

IN THE  
MISSOURI SUPREME COURT

---

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

---

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

---

RELATOR'S STATEMENT, BRIEF AND ARGUMENT

---

J. Gregory Mermelstein, MOBar #33836  
Appellate Division Director  
Attorney for Relator  
Woodrail Centre  
1000 West Nifong  
Building 7, Suite 100  
Telephone: (573) 882-9855  
FAX: (573) 882-9468  
Email: Greg.Mermelstein@mspd.mo.gov

**INDEX**

	<u>Page</u>
TABLE OF AUTHORITIES .....	2
JURISDICTIONAL STATEMENT .....	5
INTRODUCTION .....	6
STATEMENT OF FACTS .....	7
POINTS RELIED ON.....	16
ARGUMENT .....	20
CONCLUSION.....	53
APPENDIX	

**TABLE OF AUTHORITIES**

	<u>Page</u>	
<b><u>CASES:</u></b>		
<i>Abrams v. Ohio Pacific Express</i> , 819 S.W.2d 338 (Mo. banc 1991) .....	23	
<i>Argersinger v. Hamlin</i> , 407 U.S. 25 (1972).....	22	
<i>Gibbs v. Lappies</i> , 828 F. Supp. 6 (D.N.H. 1993).....	30, 44, 47, 49	
<i>Granat v. Scott</i> , 766 S.W.2d 748 (Mo. App., E.D. 1989) .....	43	
<i>In re 765 Associates</i> , 14 B.R. 449 (Bankr. D. Hawaii 1981) .....	46	
<i>In re Marriage of Redmond</i> , 131 P.3d 1167 (Colo. Ct. App. 2005) .....	45, 50	
<i>In re Stuart</i> , 646 N.W.2d 520 (Minn. 2002) .....	22, 27, 32, 33, 38	
<i>International Materials Corp. v. Sun Corp.</i> , 824 S.W.2d 890 (Mo. banc 1992).....	46	
<i>May Dept. Stores Company v. County of St. Louis</i> , 607 S.W.2d 857 (Mo. App., E.D. 1980) .....	50	
<i>Obermeyer v. Bank of America</i> , 140 S.W.3d 18 (Mo. banc 2004) .....	49	
<i>Ponce v. Ponce</i> , 102 S.W.3d 56 (Mo. App., W.D. 2003) .....	22, 29, 43	
<i>State ex rel. Beaird v. Del Muro</i> , 98 S.W.3d 902 (Mo. App., W.D. 2003) .....	21	
<i>State ex rel. Gordon v. Copeland</i> , 803 S.W.2d 153 (Mo. App., S.D. 1991) ...	24, 25	
<i>State ex rel. J. Marty Robinson v. the Hon. Ronald E. Taylor and Randall Jackson</i> , No. SC88405 .....		34
<i>State ex rel. Robinson v. Franklin</i> , 48 S.W.3d 64 (Mo. App., W.D. 2001).....	21	
<i>State ex rel. Shaw v. Provaznik</i> , 708 S.W.2d 337 (Mo. App., E.D. 1986).....	22, 27	

*State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41 (Mo. banc 2004).....21, 39, 43

*State ex rel. Tanzey v. Richter*, 762 S.W.2d 857 (Mo. App., E.D. 1989).....22, 28

*State ex rel. Teefey v. Bd. of Zoning Adjustment*, 24 S.W.3d 681  
(Mo. banc 2000).....21

*State ex rel. Wilke v. Rush*, 814 S.W.2d 687 (Mo. App., E.D. 1991).....27, 37, 43

*State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. banc 1981) .....34

*State v. Grubb*, 120 S.W.3d 737 (Mo. banc 2003) .....23

*State v. Hornbuckle*, 769 S.W.2d 89 (Mo. banc 1989).....37

*State v. Kennell*, 605 S.W.2d 819 (Mo. App., S.D. 1980) .....22, 33, 46

*Terre Du Lac Prop. Owners’ Ass’n v. Shrum*, 661 S.W.2d 45 (Mo. App.,  
E.D. 1983) .....45

*United States v. Parker*, 439 F.3d 81 (2d Cir.), *cert. denied*  
127 S.Ct. 456 (2006)..... 31, 33, 36, 44, 46, 50

*United States v. Rodriguez-Baquero*, 660 F. Supp. 259  
(D. Me. 1987)..... 30, 33, 35, 36, 43, 46, 50

**STATUTES:**

Section 600.086.1 RSMo. 2000 ..... 20, 22, 23, 24, 25, 26, 28, 38

Section 600.086.1 RSMo. 1986 .....24, 28

Section 600.090.1, RSMo 2000 .....42, 51

Section 600.090.2, RSMo 2000 .....42, 51

**RULES:**

Missouri Rule of Professional Conduct 4-1.3.....38

Missouri Rule of Professional Conduct 4-1.16.....44

Missouri Rule of Professional Conduct 4-1.16(b)(4) .....30

Missouri Rule of Professional Conduct 4-1.16(b)(5) .....30

Missouri Rule of Professional Conduct, 4-1.16(c) .....30, 44, 46

Missouri Rule of Professional Conduct, 4-1.16(d) .....45

**OTHER:**

*American Bar Association Standing Committee On Ethics And*

*Professional Responsibility Formal Opinion 06-441 (May 13, 2006).....38, 39*

*American Heritage College Dictionary 50 (3d ed. 1993) .....24*

## **JURISDICTIONAL STATEMENT**

This original writ case seeks a writ of prohibition. Relator, J. Marty Robinson, is the Director of the Missouri Public Defender System. Respondent, the Hon. Frank Conley, is Special Judge of the Circuit Court of Boone County, Missouri.

After the Missouri Court of Appeals, Western District, denied Relator's petition for a writ of prohibition without an opinion, Relator filed in this Court an application for a writ to prohibit Judge Conley's order of August 8, 2006, granting a retained private defense counsel leave to withdraw from the criminal case of *State v. Snyder* (Boone County Case No. 05BA-CR01771), and from appointing the Public Defender. The Public Defender had determined that the defendant was not eligible for Public Defender representation under *Section 600.086.1 RSMo. 2000*.<sup>1</sup>

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

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

---

<sup>1</sup> 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. Ronald E. Taylor & Hon. Randall Jackson*, No. SC88405, 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

Joseph Snyder is charged in *State v. Snyder*, Boone County Case No. 05BA-CR01771, with one count of first degree murder, two counts of attempted first degree murder, one count of first degree burglary, and three counts of armed criminal action for incidents which occurred on September 19, 2004 (E-1, E-14-16, E-55).<sup>2</sup>

Snyder's case originally arose in Warren County out of two cases involving the same factual scenario (E-1, E-55-57). Private defense counsel Michael K. Kielty, who was retained by Snyder, formally entered his appearance for Snyder in Warren County in the first case on November 29, 2004 (E-31, E-74). The Public Defender had briefly appeared in the case before private counsel Kielty was

---

<sup>2</sup> References in this brief are as follows: "E" citations are to the exhibits attached to Relator's "Petition For A Writ Of Prohibition, 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-98. 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. Respondent's Return filed with this Court on May 31, 2007, is referred to as "Respondent's Return."

retained and entered (E-73-74). The Public Defender was granted leave to withdraw after Kielty's entry (E-74).

Kielty was retained before the preliminary hearing, and he represented Snyder at the preliminary hearing on December 14, 2004 (E-34, E-73-74).

On January 4, 2005, Kielty moved for a change of venue in the first case (E-75). Venue was transferred to Boone County in April 2005 (E-1, E-76).

The Hon. Frank Conley, Special Judge of the Boone County Circuit Court, began hearing the Boone County proceedings in May 2005 (E-1). This case was originally scheduled for trial in October 2005 (E-4, E-17). Kielty did not oppose the State's motion to continue the trial setting in September 2005 (E-4, E-17, E-19). The trial was continued on September 30, 2005 (E-4).<sup>3</sup>

The State filed its second case in Warren County on or about September 29, 2005 (E-77). Retained counsel Kielty appeared for Snyder in the second case on November 7, 2005 (E-77), and formally entered his appearance on January 4, 2006 (E-80). In April and May 2006, Kielty sought and agreed to change venue in that case to Boone County (E-82). The State, with Kielty's agreement, then

---

<sup>3</sup> The docket sheets show the State moved for continuance on September 30, 2005 (E-4), but for unknown reasons, the State's written motion is file-stamped October 3, 2005 (E-17). Kielty filed a written response to the State's motion saying he "does not oppose" the State's motion to continue (E-19).

consolidated the two cases into the single case in Boone County on July 13, 2006 (E-4, E-55-56).

From November 2004 until August 2006, Kielty represented Snyder in all his proceedings in Warren and Boone Counties, including at his preliminary hearings, arraignments, and a motion to suppress hearing (E-1-5, E-31, E-34).

On April 12, 2006, Snyder wrote a letter to Judge Conley asking to “fire” Kielty because Snyder believed that Kielty was not working in his best interests, had not communicated with him, and would not discuss or file motions (E-21).

On May 25, 2006, and July 13, 2006, Kielty made an oral motion to withdraw (E-4, E-82). Kielty never filed a written motion to withdraw (E-34-35). On July 13, 2006, Judge Conley ordered that Kielty would be given leave to withdraw as per his request and with the consent of Snyder upon the Public Defender’s entry of appearance in the case (E-4). Judge Conley ordered the State Public Defender “to interview defendant and determine whether said defendant qualifies for representation” (E-4).

On August 4, 2006, the Public Defender filed a notice styled, “Public Defender’s Determination Of Defendant’s Ineligibility For Services Of The Public Defender” (E-22-26; A-1-4). The Public Defender’s notice stated that the Public Defender had interviewed Snyder, and determined that Snyder had paid Kielty \$5,000 (E-23; A-2). The notice stated that Snyder reported that he had no assets to hire another attorney, and that he was no longer satisfied with Kielty (E-23; A-2).

The notice informed Judge Conley that the Public Defender had determined that Snyder was not eligible for Public Defender services. The notice advised, in relevant part, that:

Section 600.086.1, RSMo. 2000, states: ‘A person shall be considered eligible for representation [by the Public Defender] ... when it appears from all the circumstances of the case ... 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.’ While [Snyder] may be indigent under the Public Defender Guidelines for the Determination for Indigence, he already has counsel available to him. ... Under the statute, [Snyder] is ineligible for a public defense since he already has paid for private counsel who is competent and available to him.

(E-23; A-2).

The Public Defender noted that the Public Defender System is currently suffering from an extremely burdensome caseload that has reached the point of crisis (E-24-25; A-3-4). The Public Defender stated:

This crisis and its possible remedy are currently being studied by a Missouri Bar Task Force Committee and a Missouri Senate Interim Committee. In the event the court renders [Snyder] eligible for defender services by permitting paid private counsel to withdraw, the case would be assigned to the St. Charles Public Defender office

where the case is charged and [Snyder] incarcerated [sic]<sup>4</sup> or the Boone County Public Defender office where the case is pending on change of venue. In the St. Charles office six attorneys handle an annual average of 283 cases each (FY06). The office presently has five pending murder cases. The eleven attorneys of the Boone County office handle an average of 429 cases each and the office presently has 4 pending homicide cases. Absent a showing that paid private counsel's caseload or circumstances would render him unable to provide competent and diligent representation, the court should not impose the case on an overwhelmed public defender.

(E-24-25; A-3-4).

The Public Defender also stated that Snyder did not show that he had a real or irreconcilable conflict with Kielty that would warrant Kielty's removal from the case (E-23-24; A-2-3).

On August 8, 2006, Judge Conley held a hearing on the matter (E-5, E-27-57). At the hearing, Kielty stated that he had been paid \$5,000 for the case, which had come from Snyder's family (E-31-32). Kielty said he took the case based on

---

<sup>4</sup>The case actually was originally charged in Warren County (E-1). However, the Public Defender does not have an office in Warren County. The nearest Public Defender Office is in St. Charles County, which handles cases from Warren County.

“promises and propositions as made by the family,” as well as an attorney who was representing Snyder’s wife and asked Kielty to take the case (E-31). Kielty said his fee was to be \$25,000 for a guilty plea and \$50,000 for a trial (E-32). Kielty did not have a written fee agreement with Snyder because it was his “general practice” to have “verbal” agreements only (E-33). Kielty said Snyder apparently had some later “falling out” with his family, and no one had paid Kielty further (E-43-44). Kielty said Snyder was indigent, and Kielty did not have “the resources to investigate the case or adequately prepare” through depositions and expert witnesses (E-32, E-39). Kielty said he had tried homicide cases before, but that he did not do pro bono cases, and he would have to “give up two weeks of [his] life” or “the better part of a month” to do Snyder’s case (E-37-38, E-45). Kielty said he had “probably between 200 and 300 clients,” with “probably 35 to 50” being active felony cases (E-38-39).

Peter Sterling, the Public Defender’s Trial Division Director, told the court at the hearing that the Public Defender, at times, contracts first degree murder cases to private counsel for \$5,000 (E-40). Sterling noted that Kielty “has not suggested that ... his caseload is too large that he didn’t have the 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). Sterling said the Public Defender would be willing to appoint Kielty as a “special public defender” and pay his deposition costs, expert witness costs, and other court costs in the same fashion as the Public Defender does when it hires other private attorneys on a contract basis (E-41). Sterling said

the issue was one of “professional responsibility and effective administration of justice,” and that Kielty had not made a limited entry of appearance when he entered the case (E-41). Sterling said that in light of the Public Defender’s caseload crisis, the court should not put the burden on the Public Defender and Missouri taxpayers to represent Snyder when Snyder actually hired and paid private counsel within the range that the Public Defender pays (E-41-42). Sterling argued that if the court were to permit Kielty to withdraw, the court should order him to return the \$5,000 to Snyder or to the court to be held in escrow for retaining another attorney (E-42).

After Sterling spoke, Kielty made a “counter offer” (E-45). Kielty said he would be “more than happy to represent Mr. Snyder” if the Public Defender would pay Kielty an “hourly rate” (E-45). Sterling responded that the Public Defender would not pay an hourly rate because the Public Defender uses a “flat fee” in contracting with private counsel, and \$5,000 is within the range of what the Public Defender pays in cases such as Snyder’s (E-46). Sterling reiterated that the Public Defender would pay Kielty’s expenses for depositions, expert witnesses and other case-related expenses, just as the Public Defender does for its other contract counsel (E-45).

Judge Conley asked Snyder if he had funds to further pay counsel Kielty, and Snyder said no (E-47).

Kielty and Snyder did not claim at the hearing that they had any irreconcilable conflict between them (E-27-57).

Later on August 8, 2006, Judge Conley issued the following order:

Court finds from oral argument heard this date, that Deft's family paid \$5,000 in 2004 towards the fee of attorney Kielty; that for a trial of this type, when the Deft. is charged with 1<sup>st</sup> degree murder and six other criminal charges, that his ultimate fee would be between \$25,000 and \$50,000; that there are no funds with which to take deposition[s] or to conduct other discovery; that since the case has been transferred to Columbia, Missouri, from Warren County, that counsel has made seven appearances in court, together with numerous appearances in Warren County; court further finds that Deft is estranged from his family and has had no contact with his mother who was to pay additional attorneys fees for over two years; court further finds that Deft. is indigent and without funds or ability to raise funds for his defense and that Deft. is now confined in jail and has been so confined since his arrest in 2004; court further finds that Deft. requires assistance of counsel and that his present counsel cannot properly defend Deft. Deft's attorney given leave to withdraw upon said counsel's oral request and the written request of the Deft. Court further finds that Deft. qualifies for representation by the Public Defender and Public Defender appointed to represent Deft. with further hearing set for 1:30 p.m. on August [18], 2006, for purpose of trial setting.

(E-5, E-11-12, E-59-60; A-6-7).

On August 16, 2006, the Public Defender filed a petition for a preliminary writ of prohibition in the Missouri Court of Appeals, Western District, to prohibit Judge Conley's August 8 order, which allowed Kielty to withdraw and which appointed the Public Defender (E-91). The case was styled *State ex rel. Cathy Kelly v. Hon. Frank Conley*, because Cathy Kelly was the Acting Director of the Public Defender System on August 8, 2006, while Director J. Marty Robinson was on military leave. Robinson has since resumed his duties as Director.

On November 28, 2006, the Western District granted a preliminary writ and ordered full briefing (E-91).

After the case was fully briefed (E-92), the Western District on March 13, 2007, issued the following "Order": "The court has determined that it improvidently entered its preliminary order of prohibition because the relief sought in relator's brief is not appropriate in this case. The preliminary order in prohibition is therefore dissolved and the request for a writ of prohibition is denied" (E-94).

On March 27, 2007, Relator, Public Defender Director Robinson, filed a petition for a preliminary writ of prohibition with this Court to prohibit Judge Conley's August 8, 2006, order.

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

On May 31, 2007, Respondent filed a Return.

**POINTS RELIED ON**

**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.**

*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 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.<sup>5</sup>**

*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);

---

<sup>5</sup> Point II is raised in the alternative to Point I.

*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).

## 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.**

### ***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).

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.* Whether to allow counsel to withdraw is also within the trial court's discretion, and appellate review is for abuse. *State v. Kennell*, 605 S.W.2d 819, 820 (Mo. App., S.D. 1980). 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-61; A-10)(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-72; A-12) – which language remains the same in *Section 600.086.1 RSMo. 2000* (E-61; A-10) -- 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 Snyder was himself indigent, Snyder's family hired and paid Kielty \$5,000 to represent Snyder (E-31-32). At that point, Snyder became ineligible for Public Defender representation under *Section 600.086.1* because he had "the means at his disposal or available to him to obtain counsel," as shown by the fact that he actually obtained Kielty. *See State ex rel. Gordon v. Copeland*, 803 S.W.2d at 159; *Section 600.086.1*. The Public Defender would not have required Snyder's family to obtain counsel for him. But when they chose to do so, and actually did so, Snyder became ineligible for Public Defender representation under *Section 600.086.1*.

Relator agrees that Snyder satisfies the second prong of *Section 600.086.1* because Snyder is indigent (E-47). Indigence alone, however, is not the sole requirement for eligibility for representation. Snyder does not meet the first prong because Snyder had the means to obtain counsel, and in fact, obtained counsel (E-31-32). Under the plain language of *Section 600.086.1*, Snyder is ineligible for a

public defense since he 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, Snyder had the resources to obtain Kielty, and in fact, retained him. Kielty has experience in trying homicide cases, and admitted that “skill-wise” he can try the case (E-37). As a licensed Missouri attorney, Kielty must be deemed competent to represent Snyder. *See State ex rel. Wilke v. Rush*, 814 S.W.2d 687, 689 (Mo. App., E.D. 1991)(“As a licensed attorney and member of the Missouri Bar, we presume the competency of Attorney”). Furthermore, Kielty has the resources to try the case, since the Public Defender offered to pay and will pay Kielty’s deposition costs, expert witness costs, and other court costs in the same fashion as the Public Defender does when it hires private attorneys on a contract basis (E-41, E-45).

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 in the instant case exceeded his jurisdiction, authority and power in appointing the Public Defender because Snyder is not eligible for representation under the first prong of *Section 600.086.1* since Snyder had “the means at his disposal or available to him to obtain counsel in his behalf,” and in fact, obtained retained counsel. This Court should make permanent its preliminary writ on this basis and prohibit Respondent’s August 8, 2006, order appointing the Public Defender.

***RESPONDENT ABUSED HIS DISCRETION IN ALLOWING  
KIELTY TO WITHDRAW***

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 allowing Kielty to withdraw. 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 and allowing Kielty to withdraw. The issues of appointment and withdrawal are inextricably linked in this case, since Respondent's order substituted the Public Defender when it allowed Kielty to withdraw. Respondent's August 8 order is against the logic of the circumstances, is 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 does not issue.

Kielty's sole basis for moving to withdraw from Snyder's case was economic. Kielty had been paid \$5,000 for the case, but wanted more based on his unwritten fee agreement with Snyder (E-31-33). Kielty said he did not have funds for investigation, depositions and expert witnesses (E-32, E-39). Kielty said he had tried homicide cases before, but that he did not do pro bono cases, and he would have to "give up two weeks of [his] life" or "the better part of a month" to do Snyder's case (E-37-38, E-45). Kielty made no claim of having any irreconcilable conflict with Snyder that would prevent Kielty from continuing in the case (E-27-57). To the contrary, Kielty offered to continue to represent Snyder if the Public Defender would pay Kielty an "hourly rate" (E-45) – proving that the basis for his moving to withdraw was economic.

While an attorney may move to withdraw from a case 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)* (A-18-19), 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)* (A-19).

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.*

Courts have ruled that private criminal defense counsel should not be permitted to withdraw and foist the expense of the cases onto taxpayers merely because the private counsel have made “bad deals” for themselves in undertaking representation for a smaller than desired fee. 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.*

In Snyder’s case, attorney Kielty may have made what he perceives as a “bad deal” for himself, but Kielty should not be permitted to shift the consequences of his perceived “bad deal” onto Public Defender attorneys and Missouri taxpayers. *See United States v. Rodriguez-Baquero, supra; United States v. Parker, supra; In re Stuart, supra.* Kielty could have demanded a larger retainer before agreeing to enter the case, but he chose to enter the case with the amount provided. While Kielty may perceive the \$5,000 he was paid by Snyder as inadequate, it is within the range that the Public Defender pays to contract first degree murder cases to private counsel (E-40). Moreover, since the Public Defender offered to pay Kielty’s deposition costs, expert witness costs, and other court costs, Kielty would not have any more out-of-pocket expenses in the case (E-41). The Public Defender recognizes and agrees that Kielty should not be required to advance personal funds in substantial amounts for the payment of either costs or expenses in continued representation of Snyder. *See State ex rel.*

*Wolff v. Ruddy*, 617 S.W.2d 64, 67 (Mo. banc 1981). However, Kielty will not be required to do so, since the Public Defender agreed to pay Kielty's deposition costs, expert witness costs, and other litigation costs -- just as it does for its contract counsel (E-41, 45).<sup>6</sup> The Public Defender agreed to pay Kielty's 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. The Public Defender is in the midst of a caseload crisis -- a crisis recognized by a Missouri Bar Task Force Committee and a Missouri Senate Interim Committee (E-24-25; A-3).<sup>7</sup> The Public Defender noted that Kielty "has not suggested that ... his caseload is too large that he didn't have the time to try the case except that he

---

<sup>6</sup> The Public Defender reimburses its contract counsel for reasonable hotel costs when overnight stays are required, such as during a multi-day trial; meals at Missouri government rates when counsel travel for more than 12-hours per day or spend the night; and mileage at the Missouri government rate of \$0.455 per mile. The Public Defender will reimburse Kielty for these costs as part of the litigation costs.

<sup>7</sup> Although the Public Defender made Judge Conley aware in August 2006 that a Missouri Senate Interim Committee was studying the Public Defender's caseload crisis (E-24; A-3), the Senate Committee did not issue its report until January 2007. A copy of the report is contained in the exhibits in *State ex rel. J. Marty Robinson v. the Hon. Ronald E. Taylor and Randall Jackson*, No. SC88405.

resented having to give up his time when it wasn't economical for him to do it" (E-40).

Under all these circumstances, Respondent abused his discretion in permitting Kielty to withdraw -- and in appointing the Public Defender, assuming Respondent had statutory authority to so. Respondent's ruling is against the logic of the circumstances, arbitrary and unreasonable. Respondent ruled that Kielty's "fee would be between \$25,000 and \$50,000" and that there were no funds to pay additional attorney's fees (E-5, E-59-60; A-6-7). However, non-payment of fees does not justify shifting the full cost of representation to the Public Defender and Missouri taxpayers. *See United States v. Rodriguez-Baquero, supra; United States v. Parker, supra.* Irreparable harm will result to the Public Defender and taxpayers if they must bear the full cost of Snyder's representation. The Public Defender and Missouri 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. Since Kielty has received the same fee as Missouri attorneys who contract with the Public Defender (E-40), he will not suffer an unreasonable financial burden if required to represent Snyder -- especially since the Public Defender will pay Kielty's deposition costs, expert witness costs, and other court costs (E-41).

To the extent that Respondent held that Kielty's appearances in Boone and Warren Counties justify Kielty being granted leave to withdraw (E-5, 59; A-6), this ruling is against the logic of the circumstances, arbitrary and unreasonable,

because court appearances are a direct and obvious result of undertaking representation in a criminal case. This does not justify allowing counsel to withdraw, and shifting the full cost of representation to the Public Defender and taxpayers. *See United States v. Rodriguez-Baquero, supra; United States v. Parker, supra.* Indeed, the fact that Kielty has represented Snyder at all proceedings since November 2004 – including two preliminary hearings, his arraignments, and a motion to suppress hearing (E-1-5, E-31, E-34) – logically justifies keeping Kielty on the case. Kielty already knows the case, and withdrawal will require an already overburdened Public Defender attorney to familiarize himself or herself with the case – further delaying when the case can be tried – and, in learning and preparing the case, duplicate work already provided by Kielty. *See United States v. Parker*, 439 F.3d at 105 and 107 (rules of professional responsibility militate in favor of continuing representation in face of non-payment of attorney’s fee; allowing counsel to withdraw interferes with effective administration of justice, results in duplicative legal services, and increases risk of substandard representation due to non-continuity of counsel).

Respondent ruled “that there are no funds with which to take deposition[s] or to conduct other discovery,” and that “present counsel cannot properly defend Deft” (E-5, 59-60; A-6-7). This ruling is clearly against the logic of the circumstances, arbitrary and unreasonable since the Public Defender, on the record, indicated that the Public Defender would pay Kielty’s deposition costs, expert witness costs, and other court costs, so that Kielty would not have any

additional out-of-pocket expenses in the case (E-41). Thus, funds are available to Kielty to properly defend Snyder.

To the extent that Respondent’s ruling suggests that Kielty is not a competent or qualified counsel, that ruling is also against the logic of the circumstances, arbitrary and unreasonable since Kielty acknowledged that he has experience in trying homicide cases, and admitted that “skill-wise” he could try Snyder’s case (E-37). As a licensed attorney in Missouri – with admitted experience in homicide cases (E-37) -- Kielty must be deemed competent to represent Snyder. *See State ex rel. Wilke v. Rush*, 814 S.W.2d at 689 (“As a licensed attorney and member of the Missouri Bar, we presume the competency of Attorney”).<sup>8</sup>

---

<sup>8</sup> Respondent’s ruling did not find any irreconcilable conflict between Kielty and Snyder that might require Kielty to withdraw (E-5, E-11-12, E-59-60; A-6-7). Kielty and Snyder did not claim at the hearing that they had any irreconcilable conflict between them (E-27-57). Indeed, 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. Regardless, no evidence was presented to satisfy the standard for irreconcilable conflict, *see State v. Hornbuckle*, 769 S.W.2d 89, 96 (Mo. banc 1989), so Respondent’s ruling cannot be based on such grounds.

***IRREPARABLE HARM WILL RESULT IF A WRIT DOES NOT ISSUE***

Finally, Respondent'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-24-25), and irreparably harms existing clients by requiring already-burdened Public Defender attorneys to undertake representation in yet another homicide case. *See In re Stuart*, 646 N.W.2d at 524-25. Kielty served as Snyder's attorney for more than a year and a half, and is already familiar with the case (E-31, E-34). This Court – and all Missouri courts -- should join the Missouri Bar and Missouri Senate Interim Committee in recognizing that the Public Defender System faces a caseload crisis (E-24-25; A-3). 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-63-71; A-21-29); *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-16). 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-66; A-24). The Public Defender cannot accept cases such as Snyder’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 when 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. As shown above, Relator’s request for a writ meets each of these tests.

Therefore, 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.**

Relator contends that for the reasons stated in Point I, *supra*, this Court should make permanent its preliminary writ and prohibit Respondent's order appointing the Public Defender and allowing Kielty to withdraw. 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 Kielty to return or pay \$5,000 to Snyder or the court to be held in escrow to hire other private counsel.<sup>9</sup>

At the August 8 hearing, the Public Defender argued that Kielty should not be permitted to withdraw, but that if Respondent were to allow Kielty to withdraw, Respondent should order Kielty to return the \$5,000 to Snyder or to the court to be held in escrow to retain another counsel (E-42). Since Respondent's order did not specifically address this motion, the order denied it (E-5, E-59-60; A-6-7).

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 or to the court to be held in escrow to hire another private attorney 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

---

<sup>9</sup> 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.

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 pay, and requiring the Public Defender to effectuate liens for services).<sup>10</sup> 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 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.

---

<sup>10</sup> In Snyder's case, if the money ultimately came to the Public Defender, the Public Defender could use it to hire contract counsel, and thus, not further overburden its Public Defender attorneys and harm existing clients.

## ***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).

### ***KIELTY SHOULD BE REQUIRED TO REFUND FEES OR PUT THEM IN ESCROW TO HIRE ANOTHER PRIVATE COUNSEL***

This is not a case where an attorney sought to withdraw for lack of full payment of attorney’s fees, with no resulting consequences to the general public – such as might typically occur in a civil case. *See, e.g., State ex rel. Wilke v. Rush*, 814 S.W.2d 687, 688 (Mo. App., E.D. 1991)(allowing attorneys to withdraw from representation in civil case where insurance company would no longer pay them). Instead, here, an attorney sought to withdraw and foist the burden and cost of the case on the Public Defender and taxpayers. Missouri has a fiscal and public policy

interest in ensuring that this does not occur. *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* (A-19). 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 Kielty performed some work for Snyder, Kielty has not completed the case, and he should not be permitted to withdraw where the consequence is to shift the cost of completing the representation to the Public Defender and taxpayers. Kielty's work has little or no value to Snyder if Kielty is not required to finish the case. Nor does Kielty'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 Kielty 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 Kielty has done. It is against the logic of the circumstances, arbitrary and unreasonable for Kielty to be able to keep a fee for work that has no real value to Snyder 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)(A-19).

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)* (A-19).

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, Kielty could have easily protected himself from non-payment of his total fee merely by requiring a higher retainer be paid before Kielty undertook representation. *See Gibbs v. Lappies*, 828 F. Supp. at 7. Kielty is solely responsible for failing to obtain a higher retainer before commencing representation. This was not an event beyond his reasonable control. Kielty's own failure to obtain a higher retainer has resulted in his moving to withdraw and foisting the cost of representation on the Public Defender and taxpayers. Kielty is not blameless in this matter. Kielty was free to make a "business decision" to undertake representation of Snyder with only a partial fee. But by undertaking representation under such circumstances, Kielty should bear the risk of loss when when further fees were not paid – not put the burden on the public. Requiring him to refund the money would serve the legitimate purpose of not rewarding Kielty for failing to obtain what he would regard as an adequate retainer, and,

importantly, would protect the Public Defender and taxpayers from bearing the burden and cost of Kielty's business decision.

If attorneys like Kielty 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, such as those attorneys who do contract work for the Public Defender; thus, the problem of counsel seeking to withdraw might be avoided entirely.<sup>11</sup>

---

<sup>11</sup> 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 the money they are 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 withdraw 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. Kielty should be required to stay in the case, or pay back the money.

Respondent's ruling appointing the Public Defender and allowing Kielty to withdraw without requiring Kielty to return the \$5,000 to Snyder or to pay it into court to be held in escrow for the purpose of hiring another private attorney is against the logic of the circumstances, arbitrary and unreasonable because Kielty could have readily protected himself from non-payment of his total fee by requiring a higher retainer be paid before Kielty undertook representation. *See Gibbs v. Lappies*, 828 F. Supp. at 7. Instead, Kielty made what he perceives as a "bad deal" in undertaking representation for less than his desired fee, and sought to withdraw and foist the cost of the representation on the Public Defender and taxpayers – while keeping the profits for himself. Kielty should not benefit at the expense of the Public Defender and taxpayers, since it was Kielty himself who made what he now believes to be an inadequate fee arrangement.

Relator recognizes that the money in this case was paid to Kielty by Snyder's family members (E-31-32). However, Relator contends that a refund can be made directly to Snyder himself, or paid into court to be held in escrow for hiring another attorney. This is because the money was, in effect, a gift to Snyder to be used for hiring counsel for his defense. The money went to Kielty for the purpose of providing a defense for Snyder. That purpose would continue to be fulfilled if the money is refunded to Snyder or to the court for use in hiring another counsel. *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.<sup>12</sup> *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 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). Respondent abused his discretion in not fashioning a remedy appropriate to the situation.

---

<sup>12</sup> In situations where private counsel seek to withdraw and have the Public Defender appointed, courts seeking to avoid harm to the Public Defender and taxpayers typically deny the motion to withdraw and 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.

If Kielty were required to return the money – either to Snyder personally or pay it into court to be held in escrow -- Snyder could use it to hire other private counsel. If the money were insufficient for Snyder personally to find other private counsel and the Public Defender must ultimately undertake representation, the money could 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.* The Public Defender could use the money to hire contract counsel in Snyder’s case.<sup>13</sup> Thus, the Public Defender, its existing clients, and taxpayers would not be burdened and harmed. Irreparable harm will result to the Public Defender, its existing clients and taxpayers if Kielty is not required to refund the \$5,000 to use to retain another attorney, since the Public Defender will face further case overload (E-24-25; A-3-4), 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 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

---

<sup>13</sup> In cases where the sum refunded would not be enough to fully pay contract counsel, the sum would still off-set some of the cost of hiring contract counsel, thus relieving some of the financial burden to the Public Defender and taxpayers.

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 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, 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,

---

J. Gregory Mermelstein, MOBar #33836  
Appellate Division Director  
Attorney for Relator  
Woodrail Centre  
1000 West Nifong  
Building 7, Suite 100  
Telephone: (573) 882-9855  
FAX: (573) 882-9468  
Email: Greg.Mermelstein@mspd.mo.gov

### **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 11,644 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 28<sup>th</sup> day of June, 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 28<sup>th</sup> day of June, 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.

---

J. Gregory Mermelstein