



**In the
Missouri Court of Appeals
Western District**

**STATE EX REL. MISSOURI PUBLIC
DEFENDER COMMISSION, J. MARTY
ROBINSON & KEVIN O'BRIEN,**

Relators,

v.

**THE HONORABLE GENE HAMILTON,
AND THE HONORABLE GARY
OXENHANDLER,**

Respondents.

WD70327 and WD70349

OPINION FILED:

April 14, 2009

ORIGINAL PROCEEDING FOR WRITS OF PROHIBITION

Before James Edward Welsh, P.J., Victor C. Howard, and Alok Ahuja, JJ.

The Missouri Public Defender Commission, Director of the Missouri Public Defender System J. Marty Robinson, and District Public Defender Kevin O'Brien (relators) petitioned this court for writs of prohibition, requesting that the Honorable Gary Oxenhandler be restrained from appointing a public defender to represent a defendant in a case before the Boone County Circuit Court and requesting that the Honorable Gene Hamilton be restrained from appointing a public defender, as a member of the local bar, to represent a defendant in a case before the Boone County Circuit Court. In both instances, the cases involved probation violations where the defendants had previously received a suspended execution of sentence and were in the Thirteenth Judicial Circuit where the Director of the Missouri Public Defender System had certified the

District 13 Public Defender Office as being of limited availability pursuant to 18 CSR 10-4.010. This court consolidated the cases and issued preliminary orders in prohibition ordering Judges Oxenhandler and Hamilton to refrain from proceeding further in the two cases before them.

We conclude that section 600.042.4, RSMo Cum. Supp. 2008, mandated the Director and the public defenders to provide representation for indigent defendants facing probation violations and that the Commission cannot promulgate a regulation that conflicts with that statutory mandate. We, therefore, quash our preliminary order in prohibition and deny the relators' request for a writ of prohibition restraining Judge Oxenhandler from appointing a public defender to represent a defendant in the case before him. However, we make our preliminary order in prohibition absolute as to Judge Hamilton and restrain Judge Hamilton from appointing a public defender, as a member of the local bar, to represent the defendant in the case before him, because section 600.021.2, RSMo 2000, prohibits public defenders from practicing law except in their official capacity as public defenders.

FACTUAL AND PROCEDURAL BACKGROUND

Factual and Procedural Background Common to Both Cases

In August 2008, the Director of the Missouri Public Defender System, J. Marty Robinson, determined that the District 13 Public Defender Office had exceeded the maximum caseload standard for a period of three consecutive calendar months. Pursuant to 18 CSR 10-4.010(2)(b), on August 27, 2008, the Director notified the presiding judge of the Thirteenth Judicial Circuit that the District 13 Office was at risk for being certified for limited availability pursuant to 18 CSR 10-4.010.

On October 1, 2008, the Director certified the District 13 Office to be in limited availability status. The Director accompanied the certification with statistical verification

showing that the District 13 Office had exceeded its maximum allowable caseload under the Public Defender Commission's Caseload Crisis Protocol for at least three consecutive months. On October 6, 2008, the District Public Defender notified the presiding judge of the Thirteenth Judicial Circuit that the District 13 Office had been certified as being of limited availability. The District Defender informed the court that the District 13 Office would not accept "probation violation proceedings pursuant to a suspended execution of sentence" until the District 13 Office was reinstated to full availability.

Factual Background of Case before Judge Oxenhandler

On November 7, 2008, District Public Defender Kevin O'Brien received the application of Jacqueline A. Pickrell for defender services with respect to the probation violation hearing pending before the Honorable Gary Oxenhandler in the Circuit Court of Boone County. O'Brien determined that Pickrell was indigent but that her probation violation case was within the category of cases for which the District 13 Office was unavailable in that Pickrell was on probation under a suspended execution of a three year sentence. On November 10, 2008, O'Brien filed written notice with the court that the public defender was unavailable to represent Pickrell and objected to the appointment of the public defender. On that same day, Judge Oxenhandler appointed the public defender to represent Pickrell.

On November 20, 2008, the Missouri Public Defender Commission, Director of the Missouri Public Defender System, and District Public Defender O'Brien filed a petition for a writ of prohibition with this court seeking to restrain Judge Oxenhandler from appointing the public defender to represent Pickrell. On November 24, 2008, we granted the Relators' motion for stay of the probation violation hearing and consolidated the case against Judge Oxenhandler with the

case against Judge Hamilton. On December 8, 2008, this court issued its preliminary order in prohibition restraining Judge Oxenhandler from proceeding further in the Pickrell case.

Factual and Procedural Background of Case before Judge Hamilton

On November 3, 2008, District Public Defender Kevin O'Brien received the application of Mark A. Lobdell for defender services with respect to the probation violation hearing pending before the Honorable Gene Hamilton in the Circuit Court of Boone County. O'Brien determined that Lobdell was indigent but that his probation violation case was within the category of cases for which the District 13 Office was unavailable in that Lobdell was on probation under a suspended execution of a four year sentence. On November 3, 2008, O'Brien filed written notice with the court that the public defender was unavailable to represent Lobdell and objected to the appointment of the public defender. On that same day, Judge Hamilton appointed O'Brien, "as a member of the local bar," to represent Lobdell.

On November 17, 2008, the Missouri Public Defender Commission, Director of the Missouri Public Defender System, and District Public Defender O'Brien filed a petition for a writ of prohibition with this court seeking to restrain Judge Hamilton from appointing O'Brien, "as a member of the local bar," to represent Lobdell. On November 24, 2008, we granted the Relators' motion for stay of the probation violation hearing and consolidated the case against Judge Oxenhandler with the case against Judge Hamilton. On December 8, 2008, this court issued its preliminary order in prohibition restraining Judge Hamilton from proceeding further in the Lobdell case.

DISCUSSION

A writ of prohibition is appropriate when a court exceeds its personal or subject matter jurisdiction, when a court lacks the power to act as it did or abuses its discretion, or when it is

necessary to avoid irreparable harm to a party. *State ex rel. Marianist Province of U.S. v. Ross*, 258 S.W.3d 809, 810 (Mo. banc 2008); *State ex rel. Riverside Joint Venture v. Mo. Gaming Comm'n*, 969 S.W.2d 218, 221 (Mo. banc 1998). The relators assert that Judge Oxenhandler lacked jurisdiction, exceeded his authority, and abused his discretion in appointing a public defender to represent a defendant in a case where the Director of the Missouri Public Defender System had certified that particular public defender's office as being of limited availability pursuant to 18 CSR 10-4.010 and that Judge Hamilton lacked jurisdiction, exceeded his authority, and abused his discretion in appointing the District Public Defender O'Brien, as a member of the local bar, to represent a defendant in a case where the Director of the Missouri Public Defender System had certified that particular public defender's office as being of limited availability pursuant to 18 CSR 10-4.010.¹

¹Although the relators contend that Judges Oxenhandler and Hamilton lacked jurisdiction to do what they did and point to cases wherein the court held that the circuit court exceeded its jurisdiction in appointing a Public Defender in a case, *see* *State ex rel. Tanzey v. Richter*, 762 S.W.2d 857, 858 (Mo. App. 1989), and *State ex rel. Shaw v. Provaznik*, 708 S.W.2d 337, 341 (Mo. App. 1986), we question whether such is a "jurisdictional issue" in light of the Supreme Court's recent opinion in *Webb ex rel. J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009). In *Webb*, the Missouri Supreme Court clarified that Missouri recognizes only two types of jurisdiction: personal and subject matter. *Id.* at 252. Both personal and subject matter jurisdiction derive from constitutional principles. *Id.* Subject matter jurisdiction refers to the "court's authority to render a judgment in a particular category of case." *Id.* at 253. In Missouri, the court's subject matter jurisdiction derives directly from article V, section 14 of the Missouri Constitution, which says that "[t]he circuit courts shall have original jurisdiction over *all* cases and matters, civil and criminal." *Id.* Clearly, it was within the circuit court's jurisdiction to appoint persons to represent indigent defendants.

The *Webb* court noted that there were prior cases that had created another form of subject matter jurisdiction called "jurisdictional competence." *Id.* at 254. The issue of "jurisdictional competence" arose when there was no question that the circuit court had subject matter jurisdiction over the general issue, but there was question "whether the issue or parties affected by the court's judgment [were] properly before it for resolution at that time." *Id.* (internal quotation marks omitted). In *Webb*, the Missouri Supreme Court stated that "jurisdictional competence" had no constitutional basis and was not recognized in Missouri. *Id.* The relators' argument in this case is a question of jurisdictional competence because the relators merely argue that the circuit court did not have jurisdiction over these specific cases because of who the judges were appointing to represent the defendants. Given the Missouri Supreme Court's holding in *Webb*, we do not treat this case as involving an issue of jurisdiction but treat it merely as involving an issue of the court's lacking the power to act as it did or abusing its discretion.

Appointment of Public Defender

"The Sixth and Fourteenth Amendments to the United States Constitution guarantee that the government will make available a lawyer to assist an indigent criminal defendant at any critical stage." *State v. Dixon*, 916 S.W.2d 834, 835-36 (Mo. App. 1995). "[A]n indigent accused of crime cannot be prosecuted, convicted, and incarcerated in Missouri unless he is furnished counsel." *State v. Green*, 470 S.W.2d 571, 572 (Mo. banc 1971) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). "When the probationer's status is jeopardized by [a] motion to revoke probation, due process entitles the probationer to representation by legal counsel." *State ex rel. Cochran v. Andrews*, 799 S.W.2d 919, 922 (Mo. App. 1990); *State ex rel. Cline v. Wall*, 37 S.W.3d 877, 882 (Mo. App. 2001). The circuit court must ensure that a criminal defendant receives his due process, including during a probation violation hearing.

The Missouri Public Defender System was created by the State of Missouri to represent indigent defendants² and is covered under Chapter 600, RSMo. Section 600.042.4 provides that:

The director and defenders *shall* provide legal services to an eligible person:

- (1) Who is detained or charged with a felony, including appeals from a conviction in such a case;
- (2) Who is detained or charged with a misdemeanor which will probably result in confinement in the county jail upon conviction, including appeals from a conviction in such a case;
- (3) *Who is detained or charged with a violation of probation or parole;*

²Relators have admitted that Lobdell and Pickrell are "indigent" and that, but for the regulation promulgated by the Missouri Public Defender System, they would qualify for services as eligible persons. Moreover, Lobdell and Pickrell have not waived counsel, refused counsel, or indicated in any way that they do not want counsel.

(4) Who has been taken into custody pursuant to section 632.489, RSMo, including appeals from a determination that the person is a sexually violent predator and petitions for release, notwithstanding any provisions of law to the contrary;

(5) For whom the federal constitution or the state constitution requires the appointment of counsel; and

(6) For whom, in a case in which he faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel; however, the director and the defenders shall not be required to provide legal services to persons charged with violations of county or municipal ordinances.³

Despite this statute, the Public Defender Commission promulgated a regulation holding that Districts which had exceeded caseload standards would not accept appointments under certain categories of cases until the District Office was reinstated to full availability. In this case, based on the alleged excessive caseloads held by the District 13 Office, the Director of the Public Defender System informed the court that the District 13 public defenders would no longer be accepting appointments in new probation revocation cases in which a suspended execution of sentence had been previously imposed, until the District 13 Office was reinstated to full availability. The Director based his decision on 18 CSR 10-4.010(2)(A) which provides:

When the director determines that a district office has exceeded the maximum caseload standard for a period of three (3) consecutive calendar months, the director may limit the office's availability to accept additional cases by filing a certification of limited availability with the presiding judge of each circuit or chief judge of each appellate court affected.

Once that certification is filed with the circuit court, 18 CSR 10-4.010(2)(E) says:

[T]he district defender shall file with the court a final list of categories of cases that will no longer be accepted by that district office until the office is reinstated to full availability. While an office is certified as of limited availability, no cases on the list of excluded case types shall be accepted by that district office.

³We added the emphasis.

An agency regulation is void if it is beyond the scope of authority conferred upon the state agency or if it attempts to expand or modify statutes. *State ex rel. Doe Run Co. v. Brown*, 918 S.W.2d 303, 306 (Mo. App. 1996), *overruled on other grounds by Farmer v. Barlow Truck Lines, Inc.*, 979 S.W.2d 169 (Mo. banc 1998). An agency "regulation may not conflict with a statute and if it does, the regulation must fail." *Id.* Here, the Public Defender Commission's regulation to not accept assignments on probation violation cases where the defendant had previously received a suspended execution of sentence conflicts with section 600.042.4(3). Section 600.042.4(3) requires the Public Defender to represent those indigent defendants facing a violation of probation or parole.

In the cases before us, both Lobdell and Pickrell received a suspended execution of sentence and faced probation violations, and their eligibility for public defender services is unchallenged. Thus, pursuant to section 600.042.4(3), the Public Defender "shall provide legal services to" Lobdell and Pickrell in these matters. The Public Defender Commission cannot promulgate a regulation, such as it has done here, which conflicts with section 600.042.4.

Relators assert that the regulation does not conflict with section 600.042.4 because section 600.042.3 states that:

The director and defenders shall, within guidelines as established by the commission and as set forth in subsection 4 of this section, accept requests for legal services from eligible persons entitled to counsel under this chapter or otherwise so entitled under the constitution or laws of the United States or of the state of Missouri and provide such persons with legal services when, in the discretion of the director or the defenders, such provision of legal services is appropriate.

Relators claim that this subsection allows the director to use his discretion in determining whether to provide legal services to any individual. We disagree.

Relators claim that they are allowed to reject cases in which an eligible person is charged with a violation of probation because section 600.042.3 states that the public defender shall accept requests for legal services “within guidelines as established by the commission[.]” Relators claim that “guidelines” must refer to all of the rules, regulations, instructions, which the Commission has been authorized to promulgate. Although that may be true, Relators ignore the portion of the sentence in section 600.042.3 which says that the Director and defenders must accept requests for legal services within the guidelines *and* "as set forth in subsection 4[.]"

Section 600.042.3 instructs that the director and defenders shall, as set forth in 600.042.4, accept requests for legal services. Contrary to relators' assertion, section 600.042.3 does not give the director and the defenders discretion to refuse to accept cases they are mandated by statute to accept under section 600.042.4. Nothing in section 600.042.3 allows the Commission to deny requests for legal services from eligible persons in the circumstances enumerated in section 600.042.4.

Indeed, the Missouri Supreme Court has held that the Public Defender Commission cannot promulgate a rule which declines to represent indigent persons who are entitled to representation under section 600.042. *State ex rel. Pub. Defender Comm'n v. Bonacker*, 706 S.W.2d 449 (Mo. banc 1986). In *Bonacker*, the Public Defender Commission promulgated a rule which said that Public Defenders would not represent persons seeking post-conviction relief. *Id.* at 450. The *Bonacker* court held that, because post-conviction relief cases fell within the categories of cases enumerated in what is now section 600.042.4, the circuit court had "the requisite jurisdiction to appoint members of the public defender system to represent indigent

prisoners in custody who seek to pursue post-conviction proceedings[.]"⁴ *Id.* at 450-51. The Missouri Supreme Court emphatically stated: "The Commission, by rule or regulation, cannot oust the courts of such jurisdiction."⁵ *Id.* at 451.

Relators attempt to distinguish *Bonacker* by claiming that the regulation promulgated by the Commission does not eliminate a class of cases but instead "provides the Director with a means of curing any deficiencies in competent and effective representation by making public defenders *temporarily unavailable* for appointments." Whether a regulation permanently or temporarily eliminates a class of cases, the result of the regulation is the same--the regulation is attempting to eliminate a class of cases in which the legislature has dictated that the public defender "shall provide legal services to . . . eligible person[s]."⁶ § 600.042.4.

Relators also contend that section 600.042.3 gives the Director and defenders the discretion in determining whether or not to provide representation. We disagree. Section 600.042.3 states that the Director and defenders shall "provide such persons with legal services when, in the discretion of the director or the defenders, such provision of legal services is appropriate." But, in *Sullivan v. Dalton*, 795 S.W.2d 389 (Mo. banc 1990), *superseded by statute as stated in Albers v. Koffman*, 815 S.W.2d 484, 485 (Mo. App. 1991), our Supreme Court has

⁴The *Bonacker* court noted that under section 600.042.3(5), RSMo Cum. Supp. 1984 (now section 600.042.4(6)), "the legislature has provided that the commission provide legal services to indigents facing a 'loss or deprivation of liberty [and when] any law requires the appointment of counsel.'" 706 S.W.2d at 450. At that time, Rule 27.26(h) (now Rule 29.15(e)) specifically provided counsel for indigent prisoners filing *pro se* post-conviction motions.

⁵Again, we question whether this is an issue of jurisdiction given the Missouri Supreme Court's decision in *Webb*, 275 S.W.3d at 252-54. *See* note 1, *supra*. However, whether it is an issue of jurisdiction, abuse of discretion, or a lack of power to act, the result is the same in these cases before us.

⁶From Pickrell's or Lobdell's viewpoint, whether the Commission adopts a rule to deny representation to the entire class to which they belong or whether the Commission adopts a rule which makes the lawyer temporarily unavailable, the net effect is still the same--they do not get a public defender, which the legislature has clearly provided that they should have, at the time they need a lawyer.

already held that the Director cannot refuse to accept appointments in particular categories of cases falling within section 600.042.4 based on his assessment of "the limited staff and resources of the public defender system[.]" *Id.* at 390. In *Sullivan*, the Director contended that the public defender should not be appointed to represent indigent defendants charged with municipal ordinance violations. *Id.* Despite the Director's assessment that resource constraints necessitated his refusal to accept appointments involving ordinance violations, the Supreme Court held that "the appointment of the public defender is, at the very least, authorized by statute," because these cases fell within the enumeration of what is now section 600.042.4 as then drafted. *Id.* Given *Sullivan*, we cannot hold that the Director may rely on his discretion under section 600.042.3 to refuse to accept appointments in cases falling within section 600.042.4.⁷

Relators argue that the Director is attempting to make sure that public defenders provide effective and competent representation to their clients and that the regulation had to be promulgated to control caseloads so that defenders could provide competent and effective representation. If Relators are concerned about the caseload capacity of defenders, a mechanism for handling excessive caseloads is already in place. Section 600.042.5 provides that "The director may: (1) Delegate the legal representation of any person to any member of the state bar of Missouri[.]" Moreover, section 600.042.1(10) provides that the Director shall "[c]ontract for legal services with private attorneys on a case-by-case basis and with assigned counsel as the commission deems necessary considering the needs of the area, for fees approved and

⁷This conclusion is also supported by *State ex rel. Marshall v. Blaeuer*, 709 S.W.2d 111 (Mo. banc 1986), which recognizes that "[t]he only limitation set by subsection [3] on the exercise of [the Director's] discretion is that which may be contained in 'guidelines as established by the [Public Defender Commission] and as set forth in subsection [4] of [section 600.042],'" but then goes on to observe that "[s]ubsection [4] mandates *the provision of legal services* in the enumerated types of cases." *Id.* at 112. This suggests, once again, that the Director's discretion under section 600.042.3 does not include the power to refuse appointment in cases in which section 600.042.4 mandates that he "shall provide legal services."

established by the commission[.]” If excessive caseloads are an issue, then a mechanism is already in place to divert some cases, on behalf of the Public Defender, to other members of the bar.⁸ While we are not unsympathetic to the public defenders plight and are mindful "of the limited resources of the office of public defender and the ever increasing demand for legal services by indigent defendants," the Missouri Supreme Court has instructed: "[T]he primary authority and responsibility for relieving the problem of limited public defender resources remains with the General Assembly." *Sullivan*, 795 S.W.2d at 390-91.⁹

We also note that, even if we believed that the Director or Commission had the authority to refuse specific categories of cases based on staffing or resource concerns, the record in this case is in several respects insufficient to demonstrate that the extreme measure of refusing appointments was necessary to assure effective representation of the defendants or to comply with an individual defender's ethical obligations. Thus, while relators' reply brief argues that the option of contracting with private counsel under section 600.042.1(10) is unavailable due to budgetary limitations, it offers no evidence, or authority, to support this statement.

Further, while relators submitted documentation establishing that *the District 13 office* was "of limited availability" under the Commission's caseload standards, relators' counsel admitted at oral argument that not every district office in the State is so constrained. The organization of the public defender system into districts was apparently adopted by the

⁸Relators argue that the excessive caseloads under which they operate create a conflict of interest between their representations of their various clients. But, as Relators themselves acknowledge, Bonacker held that "the Commission is authorized by statute to cure and resolve any potential conflicts of interest by employing private counsel under contract or on a case-by-case basis." 706 S.W.2d at 451 (citing section 600.042.1(10)).

⁹We note that the General Assembly in fact responded to the Director's concerns regarding the representation of defendants in cases involving municipal ordinance violations which were at issue in *Sullivan*, by enacting an amendment to what is now section 600.042.4(6) in 1991, eliminating such cases from the categories in which representation is mandatory. See S.B. 194, 86th Gen. Assem., 1st Reg. Sess. (Mo. 1991).

Commission or the Director under sections 600.021.4, RSMo 2000, or 600.042.1(3). Relators offer no explanation why a public defender from another district office, which has not been declared "of limited availability," cannot be utilized, rather than denying the court the power to appoint the public defender system, on a blanket basis, based on resource constraints in a particular office. We also note that the record is silent as to the ability of the particular defenders who would be assigned to represent Lobdell and Pickrell to effectively represent those defendants given those defenders' workloads. Other avenues to relieve any specific burdens, such as scheduling accommodations, have obviously not been explored.

Moreover, nothing in this opinion is intended to disregard or diminish the circuit court's discretionary authority to respond to perceived caseload strains on the public defender's office. For example, if the circuit court is so inclined, it may appoint attorneys outside of the public defender system to represent indigent defendants. *Sullivan*, 795 S.W.2d at 391.

The Director, however, cannot thwart his directive from the legislature to represent those persons specifically named in the statute by having the Public Defender Commission simply promulgate a rule that gives the Director the authority to temporarily decline to do so. Thus, Judge Oxenhandler did not abuse his discretion or lack the power to appoint the public defender to represent Pickrell who was charged with violation of her probation.

Appointment of Public Defender as a Member of the Local Bar

The case before Judge Hamilton presents a slightly different question. In that case, Judge Hamilton did not merely appoint a public defender to represent Lobdell. Instead, Judge Hamilton appointed Kevin O'Brien, the District Public Defender, as a "member of the local bar." Section 600.021.2, however, prohibits public defenders from practicing law except in their official capacity as public defenders. We, therefore, conclude that Judge Hamilton lacked the

power and abused his discretion in appointing the District Public Defender in his private capacity to represent Lobdell.¹⁰

Moreover, even if Judge Hamilton had appointed Kevin O'Brien to the case as a public defender, such is also prohibited. In *State ex rel. Robinson v. Franklin*, 48 S.W.3d 64, 70 (Mo. App. 2001), this court granted a writ of prohibition prohibiting a trial judge from ordering particular public defenders to enter appearances for a defendant. We concluded that the appointment of specific counsel within the public defender system to provide representation to a defendant in a particular case lies with the Director and his representatives and not the court. *Id.* at 69; § 600.042.5(2). We found that the court acted in excess of its authority when it directed the public defenders to enter their personal appearances and to provide representation for the defendant.

CONCLUSION

We recognize that serious issues exist concerning the caseloads the public defender system is asked to shoulder and the staffing and other resources it is afforded to accomplish its important mission. Moreover, we are fully aware that "the right to counsel is the right to the *effective assistance* of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (emphasis added and quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). The Commission's Caseload Crisis Protocol and its adoption of 18 CSR 10-4.010 represent an effort to address these serious issues in a considered, systematic, and responsible way. Nevertheless, under the

¹⁰We were informed in Relators' Reply Brief that O'Brien resigned from the public defender system effective March 6, 2009. Because he was appointed to represent Lobdell while employed with the public defender system and we see no indication that Judge Hamilton would have made that appointment absent O'Brien's status as a public defender, we believe issuance of a writ requiring that appointment to be vacated remains appropriate. We express no opinion concerning the circuit court's authority to appoint O'Brien, or any other private attorney, to represent Lobdell.

provisions of chapter 600 as they have been interpreted by our Supreme Court, we do not believe that either the Commission or the Director has the statutory authority to adopt these measures and thereby unilaterally refuse to accept appointments in the categories of cases enumerated in section 600.042.4.¹¹

We conclude that section 600.042.4 required the Director and public defenders to provide representation for indigent defendants facing probation violations and that the Public Defender Commission cannot promulgate a regulation that conflicts with that statutory mandate. We, therefore, quash our preliminary writ and deny the relators request for a writ of prohibition restraining Judge Oxenhandler from appointing a public defender to represent a defendant in the case before him. However, we make our preliminary order in prohibition absolute and restrain Judge Hamilton from appointing District Defender Kevin O'Brien, as a member of the local bar, to represent the defendant in the case before him. The orders staying the proceedings are dissolved.

James Edward Welsh, Judge

All concur.

¹¹As an intermediate appellate court, this court is bound to follow the law established by the Missouri Supreme Court. *Hellmann v. Walsh*, 965 S.W.2d 198, 200 (Mo. App. 1998); MO. CONST. art. V, § 2 (1945). As this court is a court of error and not a policy making court, we are bound to follow the Supreme Court's decisions in *Bonacker and Sullivan*, in which the Supreme Court has clearly held that the Director cannot refuse to represent persons who are entitled to representation under section 600.042.4. *Bonacker*, 706 S.W.2d at 450-51; *Sullivan*, 795 S.W.2d at 390.