a 7-0 decision written by Judge Michael A. Wolff, the Supreme Court of Missouri struck down certain provisions of the rules that permitted the public defender to deny representation to certain indigent defendants whom state statutes otherwise required the public defender to represent, and the Court prohibited a trial judge from appointing a public defender to represent an indigent defendant in the lawyer's "private" capacity.

Although the public defender commission is authorized to establish rules managing the public defender's caseload, its rules may not conflict with statutes. The portion of the rule excluding an otherwise indigent person from representation because the person previously retained private counsel is contrary to the statute and is invalid. The provision of the rule allowing a public defender office to decline categories of cases is contrary to the statute and is invalid. Further, a trial court has no authority to appoint a public defender in the lawyer's "private capacity," as this conflicts with the statute.

Although portions were struck down, the commission's rules still permit the public defender, prosecutor and presiding judge to confer and agree on measures to reduce the demand for the services of a public defender office that has been certified as having "limited availability." Under the rules, these measures might include the prosecutors' agreement to limit the cases in which they seek incarceration; determining cases in which the court will appoint private attorneys; a determination by judges that attorneys will not be appointed in certain cases, which would result in the cases not being available for trial or disposition; or, in the absence of agreement, the public defender may make an office unavailable for any appointments until the caseload falls below the limits. These actions are intended to assure that all indigent defendants – whether represented by the public defender or other counsel – receive effective legal representation.

Facts: Under the Sixth Amendment to the federal constitution, no person may be imprisoned for any offense unless he was represented at trial by legal counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). This legal counsel also must be effective. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). If a defendant cannot afford legal counsel, then the state is required to appoint counsel to represent the defendant. *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963). After *Gideon* was decided, Missouri's indigent defendants were represented by unpaid court-appointed attorneys. In 1971, however, this Court held the state could not compel private attorneys to discharge alone a duty that constitutionally is the state's burden. *State v. Green*, 470 S.W.2d 571, 572 (Mo. banc 1971). The next year, the legislature established a public defender commission and created a blended system of local public defender offices and appointed counsel programs. Because of a funding shortage, this Court was asked in 1981 to compel the state to pay attorneys for their work. *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. banc 1981). The Court said it could not do so but, instead, it directed that members of the legal profession represent indigent defendants until the legislature could resolve the funding shortage and set forth temporary guidelines to ensure private attorneys did not become overburdened. *Id.* at 67-8. The following year, the legislature created the state public defender's office in chapter 600, RSMo, and placed it under the control of the public defender commission. The legislation authorized the director of the office to determine whether an accused was indigent and, if so, to appoint private counsel to represent the accused for a set contract fee. In 1989, the legislature authorized the state public defender to hire assistant public defenders in addition to contracting with private attorneys to provide defense services by means of a centrally administered organization.

This is the system still in use today. The public defender now represents about 80 percent of all those charged with crimes that carry the potential for incarceration, and in the past 20 years, the number of defendants sentenced for felonies nearly has tripled. In January 2006, an interim committee of the state senate reported that, although the public defender's office had had no addition to its staff in six years, its caseload had risen by more than 12,000 cases. Since the report was issued, the public defender's caseload has continued to grow, calling into question whether any public defender fully is meeting his or her ethical duties of competent and diligent representation in all cases assigned.

In December 2007, the public defender commission enacted a rule limiting the number of cases each public defender district could take without compromising the district's ability to provide constitutionally effective legal representation. Under the rule, to determine whether a district office has exceeded its caseload standard, the commission determines, in three-month intervals, the number of cases assigned to the district in each category of case types, multiplies that by the number of hours a lawyer should need to devote to such a case, and then totals to determine the total number of hours needed for attorneys to handle the caseload assigned to that district for that three-month period. If the number of hours needed to handle the caseload is greater than the number of attorney hours available, then the district is placed on "limited availability" status pursuant to 18 CSR 10-4.010(2). When such a determination is made, the public defender must notify the presiding judge of each circuit court, or the chief judge of each appellate district court, affected and must provide statistical verification that the district office has exceeded maximum allowable caseload for at least three consecutive months. After notice is given, the rule requires the public defender to consult with the court and prosecutors and then file with the court a final list of categories of cases it no longer will take. 18 CSR 10-4.010(2). As of July 2009, every public defender office in Missouri was over its calculated caseload capacity under 18 CSR 10-4.010.

In Case No. SC89882, the state charged Steven Roloff with first-degree assault and child abuse. He was represented by private counsel from June 2007 until mid-October 2008, when St. Francois County Judge Kenneth W. Pratte granted private counsel leave to withdraw. Roloff then applied for a public defender. Although the local public defender's office determined Roloff was ineligible for its services, the judge ordered the public defender to enter the case. The public defender filed a motion to rescind the appointment. At the evidentiary hearing, the public defender argued Roloff had means to obtain counsel and noted that 18 CSR 10-2.010(2) provides that the public defender may not be appointed if private counsel is allowed to withdraw from representation. The state argued Roloff did not have money to pay for a bond or his attorney and that, although his relatives and friends had paid the private attorney \$9,000, private counsel filed no pre-trial motions except the motion to withdraw. Pratte overruled the public defender's motion to rescind the appointment. The commission, the state public defender and the

district public defender seek this Court's permanent writ prohibiting the judge from appointing the public defender to represent Roloff.

Case No. SC89948 involves two cases from Boone County. In one, Jacqueline Pickrell pleaded guilty in April 2002 to a felony, received a suspended imposition of sentence and was placed on probation for five years. A year later, Pickrell was found in violation of her probation and sentenced to three years in prison, then execution of her sentence was suspended and she was placed on probation. In April 2008, Pickrell's probation was suspended and she was taken into custody. She applied for public defender services. The local public defender's office notified the trial court it was unable to represent Pickrell because, while it was on limited-availability status under 18 CSR 10-4.010, it had excluded services for alleged probation violations where a suspended execution of sentence had been imposed. Although Pickrell was on probation under a suspended execution of sentence, Judge Gary Oxenhandler appointed the public defender to represent her. The commission, the state public defender and the district public defender seek this Court's permanent writ prohibiting the judge from appointing the public defender's office to represent Pickrell.

In the other Boone County case, Mark Lobdell pleaded guilty in 2005 to a felony, was sentenced to four years in prison, then execution of his sentence was suspended and he was placed on probation. In 2008, Lobdell was charged with violating his probation, and he applied for public defender services. The district defender determined that, although Lobdell was indigent, his probation violation case was within the category of cases for which the district public defender's office was unavailable pursuant to 18 CSR 10-4.010. Judge Gene Hamilton then appointed the district public defender "as a member of the local bar" to represent Lobdell. The public defender seeks this Court's permanent writ prohibiting the judge from appointing the district public defender to represent Lobdell.

**WRIT QUASHED AS TO SC89882, PRATTE, AND SC89948, OXENHANDLER;
WRIT MADE PERMANENT AS TO SC89948, HAMILTON.**

Court en banc holds: (1) In Case No. SC89882, the preliminary writ of prohibition is quashed. The portion of 18 CSR 10-2.010 that prohibits public defender services to an indigent person who previously retained counsel exceeds the statutory authority provided to the public defender commission and director in sections 600.017(10), 600.042.1(18), and 600.086, RSMo 2000, and, therefore, is invalid. Although the commission and director are granted authority to promulgate necessary rules, they may not conflict with statutes. Section 600.086.1, RSMo 2000, mandates that the public defender "shall" consider eligible for representation a person who, under the circumstances of the case, appears indigent. The statute sets forth a number of factors that must be considered when determining a person's eligibility for the public defender's services. Here, after the public defender denied services to Roloff, Judge Pratte heard evidence of Roloff's financial circumstances, considered all the statutory factors and determined he was indigent.

Accordingly, pursuant to section 600.086, Roloff was eligible for the public defender's services. The language of 18 CSR 10-2.010, however, denies Roloff that representation and deems him ineligible solely on the basis that he retained private counsel during the pendency of the case. As such, the rule conflicts with the statute and fails to take the statutory factors into consideration. The rule, therefore, is beyond the authority of the public defender commission.

(2) In Case No. SC89948, the preliminary writ of prohibition against Judge Oxenhandler is quashed. While the commission's rule authorizes the public defender to limit when an office is available to serve indigent defendants, the rule cannot authorize the public defender to decline categories of cases the statute requires the public defender to represent. Here, 18 CSR 10-4.010 allows a district public defender to designate categories of cases to exclude from public defender representation once the district is certified as having limited availability. This directly contradicts section 600.052.4(3), RSMo 2000, which requires the public defender's office to represent indigent defendants who are charged with violating probation. Indigent defendants who are accused of violating their probation have the same Sixth Amendment right to counsel as all other indigent defendants who face the possibility of imprisonment. The commission did not have authority to promulgate 18 CSR 10-4.010(C) and (E) to the extent these rules eliminate a category of indigent defendants whom the statutes require the public defender to represent.

(3) In Case No. SC89948, the preliminary writ of prohibition against Judge Hamilton is made permanent. Rule 31.02(a) gives trial judges discretion to appoint counsel for indigent defendants to meet the defendants' constitutional right to counsel. But section 600.020.2, RSMo 2000, bars public defenders, deputy public defenders and assistant public defenders from practicing law except as authorized by chapter 600 or by commission rule. As such, public defenders cannot be appointed in their private capacity as lawyers – they do not have private capacities, and Rule 31.02(a) does not change this. Judge Hamilton lacked authority to appoint a full-time public defender in that lawyer's private capacity.

(4) The public defender commission estimates that it needs to add 176 trial lawyers and about 22 appellate lawyers to handle the public defender's current caseload. While a court can appoint private counsel to represent an indigent defendant as long as the lawyer at least is paid for out-of-pocket expenses, *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 67 (Mo. banc 1981), there is a prospect of the state being sued under the federal civil rights law – 28 U.S.C. section 1983 – for violating private counsel's right not to be deprived of his or her livelihood. Although lawyers have an ethical duty to perform public service without compensation, there are many criminal cases that are sufficiently difficult or complex that an appointment to provide representation without compensation may be oppressive or confiscatory, especially if the burden of providing such representation falls on the relatively few lawyers who appear fully qualified to defend

difficult criminal cases. In some states, courts have gone so far as to require the state to increase funding for public services, but this is a course this Court would be reluctant to pursue. The commission's rules present an approach to dealing with the situation when current state funding is inadequate to provide the effective representation to all of Missouri's indigent defendants that the federal and state constitutions require.

Section 600.017(10), RSMo 2000, empowers the commission to make any rules needed to administer the state public defender system, and section 600.042.8, RSMo 2000, authorizes the state public defender, with the commission's approval, to promulgate rules defining the organization of his office and the responsibilities of its lawyers and other personnel. The caseload management portion of these rules – 18 CSR 4.010 – permits the public defender, the prosecutor and the presiding judge to confer and agree on measures to reduce the demand for the services of a public defender office that has been certified under the rule as having “limited availability.” Under the rules, these measures might include the prosecutors' agreement to limit the cases in which they seek incarceration; determining cases in which the court will appoint private attorneys; a determination by judges that attorneys will not be appointed in certain cases, which would result in the cases not being available for trial or disposition; or, in the absence of agreement, the public defender may make an office unavailable for any appointments until the caseload falls below the limits. This prevents the rejection of categories of cases, such as occurred here and which this Court expressly rejected in *State ex rel. Public Defender Commission v. Bonacker*, 706 S.W.2d 449 (Mo. banc 1986), and *Sullivan v. Dalton*, 795 S.W.2d 389 (Mo. banc 1990). Any approach must assure that all indigent defendants – whether represented by the public defender or other counsel – receive effective legal representation.