

**Summary of SC91150, *State ex rel. Missouri Public Defender Commission, Cathy R. Kelly and Rod Hackathorn v. The Honorable John S. Waters and The Honorable Mark Orr***

Proceeding originating in Christian County, Judges Mark Orr and John S. Waters

Argued and submitted Dec. 13, 2011; opinion issued July 31, 2012

**Attorneys:** The public defenders were represented by Stephen F. Hanlon and Laura A. Fernandez of Holland & Knight LLP in Washington, D.C., (202) 828-1871; J. Gregory Mermelstein of the public defender's office in Columbia, (573) 882-9855; Stacey H. Wang of Holland & Knight LLP in Los Angeles, (213) 896-2400; and Michael P. Gunn and John R. Gun of The Gunn Law Firm PC in St. Louis, (5314) 965-1200. The prosecutors were represented by Donovan D. Dobbs, Amy J. Fite and Benjamin J. Miller of the Christian County prosecutor's office, (417) 581-7915.

Two organizations filed briefs as friends of the Court: the American Bar Association was represented by its president, Stephen N. Zach, of Chicago, (312) 988-5000, and Gerald R. Orgbals and Carol Li of St. Louis, (314) 259-2000; and the Missouri Association of Criminal Defense Lawyers was represented by Sarah Jane Forman of the Washington University School of Law in St. Louis, (314) 935-3378.

*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 state public defender commission seeks a writ of prohibition directing the trial court to vacate its order appointing the public defender's office to represent a criminal defendant because the appointment violated an administrative rule the commission promulgated. In a 4-3 opinion written by Judge Laura Denvir Stith, the Supreme Court of Missouri orders a permanent writ to issue. A properly promulgated administrative rule must be followed unless invalidated or held inapplicable. Because no showing was made in this case that the rule was invalid or inapplicable, the trial court exceeded its authority in appointing the public defender in contravention of the rule.

Judge Zel M. Fischer wrote a dissenting opinion. He believes that, once the defendant to whom the public defender was assigned to represent pleaded guilty and was sentenced, the issues presented by the public defender's writ petition about the appointment became moot (no longer available to review). As such, he believes this Court should quash its preliminary writ of prohibition. Further, the Court's analysis of whether counsel was ineffective conflicts with two of the Court's recent decisions, which require an actual conflict of interest rather than merely a potential conflict of interest.

**Facts:** In response to mounting concern that the caseload of some public defenders had increased to a level that interfered with their ability to provide competent and effective representation to indigent defendants as required by the federal and state constitutions, Missouri's public defender commission promulgated a rule, pursuant to legislatively granted authority, permitting the state public defender director to declare a public defender district office unavailable to accept additional cases once certain conditions are met. Prior to limiting a district office's availability in

this manner, the rule requires the state public defender's office to provide at least one month's notice to a court's presiding or chief judge that an office is at risk of being declared unavailable. The rule then requires the district defender and designated state public defender management personnel to consult with the court and the local prosecuting attorney to discuss how best to address the district's caseload crisis. Such notice was given and meetings held in this case but the meetings failed to produce any agreements that would reduce the district office's caseload. As a result, the public defender district office assigned to the 38th Judicial Circuit (Christian and Taney counties) was declared unavailable as of July 1, 2010. The judges assigned to the case, over objection by the public defender's office, nonetheless appointed it to represent a defendant named Jared Blacksher. The public defender's office subsequently petitioned for relief from this Court, which issued a preliminary writ prohibiting the circuit's presiding judge from taking further action in Blacksher's case. This Court later modified that writ to allow Blacksher to enter into a plea agreement, which he eventually did.

### **PRELIMINARY WRIT MADE PERMANENT, AS MODIFIED.**

**Court en banc holds:** (1) The trial court exceeded its authority in appointing the public defender in contravention of the commission's rule. The Sixth Amendment guarantees to all criminal defendants the right to the assistance of counsel. This constitutional command is not satisfied by mere formal appointment of an attorney; an accused is entitled to *competent and effective* assistance. This right is affirmative and prospective because, as the United States Supreme Court has explained, the right to counsel applies at all critical stages of a criminal proceeding. Accordingly, a judge may not appoint counsel when the judge is aware that counsel is unable to provide competent and effective representation. To ensure that all defendants receive competent and effective counsel, Missouri's legislature statutorily has created an elaborate public defender system to provide legal services to indigent defendants. As part of that scheme, the legislature formed the commission and vested it with authority to make any rules necessary to administer the state's public defender system. It was under this authority that the commission enacted the rule permitting the state public defender director to declare a district office unavailable to accept additional cases once certain conditions are satisfied. When a commission or other state agency promulgates an administrative rule addressing an issue within the scope of its authority, the rule must be followed unless it is held invalid or inapplicable. Here, the trial court did not refuse to apply the rule after finding that it was promulgated improperly or that it was inapplicable given the particular facts of this case, and a special master appointed by this Court found it was "not invalid." The trial court erred in failing to follow the rule.

(2) While the commission's rule cannot bind trial judges directly, judges have the inherent obligation and authority to manage their dockets in a way that respects the constitutional, statutory and ethical rights and obligations of the defendant, prosecutor, public defender and public. An effective means of doing so is for judges to "triage" cases on their dockets so that those alleging the most serious offenses, those in which defendants are unable to seek or obtain bail, and those that otherwise need to be given priority in their resolution also are given priority in appointing the public defender and scheduling trials, even if it means that other cases are continued or delayed. More generally, when a trial court learns that a public defender district office is at risk of being declared unavailable pursuant to the rule, the court should exercise its inherent authority to avoid that scenario by holding meetings on the record in which the

stakeholders undertake a good faith effort to develop strategies that will avoid the need to limit a district office's availability. These measures may include entering into agreements by which the prosecutor agrees not to seek jail time, appointing private counsel in less complex matters, delaying or continuing cases when appropriate, or such other creative solutions as may appear effective in a particular jurisdiction.

(3) The commission's petition is not moot even though Blacksher's case was resolved by a guilty plea while this matter was pending. The issues underlying this petition are subject to the public interest exception to the mootness doctrine, as the case presents issues that are of general interest and importance, will recur, and will evade appellate review in future live controversies. Trial courts, prosecutors, public defenders and the public have an interest in this Court's determination of whether the public defender's office may be appointed to represent indigent defendants when a particular district office has been declared unavailable. Appeal from a criminal case does not provide a mechanism for review of this question. If the defendant prevails, no appeal would be necessary. If the state prevails, the issue would not be relevant to the defendant's appeal unless the trial court refused to appoint counsel or counsel was incompetent and, even then, it would be relevant only to the extent it affected representation. Moreover, post-conviction proceedings center only on whether a defendant received a fair trial, not on the broader Sixth Amendment right to counsel at issue when considering whether competent counsel was available during all critical stages of the proceeding. Finally, to the extent that a public defender disobeys a trial court's order, the defender risks being sanctioned or held in contempt for refusing to comply with the court's order.

**Dissenting opinion by Judge Fischer:** The author would quash the preliminary writ as the matter of the appointment of the public defender had become moot. Once the defendant entered a guilty plea and was sentenced, all issues in the case were resolved and the writ of prohibition ceased to have any practical effect on this matter. Further, because the principal opinion states that it does not determine the validity of 18 CSR 10-4.010, the opinion has no effect on any future case. The fact that a criminal appeal does not provide a mechanism for reviewing the caseload protocol does not mean that the caseload protocol will avoid review. The principal opinion's advice to the circuit courts about how to handle dockets when the public defender's caseload is nearing capacity is an advisory opinion, which this Court has a long-established practice of refusing to render. Further, the public interest exception to advisory opinions does not apply here. In addition, the Court's analysis of whether counsel was ineffective conflicts with two of the Court's recent decisions, which require an actual conflict of interest rather than merely a potential conflict of interest.