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TABLE OF AUTHORITIES

STATEMENT OF FACTS

Relators include the Missouri Public Defender Commission, the Director, J. Marty Robinson, and Wayne Williams, the Public Defender for the area including the 24th Judicial Circuit of Missouri. Respondent Honorable Judge is Circuit Judge for the 24th Circuit.

The State charged Steven L. Roloff by Information with assault first degree, a Class A felony, and child abuse, a Class C felony, in Case No. 07D7-CR00872 in the Circuit Court of St. Francois County, Missouri, Respondent Honorable Judge presiding (Exhibits attached to Relators' Petition and pages thereof numbered consecutively, hereinafter "E-"at 5).

Roloff was represented by a private attorney, Chris Hartmann. Id. On October 17, 2008, Hartmann was granted leave to withdraw by Respondent Honorable Judge (E-12). Then Roloff filed an affidavit applying for the services of the public defender (E-17). The affidavit was reviewed by the public defender's office for St. Francois County, and that office determined Roloff to be ineligible for their services, citing among other factors the amount of his bond, his assets, and the fact he had previously retained and paid private counsel in the same case. Id. Respondent Honorable Judge ordered the public defender to enter the case. Relator's Ex. C (E-12).

Relators then filed a motion to rescind the appointment, and Respondent Honorable Judge held an evidentiary hearing December 3, 2008 (E-22 and following.) Respondent Honorable Judge heard evidence at the hearing, at the

conclusion of which Relators' attorney argued Roloff had the means to obtain counsel based on facts adduced at the hearing. Relators' Ex. H at 27 (E-48). Relators cited 18 CSR 10-2.010 (2) which states in pertinent part 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. 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."

The Prosecuting Attorney replied that based on the facts adduced at the hearing, at the time of the affidavit Roloff was indigent and eligible for public defender services. She argued "…he [Roloff] was not the source of any of the money that was used to pay for a bond or for his lawyer …he [Roloff] had no job. He had zero income…" (E-50). Respondent Honorable Judge then decided his original ruling would stand and that he still considered Roloff indigent and eligible for the public defender's services (E-55). Respondent Honorable Judge at hearing heard evidence that Roloff had relatives and friends pay all his attorney's fees in the amount of $9,000 (E-35).

Relators then filed this Petition in the Missouri Court of Appeals, Eastern District, which was denied in Case No. ED92304 on January 5, 2009 (E-58). Relators next filed this Petition in this Court, and this Court granted a preliminary writ of prohibition. This brief and argument follows.

POINT RELIED ON

Relators are not entitled to an order prohibiting Respondent Honorable Judge from appointing the Public Defender to represent Roloff, because Respondent Honorable Judge did not exceed his authority in appointing the Public Defender, in that Roloff was indigent within the meaning of Chapter 600, Revised Statutes of Missouri.

Foremost-McKesson v. Davis, 488 S.W.2d 193, 197 (Mo. banc 1972)

State ex rel. Robinson v. Franklin, 48 S.W.3d 64 (Mo.App.W.D. 2001)

State ex rel, Public Defender Comm'n v. Williamson, 971 S.W.2d 835 (Mo.App. W.D.1998)

State ex rel. Gordon v. Copeland, 803 S.W.2d 153 (Mo.App. S.D. 1991)

Section 536.014, Revised Statutes of Missouri

Section 600.042, RSMo.

Section 600.086, RSMo.

18 CSR 10-2.010 (2)

ARGUMENT

Relators are not entitled to an order prohibiting Respondent Honorable Judge from appointing the Public Defender to represent Roloff, because Respondent Honorable Judge did not exceed his authority in appointing the Public Defender, in that Roloff was indigent within the meaning of Chapter 600, Revised Statutes of Missouri.

Relators, the Missouri Public Defender Commission, the Director, J. Marty Robinson, and Wayne Williams, the District Defender for the area which includes the 24th Judicial Circuit, have requested this Court make absolute its preliminary writ prohibiting the Respondent Honorable Judge from appointing the Public Defender to represent Steven Roloff, charged with felony offenses of assault first degree and child abuse in Respondent Honorable Judge's court. For the reasons herein stated Respondent Honorable Judge requests this Court dissolve the preliminary writ and refuse to make its writ absolute.

As set forth earlier supra in the Statement of Facts, Respondent Honorable Judge ordered the Public Defender to represent Roloff after finding as a fact that Roloff was indigent within the meaning of Chapter 600, Revised Statutes of Missouri (hereinafter "RSMo.") Section 600.086.1 provides that "[a] person shall be considered eligible for representation under [these sections] 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 600.086.4 further allows "[u]pon motion by either party, the court in which the case is pending shall have authority to determine whether the services of the public defender may be utilized by the defendant."

As previously noted Respondent Honorable Judge had determined in October 2008 that Roloff was indigent based on his application for Public Defender services (E-19). Respondent Honorable Judge then held a hearing in Roloff's case after private counsel was permitted to withdraw, on motion of Relators, to determine Roloff's indigency (E-22). He heard testimony from Hartmann as to the amount he was paid and the cases, four in all, including the felony criminal case, on which he was to represent Roloff (E-31).

Respondent Honorable Judge heard argument that the fee arrangement was irrelevant to the task of determining indigence because Hartmann had asked to withdraw not because he was not adequately paid for his services but for the reason he and Roloff had "conflicting views" about Hartmann's representation (E-31; E-36). Furthermore, testimony established Roloff's friends and family paid the $9,000 retainer he gave Hartmann (Id.) Roloff's family paid for his bond, he was still making payments to his bondsman, and he struggled to get by on $10.00 per hour on less than 30 hours a week (E-20). From all the foregoing the Court found its October 2008 ruling, that Roloff was indigent, still stood (E-55).

On this record it is clear the writ of prohibition will not lie. A writ of prohibition appears to lie "to restrain the further enforcement of orders that are

beyond or in excess of the authority of the judge [against whom the writ is sought]." State ex rel. Robinson v. Franklin, 48 S.W.3d 64, 67 (Mo.App.W.D. 2001), citing State ex rel. Palmer by Palmer v. Goeke, 8 S.W.3d 193, 196 (Mo.App. E.D. 1999), and State ex rel. Sisters of St. Mary v. Campbell, 511 S.W.2d 141, 148 (Mo.App. St.L.D. 1974). However, "it is not the function of the writ to control a trial court's discretion or direct how it may be exercised." Campbell at 148, citing State ex rel. Allen v. Yeaman, 440 S.W.2d 138, 145 (Mo.App. K.C.D. 1969). Accordingly, a writ of prohibition cannot "control discretionary acts…" Id.

It is likewise clear the appointment of a public defender to represent an indigent person is an act of discretion on the part of the trial judge. A case in point is Sullivan v. Dalton, 795 S.W.2d 389 (Mo. banc 1990), in which the Supreme Court held the Public Defender Commission was required to provide representation for a person facing incarceration in municipal court proceedings. The Court held "…the trial judge used his discretion to require the public defender to represent an indigent defendant in an ordinance violation where the city seeks incarceration. There is no showing of an abuse of that discretion." Id. at 391.

It is worth noting in passing that the Court in Sullivan found the appointment of the public defender in that case "authorized" by the public defender statute, Section 600.042, RSMo. Id. at 390. Indeed, Sullivan appears to hold that once the trial judge finds a defendant indigent the appointment of the public defender in the instant case is authorized under the applicable statutes, and

therefore, appointment is an act of discretion not susceptible to a writ of prohibition. Accordingly, this Court should decline to issue the "powerful writ" of prohibition. See, Robinson, 48 S.W.3d at 67, citing State ex rel. Riverside Joint Venture v. Missouri Gaming Commission, 969 S.W.2d 218, 221 (Mo. banc 1998).

Relators appear to rely on the holding in Robinson to defend their position that prohibition is available here. Relators' Brief at 13. Respondent Honorable Judge contends Robinson is inapposite here. In Robinson, the Court of Appeals, Western District, had before it a situation in which the circuit judge appointed the Director of the Missouri Public Defender System as well as the deputy director to enter their appearance on behalf of the defendant in a criminal case. Robinson, 48 S.W.3d at 67. Robinson, the Director, sought a writ of prohibition and the Western District obliged. Id. The Western District in granting the writ found that the statutes governing the Public Defender Commission do not confer power on the circuit court to appoint the Director himself to represent the defendant, and therefore the appointment was beyond the court's jurisdiction. Id. at 69. That situation is not factually similar to the case at bar, in which Respondent Honorable Judge exercised his statutory authority to appoint the Public Defender to represent the defendant after first finding he was indigent and confirming that decision by sworn testimony at hearing.

Given the analysis set forth supra, that Respondent Honorable Judge had discretion to appoint the Public Defender, and prohibition would not lie to disturb that ruling, Respondent Honorable Judge now urges the Court to consider the

record that his discretion was informed by the facts found at hearing regarding Roloff's eligibility and indigence.

Section 600.086 provides in pertinent part that "[a] person shall be considered eligible for representation under [this section] 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." The statute provides that the person seeking representation should provide an affidavit which shall be reviewed by the public defender to determine whether they are eligible and that "[t]he determination of indigency of any person seeking the services of the state public defender system shall be made by the defender or anyone serving under him at any stage of the proceedings. Upon motion by either party, the court in which the case is pending shall have authority to determine whether the services of the public defender may be utilized by the defendant." Section 600.086.3, RSMo.

In the underlying case at issue the defendant Roloff filed an affidavit applying for the services of the public defender (E-17). The affidavit was reviewed by the public defender's office for St. Francois County, and that office determined Roloff to be ineligible for their services, citing among other factors the amount of his bond, his assets, and the fact he had previously retained and paid private counsel in the same case. Id. Respondent Honorable Judge ordered the public defender to enter the case (E-12).

Simply put, Respondent Honorable Judge heard evidence as to Roloff's circumstances in the manner provided by statute, and even taking into account that through family and friends he was once able to scrape up $9,000 to hire Hartmann, at the time of the Court's determination in October 2008 he was unable to afford counsel (E-47-54). That determination of indigency is a matter of discretion and is therefore beyond the reach of the writ of prohibition, as fully argued earlier supra.

Relators are left with the argument that the application of an administrative rule, 18 CSR 10-2.010, requires that even though Roloff be found indigent he must still be considered ineligible for public defender services because he once employed private counsel in the same case. Relator's Brief at 14.

18 CSR 10-2.010(2) provides as follows: "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."

As that rule is promulgated, it appears to preclude representation of certain indigent persons by the Public Defender. Indeed, the rule presupposes by its language the person seeking services is indigent. As thus set forth, then, the rule appears to be in direct conflict with the statute ostensibly giving rise to it, namely Section 600.086. That statute, set forth more fully earlier infra, lists considerations in determining indigency for public defender applicants which

include “all the circumstances of the case including [applicant’s] ability to make bond, his income and the number of persons dependent on him for support…” Section 600.086.1.

While the Commission is empowered to make rules to “[determine] indigency” by Section 600.086.2, it does not appear to have the authority to make rules that deny services to indigent persons. Unfortunately, the rule as excerpted above appears to do just that.

Such an administrative rule would not then meet the standard of Section 536.014, RSMo.,, part of this State’s Administrative Procedure Act, which declares “No… commission… rule shall be valid in the event that: (1) There is an absence of statutory authority for the rule or any portion thereof; or (2) The rule is in conflict with state law; or (3) The rule is so arbitrary and capricious as to create such substantial inequity as to be unreasonably burdensome on persons affected.” Section 536.014.

Respondent Honorable Judge is mindful that the administrative rule is to be upheld as valid unless “unreasonable and plainly inconsistent” with the empowering act and not to be invalidated except for “weighty” reasons. Massage Therapy Training Institute, LLC v. Missouri State Board of Therapeutic Massage, 65 S.W.3d 601, 606 (Mo.App. S.D. 2002), citing Foremost-McKesson v. Davis, 488 S.W.2d 193, 197 (Mo. banc 1972). The burden is upon the party challenging the rule to show it bears “no reasonable relationship” to the legislative objective of the act under which authority the rule is promulgated. Foremost-McKesson, 488

S.W.2d at 197, citing King v. Priest, 206 S.W.2d 547, 552 (Mo. banc 1947), and Ketring v. Sturges, 372 S.W.2d 104 (Mo. 1963).

Nonetheless, the Respondent Honorable Judge is faced with a situation where a criminal defendant who is found to be indigent under the applicable statute is refused services by the Public Defender because he previously had hired counsel. Respondent Honorable Judge would submit that the rule as promulgated bears no reasonable relationship to the legislative objective of providing representation to indigent persons when by its very terms it acts to refuse representation to a number of those very same indigent persons.

As Respondent Honorable Judge noted in his ruling from which Relators appeal, there are a number of circumstances under which an attorney-client relationship can be severed by a trial court, including but not limited to real and stark conflicts in interest between the attorney and the client (E-55). Those reasons may have nothing whatsoever to do with the defendant-client's ability to pay or any change in their financial situation.

Such an analysis strikes at the very heart of Relators' argument. Relators appear to be attacking Respondent Honorable Judge's decision to permit Hartmann to withdraw. Roloff hired Hartmann and thereafter a conflict developed which precipitated Hartmann's withdrawal (E-48-49). There is nothing in the record to indicate Hartmann sought leave to withdraw solely because of a non-payment of fees (E-53). Relators make that assertion only because Hartmann said

he would require more money to continue his representation, one of a "bunch of reasons" why he withdrew (E-36).

It is worth noting Counsel for Relators at the December 2008 hearing openly criticized Respondent Honorable judge's determination Hartmann should have been permitted to withdraw (E-48-49). The rule advanced by Relators would in effect say there was no acceptable reason for counsel to withdraw from a case which would result in the defendant then becoming eligible for Public Defender representation.

Nonetheless, the questions before Respondent Honorable Judge were: first, should Hartmann be permitted to withdraw, and second, assuming he would be permitted, if Roloff was in October 2008, in a position to hire counsel. To that end Respondent took testimony at the December 2008 hearing from Roloff and his mother, who had sold assets to get the money to hire Hartmann in January 2008 (E-28; E-44). The facts elicited at the December hearing confirmed that whether or not Roloff and his supporters had once had the money to spend on private counsel, they no longer did.

In the underlying case here, at the moment that relationship was severed, and private counsel was permitted to withdraw the Respondent Honorable Judge took stock of the defendant's condition and found him to be indigent. The administrative rule upon which Relators rely serves in fact as a barrier to persons otherwise indigent and eligible for public defender services as found by a judge of appropriate jurisdiction. Such a rule cannot be found to bear a "reasonable

relationship" to the objectives of the statutes creating the Public Defender Commission and setting forth the eligibility for its services.

In defending the challenged regulation Relators cite State ex rel. Gordon v. Copeland, 803 S.W.2d 153 (Mo.App. S.D. 1991). In Gordon the Court of Appeals, Southern District, considered the fact that a juvenile's parents did not choose to hire an attorney a factor in deciding whether the juvenile was indigent. Id. at 159. Such a ruling appears to lend support to Respondent Honorable Judge's decision that once Roloff's resources of assistance from his supporters were exhausted, he could be said to be indigent. Indeed, an adult would not necessarily be required, as a juvenile would, to seek the help of family or friends as opposed to relying on his own means to either hire an attorney or request the Public Defender.

Furthermore, in Gordon, as here, the Public Defender sought by writ of prohibition to force an interpretation of Section 600.086, as amplified by CSR regulations Relators had promulgated, so as to limit their responsibilities. The Southern District recognized that "[i]n so holding we are not oblivious of the case load borne by the public defender system." Id. at 160.

The clear import of the Southern District's ruling was that the Public Defender Commission could not regulate so unreasonably as to evade its responsibilities under Section 600.086. That is the situation in the case at bar. The rule promulgated by Relators as set forth here does not take into account the circumstances under which private counsel had been originally hired and at what

point and for what reason that relationship ended. Nor does it weigh the factors actually delineated in Section 600.086.1, "… including [applicant's] ability to make bond, his income and the number of persons dependent on him for support…" So in the respects outlined above Gordon appears to read adversely to Relators' position.

Relators spend a substantial part of their argument on the notion the Respondent Honorable Judge should not have permitted Hartmann to withdraw. Relators' Brief at 26. Relators then in the next breath concede that Respondent Honorable Judge had discretion to permit Hartmann to withdraw and the only review available is for abuse of discretion. Id. at 27. Relators cannot seriously contend that a writ of prohibition should issue to compel Hartmann to represent Roloff under the circumstances, where the most Relators can say is Respondent Honorable Judge exercised his discretion; and since Respondent Honorable Judge certainly had jurisdiction and power to allow Hartmann to withdraw, prohibition is not a proper remedy, as fully set forth in the analysis earlier infra. See generally Robinson, cited earlier infra.

The case cited by Relators in support of the notion prohibition is proper to prevent Respondent Honorable Judge from permitting Hartmann to withdraw is State ex rel, Public Defender Comm'n v. Williamson, 971 S.W.2d 835 (Mo.App. W.D. 1998). In that case the trial court ordered the Commission to pay attorney's fees for an attorney, Brewer, who had once been a public defender, was thereafter terminated from her employment but was appointed by the court to continue to

represent the defendant. Id. at 836-837. The trial court then made an order requiring the Public Defender Commission to pay Brewer's attorney fees. Id. at 837.

The Western District granted the writ of prohibition to prohibit the trial judge from requiring the Commission to pay the fees because that action was in excess of the trial court's jurisdiction under Chapter 600. Id. at 839. In so doing the court noted Brewer had initially come to the Court of Appeals for a writ of prohibition to prevent the trial judge from requiring her to represent the defendant, which the court declined to issue. Id. at 837. It seems the opinion in Williamson does not bolster Relators' position, but to the contrary stands for the principle the trial court's decision, as to whether a particular attorney will be permitted to withdraw once they are entered as attorney for the defendant, is a matter of discretion not vulnerable to a writ of prohibition.

Simply put, Relators' discussion, of the circumstances surrounding Hartmann's conduct during his representation of Roloff and his withdrawal as Roloff's attorney, has nothing to do with the issue before the Court and their argument certainly does not entitle Relators to a writ of prohibition on the basis of Respondent Honorable Judge's exercise of discretion in that situation.

CONCLUSION

For the reasons herein stated, Respondent Honorable Judge respectfully requests this Court's preliminary writ of prohibition be quashed in all respects and Relators' Petition be denied.

Respectfully submitted,

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HONORABLE JUDGE

CERTIFICATION

Undersigned counsel hereby certifies as follows in compliance with Missouri Supreme Court Rule 84.06 (c):

1) That the brief complies with the limitations contained in Rule 84.06(b);

2) That there are 3,917 words in the brief;

3) That there are no lines of monospaced type in the brief;

4) That with the required service of copies of this brief undersigned counsel will have provided a disk to the Court and counsel containing a true and correct copy of this brief which is complete and virus-free;

5) That a true and correct copy of this brief was mailed, postage prepaid, to Daniel J.Gralike, Attorney for Relators, 1000 West Nifong, Building 7, Suite 100, Columbia MO 65203, on this _____ day of June, 2009.

_____

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