

IN THE  
MISSOURI SUPREME COURT

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STATE ex rel. )  
J. MARTY ROBINSON, )  
 )  
 Relator, )  
 )  
 vs. ) No. SC88404  
 )  
 THE HON. FRANK CONLEY )  
 Special Judge, Boone County )  
 Circuit Court, )  
 )  
 Respondent. )

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ON PRELIMINARY WRIT OF PROHIBITION  
FROM THE MISSOURI SUPREME COURT  
TO THE HONORABLE FRANK CONLEY, SPECIAL JUDGE  
CIRCUIT COURT OF BOONE COUNTY, MISSOURI  
THIRTEENTH JUDICIAL CIRCUIT

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RELATOR'S REPLY BRIEF

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## JURISDICTIONAL STATEMENT

Relator adopts the Jurisdictional Statement from his opening brief.

### STATEMENT OF FACTS

At the August 8, 2006, hearing, Public Defender Trial Division Director, Peter Sterling, told Judge Conley that “\$5,000 is within the range of what we contract for in cases such as this” (E-46). Judge Conley said that he knew that an attorney in a death penalty case had contracted with the Public Defender for a different amount (E-46). The Public Defender told Judge Conley, “I’m not saying all the contracts were. I’m saying it was well within the range” (E-46).

The instant case is not a death penalty case, since no aggravating circumstances to seek death, *see Section 565.032.2*, have been charged (E-14-15). On August 8, 2006, Judge Conley specifically asked the prosecutor if he was going to seek the death penalty (E-48). Judge Conley said, “I want a definitive answer right now” (E-48). The prosecutor said, “At this point I do not anticipate it,” but “would hope to know that within the next 30 days,” depending on what two witnesses report (E-48). No aggravating circumstances were subsequently filed (E-89-90).

## ARGUMENT

### I.

**Relator is entitled to a permanent writ prohibiting Respondent from appointing the Public Defender to represent Snyder and allowing Kielty to withdraw, 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 his disposal or available to him to obtain counsel,” and Snyder had the means to obtain counsel because he actually obtained Kielty to represent him;**

**(2) it was against the logic of the circumstances, was arbitrary and unreasonable to allow Kielty to withdraw since he could have protected himself from what he perceives as an inadequate fee by requiring a higher retainer before representation; Kielty would not suffer unreasonable financial burden because the \$5,000 he received was within the range the Public Defender pays to contract counsel; the Public Defender would pay for experts and depositions, so Kielty would have such funds available and not suffer out-of-pocket expenses for these costs; and Kielty should not be permitted to shift the full cost of representation to the Public Defender and taxpayers because he failed to obtain a higher retainer; 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 full cost of the representation.**

Respondent agrees with the Public Defender that eligibility for Public Defender representation under *Section 600.086.1* is a two-part test. Respondent states that “[a] person is eligible for representation by the Public Defender if he does not have the means at his disposal or available to him to obtain counsel on his behalf and he is indigent,” (Resp. Br. at 13), and similarly states that “the statute ... focuses on indigence and the lack of means to obtain counsel as the test for eligibility” (Resp. Br. at 18). Yet Respondent also believes that the decision to allow Kielty to withdraw “is independent of whether Snyder is eligible for Public Defender services” (Resp. Br. at 14).

The issues of Kielty’s withdrawal and the appointment of the Public Defender cannot be decided in a vacuum separate from each other, because if Kielty is allowed to withdraw, the Public Defender must be appointed, since Snyder is indigent, has no further funds for hiring counsel, and does not wish to proceed *pro se* (E-32, E-47). Analytically, the issue is not should Kielty be allowed to withdraw, and then should the Public Defender be appointed. Instead, the issue is that the Public Defender should not be appointed because Snyder has Kielty to represent him. To focus solely on Kielty’s withdrawal – without considering the impact on the Public Defender – negates *Section 600.086.1*’s

direction that a person is not eligible where he has “the means at his disposal or available to him to obtain counsel.”

Respondent contends that the Public Defender has conceded that Snyder is eligible for Public Defender representation, because the Public Defender offered to pay Kielty’s deposition costs, expert witness costs and other case-related costs (Resp. Br. at 14, 18).<sup>1</sup> The Public Defender has not made any such concession. It has been held in Missouri that “the retention of private counsel does not cause a defendant to forfeit his or her eligibility for state assistance in paying for expert witnesses or investigation expenses.” *State v. Huchting*, 927 S.W.2d 411, 419 (Mo. App., E.D. 1996); *see also State v. Williams*, 134 S.W.3d 766, 773-74 (Mo.

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<sup>1</sup> Respondent suggests that the Public Defender’s statement in its brief that it will pay Kielty’s travel expenses is something new (Resp. Br. at 16 n. 1). It is not. The Public Defender made this statement in its brief because when this case was pending in the Western District, Respondent claimed Kielty would not have funds for travel expenses to Boone County (Respondent’s Western District Brief at 10-11). Travel expenses are included in “case-related expenses” (E-45), though the Public Defender acknowledges it did not expressly state that below. The Public Defender said it would pay for “case-related expenses such as depositions, experts and so forth” (E-45). Regardless, Judge Conley’s ruling makes no mention of lack of travel expenses (E-5, E-11-12, E-59-60; A-6-7), so this was not the basis of his ruling.

App., W.D. 2004)(agreeing with *Huchting*). “[A] defendant who spends down his resources in the middle of his defense or who relies on the largesse of friends and family for initial defense expenses is no less entitled to due process and fundamental fairness [to state assistance for expenses] than is a defendant who enters the judicial system penniless.” *State v. Huchting*, 927 S.W.2d at 419; *see also Ake v. Oklahoma*, 470 U.S. 68, 77 (1984)(Due Process requires that indigent defendants be provided with the “basic tools of an adequate defense” (citation omitted)).

Despite recognizing a right to state assistance in obtaining basic defense tools, *see Huchting* and *Williams, supra*, Missouri has failed to provide a funding mechanism for this to occur. To fill this void, the Public Defender has voluntarily chosen -- in some situations where private counsel are paid no more than the Public Defender’s rates for its own contract counsel – to pay the private attorneys’ expenses for experts, depositions, investigation and other case-related expenses, just as it has offered to do for Kielty. This is not a concession that defendants who obtained private counsel are entitled to a Public Defender *attorney*, or even that they are legally entitled to Public Defender funding for case-related expenses. Rather, it is a reaction to the recurring problem of private attorney withdrawals based on a claim that they did not receive enough money to cover fees and expenses, followed by appointment of the Public Defender. It is the Public Defender’s attempt to limit the injury to its existing clients and taxpayers – especially given the Public Defender’s caseload crisis (E-24-25; A-3) – by

voluntarily providing a funding mechanism for case-related expenses in some cases consistent with how the Public Defender handles such expenses in contract cases, in an effort to prevent the Public Defender from having to fund both attorneys (either a Public Defender or contract counsel) and case expenses, even though private counsel were paid, are available, and are keeping attorney's fees.

If private counsel are permitted to withdraw, not only must the Public Defender and taxpayers assume the burden and cost of the case-related expenses, but the Public Defender must also assign an already overburdened Public Defender attorney to the case – thus harming existing clients by diverting that attorney's attention to a case where private counsel would otherwise be available. *See In re Stuart*, 646 N.W.2d 520, 524-25 (Minn. 2002). Meanwhile, the private counsel are permitted to leave the case, after having depleted the defendants' resources and keeping the money for themselves. Nothing in *Chapter 600, Section 600.086.1*, or the constitution requires this absurd result. *Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397, 405 (Mo. banc 1986)(statutes should not be interpreted to reach absurd results).

To the contrary, *Section 600.042.1(10)* authorizes the Public Defender Director to “[c]ontract for legal services with private attorneys on a case-by-case basis and with assigned counsel as the [Public Defender] commission deems necessary considering the needs of the area, for fees approved and established by the commission” (Reply Br. A-4). The fee that Kielty received in this case is within the range that the Public Defender pays its contract counsel (E-40). Thus,

the Public Defender's offer to make Kielty a "special public defender" and pay his case-related expenses (E-41) is consistent with and authorized by **Section 600.042.1(10)**. As stated in Relator's opening brief at p. 34, the Public Defender agreed to pay Kielty's case-related costs to avoid having to assign Public Defender attorneys to the case, prevent duplication of legal services, and further case overload at the Public Defender. This was not a concession that Snyder is eligible for a Public Defender *attorney*, but was a voluntary effort on the part of the Public Defender to provide funds for necessary and reasonable case-related expenses, and to prevent Kielty from having to expend substantial personal funds in costs or expenses in representing Snyder. Nothing in **Chapter 600** prevents the Public Defender from voluntarily making such funds available.

Respondent next suggests that Snyder's dissatisfaction with Kielty supports allowing Kielty to withdraw and appointing the Public Defender (Resp. Br. at 15-16). It does not. The Public Defender would have no objection to Snyder discharging Kielty if Snyder wished to proceed *pro se*. Snyder, however, requested to discharge Kielty and have the Public Defender appointed (E-21, E-32). Snyder, however, is not eligible for Public Defender representation under **Section 600.086.1** because he obtained Kielty to represent him. The legislature did not create the Public Defender to allow defendants to exhaust their available funds on private counsel, and then not liking what they paid for, be represented by a Public Defender attorney. **Section 600.086.1** was enacted to provide Public Defender counsel only to those indigent defendants who cannot obtain counsel by

any other means, and to conserve taxpayer funds by limiting Public Defender representation to such defendants.

To warrant substitution of counsel, a defendant must show “justifiable dissatisfaction” with counsel, and to demonstrate irreconcilable conflict, “the defendant must come forward with evidence that shows a total breakdown in communication between defendant and his attorney.” *State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo. banc 1989). “Such an allegation may not be grounded on subjective, unsubstantiated feelings, but must be rational.” *Id.* “[V]ague assertions of disagreement and disregard of feelings do not meet this burden.” *State v. Parker*, 886 S.W.2d 908, 929 (Mo. banc 1994).

Snyder’s letter to Judge Conley stated that Snyder “feel[s] [Kielty] is not working in my best interests,” “will not return my calls or letters or come see me when asked,” and “will not discuss with me or file motions that I have asked of him” (E-21). Snyder’s allegations fall far short of meeting the *Hornbuckle* or *Parker* standards for removing counsel. Snyder did not explain why Kielty was not working in his best interests, or explain what motions Kielty would not file (E-21). Kielty filed and litigated a motion to suppress physical evidence and statements (E-2). Kielty appeared in court numerous times to argue on Snyder’s behalf (E-31-32, E-59; A-6). Kielty obviously had discussed the case with Snyder because at the August 8, 2006, hearing, Kielty stated facts obtained from Snyder as to why Kielty should be permitted to withdraw (E-32). Kielty said that

Snyder's brother had taken all of Snyder's money and property, and would not pay for his defense (E-32).

Significantly, Kielty and Snyder did not claim at the hearing that they had any irreconcilable conflict between them (E-27-57). Instead, Kielty asked leave to withdraw because he did not have resources for investigation, depositions and experts (E-32, E-39). However, Kielty offered to continue to represent Snyder if the Public Defender would pay Kielty an "hourly rate" (E-45) – showing that the basis for withdrawing was economic, not an irreconcilable conflict with Snyder. This simply is not a "justifiable dissatisfaction" or "irreconcilable conflict" case, and should not be decided on that basis. Judge Conley's ruling did not mention justifiable dissatisfaction or irreconcilable conflict (E-5, E-10-12, E-59-60; A-6-7). Assuming, *arguendo*, that Kielty was not answering Snyder's calls or letters, visiting Snyder, or discussing motions with Snyder (E-21), the appropriate remedy was not to appoint an overwhelmed Public Defender, but to order Kielty to fix his lack of communication, or refund Snyder's attorney's fee, so that Snyder could hire someone else. ***Missouri Rule of Professional Conduct 4-1.4(a)*** requires lawyers to communicate with clients by promptly complying with reasonable requests for information (Reply Brief A-1).

This is a case where Kielty moved to withdraw because of non-payment of further attorney's fees, and lack of money for investigation, depositions and experts (E-31-32, E-39). The lack of money for these case-related expenses has been remedied by the Public Defender's commitment to pay them (E-41, E-45).

Respondent next cites *State ex rel. Wolfrum v. Wiesman*, 225 S.W.3d 409 (Mo. banc 2007), for the proposition that a trial court should protect a defendant’s right to adequate and competent representation, and that Snyder has a right to a fair trial “the first time” (Resp. Br. at 16). The Public Defender agrees with these general propositions. But foisting the case on an overwhelmed Public Defender attorney will not achieve them. The Public Defender System has a caseload crisis (E-24-25, E-42). The Public Defender raised a red flag that its caseload is too large to effectively represent Snyder (E-24-25, E-42). By contrast, as the Public Defender told Judge Conley, Kielty “has not suggested that ... his caseload is too large that he didn’t have time to try the case except that he resented having to give up his time when it wasn’t economical for him to do it” (E-40).<sup>2</sup> Indeed, Kielty said he would “be more than happy to represent Mr. Snyder” if the Public Defender would pay Kielty an “hourly rate” (E-45), thus conceding that he had the ability to finish the case if he were paid more. Kielty had tried homicide cases before, and acknowledged that “skill-wise” he could try Snyder’s case (E-37). It was not statutorily authorized, and was against the logic of the circumstances, arbitrary and unreasonable for Judge Conley to foist the case on an overwhelmed

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<sup>2</sup> Kielty said it would take “two weeks” or “the better part of a month” to do Snyder’s case (E-38, E-45). This is undoubtedly less time than it would take an overwhelmed Public Defender attorney to learn the case from scratch, and proceed through trial.

Public Defender, when Kielty was available and able to competently represent Snyder.

Respondent asserts that requiring Kielty to continue the case without further attorney's fees "would apparently create a conflict of interest adversely affecting representation" (Resp. Br. at 17). This is not the rule, however. If it were, counsel could always cease representation automatically when further attorney's fees were not paid. As discussed in Relator's opening brief at pp. 30-33, courts have repeatedly held that criminal defense counsel should not be permitted to withdraw merely because full attorney's fees were not paid. *See United States v. Parker*, 439 F.3d 81, 104 (2d Cir.), *cert. denied*, 127 S.Ct. 456 (2006); *United States v. Rodriguez-Baquero*, 660 F. Supp. 259, 260-61 (D. Me. 1987); *State v. Kennell*, 605 S.W.2d 819, 820 (Mo. App., S.D. 1980); *see also State ex rel. Public Defender Commission v. Williamson*, 971 S.W.2d 835, 839 (Mo. App., W.D. 1998)("agree[ing] with" a trial court's order requiring a former Public Defender (Brewer) 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).

Next, Respondent contends that "[t]he fact that Snyder's family paid an attorney a down payment in 2004 does not show that Snyder had the means available to him or at his disposal in 2006 to obtain counsel" (Resp. Br. at 17). Snyder, however, became ineligible for Public Defender representation in this case once his family hired and paid Kielty to represent him. *State ex rel. Gordon v.*

*Copeland*, 803 S.W.2d 153, 159 (Mo. App., S.D. 1991); **Section 600.086.1**.

Respondent's statement is merely a statement that Snyder is indigent in 2006. The Public Defender agrees that Snyder is indigent (E-47), but that is not the relevant fact in the instant case. Rather, the relevant fact is that Snyder had the means to obtain, and actually obtained, Kielty to represent him in this particular case.

Consequently, Snyder is not statutorily eligible for a Public Defender attorney.

Contrary to Respondent's suggestion that the Public Defender is trying to "punish" Kielty to achieve some "economic theory" (Resp. Br. at 18 n. 4), the Public Defender is merely trying to enforce **Section 600.086.1**, and prevent harm to its existing clients and taxpayers. The public policy of Missouri, as expressed in **Section 600.086.1**, is that defendants are not eligible for Public Defender representation where they have the means available to obtain counsel, and actually obtain counsel to represent them.

Finally, Respondent contends that the Public Defender has not shown any injury in having to represent Snyder (Resp. Br. at 14). However, having to represent an ineligible defendant who has private counsel available to him necessarily diverts scarce Public Defender attorney time -- and money in paying the Public Defender attorney or contract counsel -- away from other clients who must rely solely on the Public Defender for representation. *In re Stuart*, 646 N.W.2d at 524-25. This diminishes the effectiveness of representation that can be provided to other clients. *Id.* That is a real and irreparable injury, which this Court should stop. *Id.*

This Court should make permanent its preliminary writ of prohibition and prohibit Respondent's order of August 8, 2006, which appointed the Public Defender and granted Kielty leave to withdraw.

## II.

**Relator is entitled to a permanent writ prohibiting Respondent from appointing the Public Defender and allowing attorney Kielty to withdraw without requiring Kielty to refund or pay \$5,000 to Snyder or to the court to be held in escrow to hire other counsel, because Respondent abused his discretion in not requiring Kielty 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, was arbitrary and unreasonable for Kielty to be allowed to withdraw and keep his fee since Kielty could have protected himself from what he perceives as an inadequate fee by requiring a higher retainer before Kielty undertook representation;**

**(2) Kielty should not be permitted to profit from his failure to obtain a higher retainer by foisting the burden and cost of the representation on the Public Defender and Missouri taxpayers; and,**

**(3) the Public Defender will face further case overload, which will harm existing clients, and Missouri taxpayers will bear the cost of the representation.**

Respondent contends that the fact that the Public Defender's proposed alternative remedy of requiring Kielty to return his attorney's fee is novel "defeats the argument that the trial court abused its discretion by not ordering this remedy" (Resp. Br. at 20). Respondent suggests that courts may never be deemed to have

abused their discretion in failing to craft a novel remedy (Resp. Br. at 20-21). Such is not the case. If courts permit private counsel to withdraw, 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 equities of a case). Judge Conley abused his discretion in not doing so.

The Public Defender proposed the “refund remedy” in an attempt to provide the trial court – and this Court -- with options in fashioning an appropriate remedy. The Public Defender’s interest in this litigation is that **Section 600.086.1** be enforced, so that the Public Defender is not appointed to represent Snyder. Exactly who represents Snyder is not the Public Defender’s direct concern, provided that the Public Defender is not appointed. That is why the Public Defender believes this Court should either require Kielty to continue representation, or order him to refund his attorney’s fee to allow Snyder to hire another private counsel willing to do the case for the amount available, or if the money is insufficient for Snyder to find another private counsel, then the money can go to the Public Defender as part of a limited cash contribution or to pay Public Defender liens.<sup>3</sup> *See Section 600.090.1(1) and .2.* The Public Defender

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<sup>3</sup> The Public Defender also believes there is a third option: allow Kielty himself to choose among these two alternatives. In other words, a court may order Kielty to

could then use the money to hire contract counsel in Snyder's case, and thus, not further overburden its Public Defender attorneys and not expend scarce taxpayer funds for contract counsel.

Kielty's problem in not being paid his full fees was not caused by the Public Defender. The Public Defender, its existing clients and taxpayers should not bear the burden and full cost of fixing it. The Public Defender was not established to be an insurance plan to bail out private counsel who are not paid their full fees. Kielty chose to undertake representation of Snyder for a small retainer, and hope for more money later. He should bear the risk of loss when the further fees were not paid, either by having to continue to represent Snyder despite non-payment of fees, or by having to refund Snyder's money to allow the hiring of another private counsel willing to do the case for the amount available, or the hiring of Public Defender contract counsel.

The Public Defender is not seeking to "driv[e] out higher priced attorneys" (Resp. Br. at 18 n. 4). Kielty should be free to charge the fee that the marketplace

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either continue to represent Snyder despite non-payment of further fees, or order him to refund his attorney's fees to enable Snyder to hire other counsel – *and leave the choice to Kielty as to which he wishes to do*. Kielty may find it more beneficial to him to complete representation, or he may find it more beneficial to refund Snyder's money. In either event, however, the Public Defender and taxpayers would not be harmed.

will bear. But he should not be free to accept cases for low retainers with promises to pay more later, exhaust those retainers, and when further fees are not forthcoming, foist the burden and full cost of the representation on the Public Defender. If Kielty had not taken Snyder's case with a low retainer, the \$5,000 paid to Kielty could have been used to hire another counsel who would have been more "affordable" to Snyder and who would have completed the case for the money available, such as those attorneys who do contract work for the Public Defender.

Here, the Public Defender and taxpayers are being required to assume the burden and full cost of representing Snyder – while Kielty keeps the profits for himself. Missouri has a fiscal and public policy interest in ensuring that this does not occur. *Section 600.086.1* prohibits this. *See also United States v. Rodriguez-Baquero*, 660 F. Supp. 259, 261 (D. Me. 1987) and *United States v. Parker*, 439 F.3d 81, 102 and 109 (2d Cir), *cert. denied*, 127 S.Ct. 456 (2006), discussed in Relator's opening brief at p. 43-44.

Thus, if this Court does not make permanent its preliminary writ and prohibit Respondent's order appointing the Public Defender and allowing Kielty to withdraw as requested in Point I, then this Court should hold that Respondent abused his discretion in allowing Kielty to withdraw without requiring him to return or pay the \$5,000 to Snyder or the court to be held in escrow to retain other

private counsel.<sup>4</sup> In either event, this Court should make permanent its preliminary writ prohibiting Respondent from appointing the Public Defender.

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<sup>4</sup> As a third alternative remedy, this Court should order that Kielty be required to choose between continuing to represent Snyder through trial, or refunding his attorney's fee to hire other counsel. *See* footnote 3, *supra*.

## CONCLUSION

For the reasons stated in Point I of Relator's opening brief and this reply, Relator respectfully requests that this Court make permanent its preliminary writ of prohibition and prohibit Respondent's order of August 8, 2006, which appointed the Public Defender and granted attorney Kielty leave to withdraw.

Alternatively, for the reasons stated in Point II of Relator's opening brief and this reply, Relator respectfully requests that this Court make permanent its preliminary writ of prohibition on grounds that Respondent abused his discretion in not requiring Kielty to return the \$5,000 to Snyder or the court to be held in escrow to retain other private counsel.

In either event, this Court should make permanent a writ prohibiting Respondent 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 2007, 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 4,427 words, which does not exceed the twenty-five percent of the 31,000 words allowed for a reply 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 August, 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 29th day of August, 2007, to Michael J. Spillane, Office of the Attorney General, P.O. Box 899, Jefferson City, MO 65102-0899, and one true and correct copy of the attached brief and floppy disk containing a copy of this brief was mailed, postage prepaid this 29th day of August, 2007, to Hon. Frank Conley, Special Judge, Boone County Circuit Court, 705 East Walnut St., Columbia, MO 65201; Christy Blakemore, Circuit Clerk, Boone County Circuit Court, 705 East Walnut St., Columbia, MO 65201; Michael K. Kielty, 201 N. Kingshighway, St. Charles,

MO, 63301; Michael Wright, Warren County Prosecutor, 104 W. Main St., Ste. E,  
Warrenton, MO 63383; and Joseph J. Snyder, Warren County Jail, 104 West  
Main St., Warrenton, MO 63383.

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J. Gregory Mermelstein