IN THE
MISSOURI SUPREME COURT

STATE ex rel. MISSOURI PUBLIC DEFENDER COMMISSION, J. MARTY ROBINSON, & WAYNE WILLIAMS,	)	
Relators,	)	
vs.	)	No. SC89882
THE HON. KENNETH W. PRATTE CIRCUIT JUDGE, 24TH JUDICIAL CIRCUIT,	)	
Respondent.	)	

ON PRELIMINARY WRIT OF PROHIBITION
FROM THE MISSOURI SUPREME COURT
TO THE HONORABLE KENNETH W. PRATTE, JUDGE
CIRCUIT COURT OF ST. FRANCOIS COUNTY, MISSOURI
TWENTY-FOURTH JUDICIAL CIRCUIT

RELATORS' BRIEF

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INDEX

TABLE OF AUTHORITIES

Page

***CASES*:**

***CONSTITUTIONAL PROVISIONS*:**

***STATUTES*:**

***MISSOURI SUPREME COURT RULES*:**

***OTHER*:**

JURISDICTIONAL STATEMENT

This original writ case seeks a writ of prohibition. Relator Missouri Public Defender Commission is a body of seven members appointed by the Governor of Missouri to oversee the operation of the Missouri State Public Defender System. Relator, J. Marty Robinson, is the Director of the Missouri Public Defender System. Relator, Wayne Williams, is the District Defender of the Area 24 Public Defender Office in Farmington, Mo. Respondent, the Hon. Kenneth W. Pratte, is the Presiding Judge of the Circuit Court of St. Francois County, Mo.

After the Missouri Court of Appeals, Eastern District, denied Relators' petition for a writ of prohibition without an opinion, Relators filed in this Court an application for a writ to prohibit Judge Pratte's orders of October 17, 2008, and December 3, 2008, granting a retained private defense counsel leave to withdraw from the criminal case of ***State v. Steven L. Roloff*** (St. Francois County Case No. 07D7-CR00872-01), 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,[1] and 18 CSR 10-2.010.

On March 31, 2009, 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.

[1] Unless otherwise indicated, all further statutory references are to RSMo. 2000.

STATEMENT OF FACTS

On March 27, 2007, the State of Missouri charged defendant Steven Roloff with: Count 1- Assault in the 1st Degree, a class A Felony in violation of 565.050 RSMo, and Count 2 - Abuse of a Child, a class C Felony in violation of 568.060 RSMo. (E. 4-14).[2]

On June 5, 2007, private attorney Chris Hartmann entered his appearance on behalf of defendant Steven Roloff (E. 23). Attorney Hartmann continued as counsel of record through October 17, 2008, at which time he was granted leave to withdraw (E.12). Respondent, Judge Pratte, on that same date and over the objection of the Public Defender, ordered the Public Defender to enter the case (E.12). The Public Defender objection was based on – as relevant to this writ proceeding -- State Code of Regulations 18 CSR 10-2.010, which provides that the Public Defender shall not represent indigent defendants who have at any time

[2] References in this brief are as follows: "E" citations are to the exhibits attached to Relators' "Petition for a Writ Of Prohibition, And Suggestions In Support Of the Petition, With Attached Exhibits" filed with this Court on January 9, 2009. Each exhibit was given a separate designation by letter, with the pages numbered consecutively from E. 1 ("E" for exhibit) to E. 58. This brief refers to these exhibits only by their "E" page numbers. An "Index of Exhibits" filed By Relators appears in Relators' petition immediately before page E. 1.

during the pendency of their case retained private counsel (E. 1, 17).[3] Judge Pratte then overruled the Public Defender's denial of Roloff's application for services and ordered the Public Defender to represent Roloff in the case (E. 12).

Prior to Hartmann's withdrawal, the case had been set for jury trial to commence on June 24, 2008, but the case was removed from that trial docket by agreement of the parties and subsequently reset for trial to commence on November 3, 2008 (E. 11). Thus, Judge Pratte allowed Hartmann to withdraw and appointed the Public Defender just 17 days before trial was scheduled to begin on November 3, 2008. During the approximately sixteen months private counsel Hartmann represented Roloff, he filed no pre-trial motions except for his motion to withdraw (E. 23).

On November 5, 2008, the Public Defender filed a Motion to Rescind Appointment and Request for Evidentiary Hearing (E. 18-21).

On December 3, 2008, the Motion to Rescind Appointment was heard by Respondent and overruled (E. 14). During the hearing, attorney Hartmann testified that he and Roloff did not agree on whether to take the case to trial and the need for "additional fees" as the reasons why he moved to withdraw (E. 37).

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[3] The Public Defender also denied eligibility based on Roloff having posted a bond, and having personal assets in excess of the Public Defender's indigency guidelines (E. 16, 39). However, Relators are not raising those issues in this writ action.

Private attorney Hartmann also testified he had been paid $9,000.00[4] in attorney fees and used none of the fee to pay for litigation costs (E. 15, 28).

Defendant Roloff also testified at the December 3, 2008 hearing. He said he is willing to preserve the attorney-client relationship with Hartmann if Hartmann would file motions and work on the case (E. 44-45).

Judge Pratte overruled Relators' Motion to Rescind Appointment stating he would not enforce 18 CSR 10-2.010 because the court has "serious issues" with the Rule, believing that it states "once they've ever had a private attorney, they can never get a public defender" (E. 33).

On December 17, 2008, the Public Defender filed a petition for a preliminary writ of prohibition in the Missouri Court of Appeals, Eastern District, to prohibit Judge Pratte's orders of October 17, 2008, and December 3, 2008, allowing private counsel Hartmann to withdraw and appointing the Public Defender. On January 5, 2009, the Eastern District summarily denied Relators' Petition of Prohibition (E. 58).

On January 9, 2009, Relators filed a petition for a preliminary writ of prohibition with this Court to prohibit Judge Pratte's orders. On March 31, 2009,

[4] This fee also included Mr. Hartmann's representation on a municipal charge, a juvenile matter, and a misdemeanor charge in St. Francois County. Mr. Hartmann intends to file a motion to withdraw on the misdemeanor case also (E. 33).

this Court issued a preliminary writ of prohibition. On April 28, 2009, Respondent filed his Return to the preliminary writ in prohibition with this Court.

POINT RELIED ON

I.

Relators are entitled to a permanent writ prohibiting Respondent from appointing the Public Defender to represent Roloff and allowing Hartmann to withdraw, because Respondent exceeded his authority and abused his discretion, in that:

(1) Roloff is ineligible for a Public Defender under Section 600.086.1 because he had "the means at this disposal or available to him to obtain counsel" and he obtained Hartmann, and he is ineligible under 18 CSR 10-2.010, which provides that the Public Defender "shall not represent indigent defendants who have at any time during the pendency of the case retained private counsel." 18 CSR 10-2.010 was binding upon the court, and is not unreasonable or plainly inconsistent with the Public Defender statute; and,

(2) Respondent acted unreasonably, arbitrarily, and against the logic of the circumstances in allowing Hartmann to withdraw days before trial and in overruling Relators' Motion to Rescind Appointment, because Hartmann had been paid $9,000 in attorney's fees, did not show unreasonable financial hardship, and cannot withdraw because Roloff chose to go to trial, since the decision whether to proceed to trial belongs to a client and disagreement with the attorney on that matter does not constitute a real conflict of interest. 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 the taxpayers will bear the full cost of the representation.

Pharmflex, Inc. v. Div. of Employment Security, 964 S.W.2d 825 (Mo. App. W.D. 1997);

Termini v. Missouri Gaming Comm'n, 921 S.W.2d 159 (Mo. App. W.D. 1996);

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. 2006);

Section 600.086.1, RSMo. 2000; and,

18 CSR 10-2.010.

ARGUMENT

I.

Relators are entitled to a permanent writ prohibiting Respondent from appointing the Public Defender to represent Roloff and allowing Hartmann to withdraw, because Respondent exceeded his authority and abused his discretion, in that:

(1) Roloff is ineligible for a Public Defender under Section 600.086.1 because he had "the means at this disposal or available to him to obtain counsel" and he obtained Hartmann, and he is ineligible under 18 CSR 10-2.010, which provides that the Public Defender "shall not represent indigent defendants who have at any time during the pendency of the case retained private counsel." 18 CSR 10-2.010 was binding upon the court, and is not unreasonable or plainly inconsistent with the Public Defender statute; and,

(2) Respondent acted unreasonably, arbitrarily, and against the logic of the circumstances in allowing Hartmann to withdraw days before trial and in overruling Relators' Motion to Rescind Appointment, because Hartmann had been paid $9,000 in attorney's fees, did not show unreasonable financial hardship, and cannot withdraw because Roloff chose to go to trial, since the decision whether to proceed to trial belongs to a client and disagreement with the attorney on that matter does not constitute a real conflict of interest. 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 the 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 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).

While it is true that a writ of prohibition cannot "control discretionary acts," ***State ex rel. Allen v. Yeaman***, 440 S.W. 2d 138, 145 (Mo. App. K.C.D. 1969) the principal act complained of here is not Respondent's order granting private counsel withdrawal, it is Respondent's order appointing the Public Defender to assume representation. When a trial court exceeds its authority 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).

Roloff is ineligible for services under 18 CSR 10-2.010

The Public Defender Commission has duly promulgated 18 CSR 10-2.010 for the determination of eligibility and it is substantive law. Under this regulation, defendant Roloff is ineligible for Public Defender services. 18 CSR 10-2.010 for the determination of eligibility states, in relevant part:

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(2) The State Public Defender System shall not represent indigent defendants who have at any time during the pendency of the case retained private counsel. The public defender shall not be available to assume representation where private counsel is allowed by court order to withdraw from representation regardless of the cause for such order of withdrawal unless approved by the director. In certain circumstances, as determined by the director, the State Public Defender System shall provide state assistance in paying for reasonable expert witnesses or investigation expenses for indigent defendants represented by private counsel. This regulation, in whole or part, does not restrict the Missouri State Public Defender System from exercising its authority to contract cases to private counsel as provided by law.

(3) Definition of Case.

(A) For purposes of determining eligibility under section (2), the term "case" shall be defined as a criminal proceeding, matter, action, or appeal in which private counsel has been retained, and shall include the time from the initial retention of private counsel through sentencing, final judgment, or completion of the direct appeal.

18 CSR 10-2.010.

The Missouri Legislature "has the power to delegate its authority, even that which involves an exercise of discretion." ***Bergman v. Mills***, 988 S.W.2d 84, 89

(Mo. App. W.D. 1999). The Legislature has chosen to delegate to the Public Defender Commission broad rulemaking authority to carry out the Commission's mandate.

Section 600.017 RSMo. provides, in relevant part:

> The [Public Defender] commission shall have the following powers together with all powers incident thereto or necessary for the performance thereof:
>
> * * *
>
> (10) Make *any rules* needed for the administration of the state public defender system.

Section 600.017 RSMo. (emphasis added).

And, Section 600.042 RSMo. Cum. Supp. 2007 provides, in relevant part:

> 1. The [Public Defender] director shall:
>
> * * *
>
> (8) With the approval of the commission, promulgate necessary rules, regulations and instructions consistent with this chapter defining the organization of his office and the responsibilities of public defenders, assistant public defenders, deputy public defenders and other personnel [.]
>
> * * *

> 2. No rule or portion of a rule promulgated under authority of this chapter shall become effective unless it has been promulgated pursuant to the provisions of Section 536.024 RSMo, [Missouri Administrative Procedure Act.]

Section 600.042.1(8) and .2 RSMo. Cum. Supp. 2007.

Furthermore, Sections 600.086.1 and .2 grant the Public Defender Commission broad power to adopt and enforce rules for determining eligibility and indigency. Those statutes provide in relevant part:

> 1. 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.
>
> 2. Within the parameters set by subsection 1 of this section, the commission may establish and enforce such further rules for courts and defenders in determining indigency as may be necessary.

Section 600.086.1 RSMo. (emphasis added).

The Public Defender Commission adopted 18 CSR 10-2.010 (hereinafter, "the Eligibility Rule") pursuant to its rule-making authority granted by Sections

600.017(10), 600.042.1(8), 600.042.2, and 600.086.2. The Rule was also adopted and promulgated pursuant to the procedures set forth in Sections 536.021 and 536.024 RSMo. Cum. Supp. 2007, and therefore, is in compliance with the Missouri Administrative Procedure Act. ***See Section 536.021 and 536.024 RSMo. Cum. Supp. 2007***.

Properly adopted and promulgated administrative rules "have independent power as law." ***See United Pharmacal Co. v. Missouri Bd. of Pharmacy***, 159 S.W.3d 361, 365 (Mo. banc 2005). When an agency's rules and regulations promulgated under an act are challenged, they will be sustained unless they are "unreasonable and plainly inconsistent with the act;" rules and regulations are not to be overturned except for "weighty reasons." ***Pharmflex, Inc. v. Div. of Employment Security***, 964 S.W.2d 825, 829 (Mo. App. W.D. 1997); ***Termini v. Missouri Gaming Comm'n***, 921 S.W.2d 159, 161 (Mo. App. W.D. 1996). The challenger of an administrative regulation carries the burden to show the regulation "bears no reasonable relationship to the legislative objective." ***Termini v. Missouri Gaming Comm'n***, 921 S.W.2d at 161. Therefore, the fundamental question before this Court is whether the Eligibility Rule is unreasonable and plainly inconsistent with the Public Defender statute. It is not.

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. U.S. Const. Amend. VI; Mo. Const. Art. 1 Section 18(a); ***see***

Gideon v. Wainwright, 372 U.S. 335 (1963); ***Argersinger v. Hamlin***, 407 U.S. 25, 37-40 (1972). Section 600.042.4 provides that the Public Defender shall provide representation to "eligible person[s]," such as those charged with felonies. ***See Section 600.042.4(1) RSMo. Cum. Supp. 2007.*** The Legislature clearly intended the Public Defender to determine eligibility as a precursor before providing representation. Eligibility is determined through Sections 600.086.1 and .2, and 18 CSR 10-2.010 (the Eligibility Rule) and 18 CSR 10-3.010 (Indigence Guidelines). These regulations are consistent with each other and with the requirements of Chapter 600.

Section 600.086.1 contains two requirements, both of which must be satisfied in order for a defendant to be eligible for Public Defender representation: the defendant "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 RSMo.*** (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 the statute contains two distinct requirements. This is illustrated by the holding in ***State ex rel. Gordon v. Copeland***, 803 S.W.2d 153 (Mo. App. S.D. 1991). There, 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, which language remains the same today, 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, Roloff's family hired Hartmann and paid him $9,000 to represent Roloff, and Hartman entered his appearance as attorney of record. (E. 31-32). At

that point, Roloff 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." He also became ineligible for representation under 18 CSR 10-2.010(2), which consistently with Section 600.086.1, provides that "[t]he State Public Defender System shall not represent indigent defendants who have at any time during the pendency of the case retained private counsel." While the Public Defender could not require Roloff's family to obtain counsel for him or consider their assets in determining indigence, when they chose to do so and actually hired Hartmann, Roloff became ineligible for Public Defender representation under Section 600.086.1 and 18 CSR 10-2.010(2).

In enacting Section 600.086.1, 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 entitled to representation 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 means, and to conserve scarce taxpayer funds by limiting Public Defender representation to such defendants. 18 CSR 10-2.010(2) is not "unreasonable and plainly inconsistent," ***see Pharmflex, Inc. v. Div. of Employment Security***, 964 S.W.2d at 829, with Section 600.086.1. The regulation is clearly reasonably related to the legislative objective. ***See Termini v. Missouri Gaming Comm'n***, 921 S.W.2d at 161.

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, 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, Roloff had the resources to obtain Hartmann, and in fact, retained him. The Eligibility Rule is a proper and necessary exercise of the Commission's statutory power to administer the Public Defender System and the Director's statutory duty to coordinate the System's operations. The Rule is designed to ensure that representation by the Public Defender meets Sixth Amendment standards for competent and effective representation by reducing caseloads where private attorneys have already entered and where there is no real conflict of interests necessitating new counsel. In such circumstances, there is no constitutional or statutory right to a Public Defender, and the Public Defender Commission is well within its authority to promulgate its Rule defining the eligibility requirements entitling one to a Public Defender.

Realtors realize that there are situations where counsel or the courts must terminate representation in a particular case. Conflicting interests of counsel can arise from attempts to represent multiple clients on the same charge, e.g. ***LaFrance v. State,*** 585 S.W.2d 317 (Mo. App. W.D. 1979), or where trial counsel's misconduct or malfeasance jeopardizes the defendant's rights, e.g. ***Nunn v. State***, 778 S.W.2d 707 (Mo. App. E.D. 1989); and Missouri Rule of Professional Conduct 4-1.7: Conflict of Interest.

The Eligibility Rule does not forestall private counsel or the courts from ensuring conflict-free counsel. Where there is a real conflict of interest necessitating new counsel, the Public Defender Director has the authority and discretion under the Eligibility Rule and by statute to accept (approve)

representation by a Public Defender attorney or contract actual conflicts to other members of the Bar. 18 CSR 10-2.010(2) states, in relevant part:

> The public defender shall not be available to assume representation where private counsel is allowed by court order to withdraw from representation regardless of the cause for such order of withdrawal *unless approved by the director*. … This regulation, in whole or part, does not restrict the Missouri State Public Defender System from exercising its authority to contract cases to private counsel as provided by law.

18 CSR 10-2.010(2).

While courts can compel private attorneys to represent indigent defendants despite not being paid attorney's fees, courts cannot compel private attorneys to advance personal funds for the payment of either costs or expenses in the preparation of a proper defense of the indigent accused. ***See State ex rel. Wolff v. Ruddy,*** 617 S.W.2d 64 (Mo. banc 1981). The Eligibility Rule takes this into account, by providing a mechanism for private counsel to receive financial assistance in continuing representation in a case, despite the lack of additional attorney's fees. The Eligibility Rule provides:

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> In certain circumstances, as determined by the director, the State Public Defender System shall provide state assistance in paying for reasonable expert witnesses or investigation expenses for indigent defendants represented by private counsel.

18 CSR 10-2.010(2).

While Relators have no legal obligation to pay for litigation expenses incurred or anticipated by private counsel, Relators saw fit to provide that assistance as a means to enable courts to allow private attorneys to continue to represent indigent defendants where those defendants have run out of money to pay additional attorney's fees or litigation expenses. This relieves the Public Defender of the burden of having to provide a Public Defender attorney for the case. While attorney Hartmann was unaware that he could seek such costs until after the court allowed him to withdraw (E-32), this information did not change the ruling of the court after the December 3, 2008, hearing on the motion to reconsider the appointment of the Public Defender. It should have, regardless of whether Judge Pratte considered Hartmann adequately compensated for his services.

The circuit courts must ensure that a criminal defendant receives the right to counsel, but the circuit courts must do so in accordance with state and federal law. Missouri has legislatively established a mechanism for determining and identifying criminal defendants who are eligible for Public Defender services. That mechanism is contained in Chapter 600 and its provisions for the promulgation of administrative rules for the determination of indigence and eligibility. Section 600.086.1 provides that a defendant is eligible for a Public Defender only when "the person does not have the means at his disposal or available to him to obtain counsel in his behalf." ***Section 600.086.1 RSMo***. The

Eligibility Rule specifically states the State Public Defender shall "not represent indigent defendants who have at any time during the pendency of the case retained private counsel." ***18 CSR 10-2.010(2)***. The Rule is clearly within the authority of the Public Defender Commission to promulgate by virtue of Section 600.017(10), 600.042.1(8), 600.042.2, and 600.086.2. RSMo. The Rule has the force of law. ***See United Pharmacal Co. v. Missouri Bd. of Pharmacy***, 159 S.W.3d at 365. The Rule is not unreasonable or plainly inconsistent with the statute. ***See Pharmflex, Inc. v. Div. of Employment Security***, 964 S.W.2d at 829.

Therefore, Judge Pratte in the instant case exceeded his authority in appointing the Public Defender because Roloff is ineligible for representation under the first prong of Section 600.086.1 since he had "the means at his disposal or available to him to obtain counsel in his behalf," and 18 CSR 10-2.010(2), since Roloff, in fact, obtained private counsel. This Court should set aside Respondent's orders of October 17, 2008, and December 3, 2008, appointing the Public Defender and granting Hartmann leave to withdraw, and should make permanent its preliminary writ.

Hartmann should not be permitted to withdraw

While the Public Defender's real interest in this case is that the Public Defender not be appointed to represent Roloff, the issues of its appointment and Hartmann's withdrawal are intertwined because in allowing Hartmann to withdraw, Judge Pratte appointed the Public Defender. Respondent acted unreasonably, arbitrarily, and against the logic of the circumstances in allowing

Hartmann to withdraw days before trial and in overruling Relators' Motion to Rescind Appointment and 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 the taxpayers will bear the full cost of the representation despite private counsel having been paid a substantial amount in attorney's fees.

Where the appointment of the Public Defender is statutorily authorized, a point not conceded here, whether to appoint counsel is within the trial court's discretion and appellate review is for abuse of that discretion. ***In re Stuart***, 646 N.W.2d at 523. 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).

This Court should find that Respondent abused his discretion in allowing Hartmann to withdraw just days before trial after having been in the case for approximately sixteen 16 months. Assuming, *arguendo*, that Respondent had authority to appoint the Public Defender – and if this Court should find such authority – then this Court should hold that Respondent abused his discretion in appointing the Public Defender. It was unreasonable to allow Hartmann to withdraw seventeen days before the second trial setting (E.11) after having been in the case for sixteen months without filing any pre-trial motions other than his motion to withdraw (E.23) and pocketing $9,000.00 (E.15). It was exactly this

type of abuse that Section 600.086.1 seeks to avoid through its requirement that indigence alone not be the sole factor in determining eligibility.

Attorney Hartmann testified at the December 3, 2008, hearing that his principal reason for moving to withdraw was Roloff's decision to take the case to trial, which would have required "8 to $10,000.00" in additional attorney's fees (E. 36-38). This is not a compelling reason for the court to allow him to withdraw.

First, Missouri Rule of Professional Conduct 4-1.2 states:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to Rule 4-1.2(c), (f) and (g), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Missouri Rule of Professional Conduct 4-1.2(a).

Second, while an attorney may move to withdraw 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)(5) and 4-1.16(b)(6)***,

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).***

Respondent certainly had the legal authority to require Hartmann to continue representing Roloff even if Roloff was in arrears in attorney's fees. ***See 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 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).

There is no evidence that completing the representation of Roloff would result in an unreasonable financial hardship on Hartmann. The record establishes that Hartmann was enriched $9,000.00 when he moved to withdraw for no reason other wanting even more money and not wanting to abide by Mr. Roloff's wishes regarding the legitimate ends of the representation (proceed to trial rather than accept a plea bargain).

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). While an attorney may protect himself or herself from risk of non-payment of a fee by requiring an adequate retainer as a condition of appearing in the case, 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*** at 8.

This Court should recognize the Eligibility Rule as within the authority of the Public Defender Commission to control the System's caseload by limiting the circumstances where private criminal defense counsel are allowed to withdraw – i.e., cease representation -- and foist the full expense of cases onto taxpayers merely because the private counsel have not been paid their full attorney's fees. 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 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. 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. 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***.

While in the present case, Hartmann testified that "there was a bunch of reason why I withdrew" (E. 36), he only advanced two: Roloff's decision to go to trial and his need for additional fees to take it to trial (E. 37). Regarding Hartmann's first reason, the decision to go to trial belongs to the client. ***Missouri Rule of Professional Conduct 4-1.2(a)***. It is not logical or reasonable to allow defense counsel to withdraw from a criminal case merely because a criminal defendant wishes to proceed to trial. This is not a real conflict of interest or a valid reason to withdraw. If it were, any time an attorney disagreed with his or her client's decision to proceed to trial (which may be a common occurrence), the attorney could always withdraw. Regarding the second reason, the Public Defender and 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. It is against the logic of the circumstances, arbitrary and unreasonable to shift the full burden and cost of Roloff's representation to the Public Defender and taxpayers merely because Hartmann made a perceived "bad deal" for himself financially. It is against the logic of the circumstances, arbitrary and unreasonable to allow Hartmann to withdraw on the eve of trial after he received more $9,000.00 in attorney's fees while doing little or nothing in exchange for that fee during the sixteen months he represented Roloff. The trial court abused its discretion in allowing Hartmann to withdraw and

appointing the Public Defender. This Court should set aside Respondent's orders of October 17, 2008, and December 3, 2008, granting Hartmann leave to withdraw and appointing the Public Defender, and should make permanent its preliminary writ.

CONCLUSION

For the reasons stated, Relators respectfully requests that this Court make permanent a preliminary writ of prohibition to prohibit the orders of October 17, 2008 and December 3, 2008, appointing the Public Defender, on grounds that Respondent exceeded his authority since such appointment was not authorized under Section 600.086.1 RSMo. and 18 CSR 10-2.010(2).

Alternatively, and/or additionally, Relators respectfully requests that this Court make permanent its preliminary writ of prohibition on grounds that Respondent Judge Pratte abused his discretion in allowing private attorney Hartman to withdraw and appointing the Public Defender in that such order was against the logic of the circumstances, arbitrary and unreasonable.

In either event, this Court should make permanent a writ prohibiting Respondents from appointing the Public Defender.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Daniel J. Gralike, 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, Office 2002, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 7,096 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in May, 2009. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

I hereby certify that on this 28th day of May, 2009, a true and correct copy of the foregoing was mailed postage prepaid to: Hon. Kenneth W. Pratte--Circuit Judge (Div. 2) 1 N. Washington, 3rd Floor, Farmington, Mo 63640 (573) 756-5144, fax: (573) 756-3733, and Wendy Horn, St. Francois County Prosecuting Attorney's Office, Farmington, Mo 63640, (573) 756-3623 or 431-6505 ext. 7. Mr. Steven Roloff, 583 S. Carriage Crossing, Nixa, Mo 65714; Chris Hartmann, Attorney at Law, 205 East Liberty Street, Farmington, Mo 63640; Vickie Weible, Circuit Clerk, 1 N. Washington, Farmington, MO 63640, (573) 756-4551; fax: (573) 756-3733.

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Daniel J. Gralike