No. SC90195

IN THE
MISSOURI SUPREME COURT

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

v.

THE HONORABLE GENE HAMILTON,
Respondent,
AND
THE HONORABLE GARY OXENHANDLER
Respondent.

ON ORIGINAL WRIT OF PROHIBITION

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

Relators seek a writ of prohibition against the Honorable Gene Hamilton and the Honorable Gary Oxenhandler to prohibit their appointments of the Public Defender to represent two individuals facing probation violations in the Boone County Circuit Court. The issue involves the validity of an agency regulation and the Public Defenders ability to deny representation to those persons in which they are charged to represent under State Statute. The Missouri Court of Appeals Western District issued its Preliminary Order in Prohibition on December 8, 2008 and issued its opinion on April 14, 2009. Upon application of Relators, this Court ordered transfer of the case.

STATEMENT OF FACTS

On April 22, 2002, Jacqueline Pickrell, with counsel from the Public Defender's Office, pled guilty to one count of the felony of passing bad checks in Division 2 of the Circuit Court of Boone County, Missouri, case number 02CR164244-01. On July 22, 2002, Pickrell received a Suspended Imposition of Sentence and was placed on five years of probation. On April 14, 2003, Pickrell was found in violation of her probation; she was sentenced to three years in the Missouri Department of Corrections and execution of her sentence was suspended and she was placed on a new five year term of probation. She was represented by the Missouri Public Defender. In April of 2008, Pickrell's probation was suspended and a capias warrant was issued. On November 3, 2008, Pickrell appeared, in custody, for her first appearance on the probation violation. The Court, over objection by the Public Defender claiming non-availability pursuant to 18 CSR 10-4.010 (that District 13 Public Defenders were no longer accepting appointments on probation violation cases where the defendant had received a suspended execution of sentence), appointed the Public Defender to represent Ms. Pickrell.

Relators have asked this Court to issue a writ of prohibition against Respondent appointing the Missouri Public Defender's Office to represent Ms. Pickrell in her probation violation case because the Missouri State Public

Defender Commission has promulgated a regulation stating that in the Columbia Office, due to the number of cases, the Public Defenders will no longer represent individuals facing probation violation where they received a suspended execution of sentence.

On July 19, 2005, Mark Lobdell was charged by information with the class D felony of Leaving the Scene of an Accident in the Circuit Court of Boone County, Missouri, case number 05BA-CR02127-01. He was represented by the Missouri State Public Defender's Office. On July 25, 2005, Lobdell pled guilty pursuant to an agreement with the State. He was at that time still represented by the Public Defender's Office and appeared with Assistant Public Defender Stephen Richey. On September 26, 2005, Lobdell, who appeared with Assistant Public Defender Valerie Leftwich, was sentenced to four years in the Missouri Department of Corrections and was placed on five years on probation. On October 9, 2008, Lobdell appeared in Division 1 of the Circuit Court of Boone County, Missouri to make a first appearance in regards to a probation violation. The docket entry reflects that on October 9, 2008 "State appears by Asst. PA Hicks. Deft. appears in person but without counsel. Court appoints Kevin O'Brien as member of local bar. Deft. denies allegations. Cause set for probation violation hearing at 10:30 a.m. on November 24, 2008, Div 1." Relators have asked this Court to issue a writ of prohibition against Respondent appointing Kevin O'Brien, District Defender for the Missouri Public Defender's

Office, to represent Mr. Lobdell in his probation violation case because the Missouri State Public Defender Commission has promulgated a regulation stating that the District 13 Columbia Public Defender's Office, due to its number of open cases, will no longer represent individuals facing probation violation where they received a Suspended Execution of Sentence.

The Missouri Court of Appeals Western District issued its Preliminary Order in Prohibition on December 8, 2008 and issued its opinion on April 14, 2009. Upon application of Relators, this Court ordered transfer of the case.

ARGUMENT

I.

APPOINTMENT OF PUBLIC DEFENDER IN PROBATION VIOLATION CASES

Respondents had jurisdiction and properly appointed the Public Defender to represent Jacqueline Pickrell and Mark Lobdell in their probation violation hearings because the Public Defender is required by statue to represent indigent individuals charged with violations of their probations. Although this Court in State ex. Rel. Public Defender Commission v. Bonacker, 706 S.W.2d 449 (Mo. banc 1986) discussed a similar issue as to whether the circuit court had jurisdiction to appoint the public defender's office to represent indigent defendants in post-conviction proceedings, this Court's recent decision in Webb ex rel. J.C.W. v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009) indicates that because only two types of jurisdiction, personal and subject matter jurisdiction are recognized in Missouri. Neither type of jurisdiction is at issue in this case. As such, Relator's claim is without merit in regard to claiming a lack of jurisdiction, and Respondents had subject matter jurisdiction over these criminal cases.

Futher, the Public Defender's office is required by statute to represent indigent defendants in probation violation hearings and trial courts were authorized to appoint the Public Defender. The Sixth and Fourteenth

Amendments to the United States Constitution guarantee that the government will make available a lawyer to assist an indigent criminal defendant at any critical stage. State v. Dixon, 916 S.W.2d 834, 835-836 (Mo.App. W.D. 1995). An indigent accused of crime cannot be prosecuted, convicted, and incarcerated in Missouri unless he is furnished counsel. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963); State v. Green, 470 S.W.2d 571 (Mo.banc 1971). When the probationer's status is jeopardized by a motion to revoke probation, due process entitles the probationer to representation by legal counsel. State ex rel. Cochran v. Andrews, 799 S.W.2d 919, 922 (Mo.App. W.D. 1990). The trial court must ensure that a criminal defendant receives his due process, including during a probation violation hearing.

The Missouri Public Defender System was created by the State of Missouri to represent indigent defendants[1] and is covered under Chapter 600, RSMo. The Public Defender System developed out of a concern of rquiring private attorneys to carry the burden of representing indigent defendants and illustrates the

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

importance of public defenders satisfying their statutory mandate not to refuse cases. In State ex rel. Public Defender Com'n v. Williamson 971 S.W.2d 835, 837-838 (Mo.App.W.D. 1998), the Missouri Court of Appeals, Western District, addressed the history of the Missouri Public Defender System:

> The history of the current public defender system in Missouri commenced with the Missouri Supreme Court's ruling in State v. Green, in which the Court determined that the burden of representing indigent defendants is not the burden of attorneys alone, but should be shared by the state. 470 S.W.2d 571, 573 (Mo. banc 1971). In response to this ruling, legislation was passed that provided for fee payment of private attorneys who had been assigned by the circuit court to represent indigent criminal defendants.
>
> In 1981, the public defender system was in a state of crisis when the money appropriated for fee payment was exhausted long before the end of the fiscal year. In assessing the situation, the Missouri Supreme Court weighed the competing concerns of the unpaid appointed attorneys and the accused in need of representation. State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 67 (Mo. banc 1981). The court ruled that "[i]t is our first obligation to secure to the indigent accused all of his constitutional rights and guarantees." Id. However,

it also found that there is “an obligation to deal fairly and justly with the members of the legal profession who are subject to our supervision.” Id. The result was that the court established temporary guidelines for the provision of legal services to the indigent, without overburdening appointed counsel. If the court was unable to appoint counsel for the indigent accused, in order to protect the defendant's constitutional rights, the court was required to discharge the defendant. Id. at 67.

In response to the Wolff ruling, the General Assembly enacted a new statutory scheme by establishing the Office of the State Public Defender as an independent department of the judicial branch. Sections 600.011 et seq., RSMo 1983. Under the new centralized scheme, the director of the State Public Defender's Office was charged with the responsibility of determining whether an accused criminal was indigent and, in turn, to provide defense counsel for such individuals. This legislation repealed § 600.150, which provided for payment of private attorneys appointed by the circuit court, who were acting as public defenders.

Under the present system, the director has the authority to hire assistant public defenders, as well as contract with private attorneys, in order to provide defense services “by means of a

centrally administered organization." §§ 600.011(7), 600.021 & 600.042.1(10), RSMo 1994. The budget for this system is provided through an annual appropriation approved by the General Assembly. § 600.040, RSMo 1994. Although the director is given the authority to hire private attorneys, and apparently does so in cases of conflict, the statute grants that authority only to the director.

Section 600.042.4, RSMo provides that:

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

(1) Who is detained or charged with a felony, including appeals from a conviction in such a case;

(2) Who is detained or charged with a misdemeanor which will probably result in confinement in the county jail upon conviction, including appeals from a conviction in such a case;

(3) Who is detained or charged with a violation of probation or parole;

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

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

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

[emphasis added].

Despite this statute, the Public Defender Commission promulgated a regulation holding that Districts which had exceeded caseload standards would no longer accept appointments under certain categories. In this case, based on the alleged excessive caseloads held by Public Defenders in District 13, the Director of the State Public Defender informed Respondents and Boone County Prosecuting Attorney Daniel Knight that the District 13 Public Defenders would no longer be accepting appointments in new probation revocation cases in which a suspended execution of sentence had been previously imposed[2], until the

[2] Relators have offered no explanation detailing why these particular cases, both felony and misdemeanor probation revocation cases, in which defendants are facing a real chance of jail or prison time, are the types of cases in which the Public Defender has chosen to refuse appointments. And, considering that many

District 13 Office was reinstated to full availability.[3] Pursuant to the regulation, the Public Defender has subsequently declined to represent indigent defendants facing probation violation hearings and Respondents have been required to appoint the Public Defender.

The regulation, however, is in conflict with Section 600.042, RSMo. "Agency regulations may not conflict with statutes granting agency authority to promulgate such regulation, and if regulation conflicts with statute, it must fail." Pharmflex, Inc. v. Division of Employment Security, 964 S.W.2d 825 (Mo.App. W.D. 1997). Here, the Public Defender Commission regulation to **not** accept assignments on probation violation cases where the defendant had previously received a suspended execution of sentence conflicts with the statute, Section 600.042.4, which requires the Public Defender to represent those indigent

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times probation violations are based on new charges in which the Public Defender is representing the defendant, the rational does not seem clear.

[3] Neither Mr. O'Brien, counsel appointed in Mr. Lobdell's case, or the Public Defender that appeared with Ms. Pickrell have ever indicated that they personally felt that their caseload was too excessive or that they could not effectively represent each of these criminal defendants. Rather, this is a regulation from the Public Defender Commission and Director which assumes that these attorneys cannot effectively represent these defendants.

defendants facing a violation of probation or parole[4]. That is the situation in the underlying criminal cases where Mr. Lobdell and Ms. Pickrell received a suspended execution of sentence and now face probation violations. Under Seciton 600.042, the Public Defender must represent Mr. Lobdell and Ms. Pickrell in these matters. Because of the statutory mandate, the Public Defender Commission cannot promulgate a regulation, such as it has done here, which conflicts with the statute granting it authority and thereby avoid the requirements of the statute.

Relators assert that the regulation does not conflict with state statute because Section 600.042.3, the subsection preceding the directive that the Public Defender shall represent those who are charged with violations of probation, states that:

> The director and defenders shall, within guidelines as established by the commission and as set forth in subsection 4 of

[4] The rule promulgated by the Missouri Public Defender Commission actually provides that the Director will determine the class of cases that the Public Defender will refuse appointment. In this case, the "class of cases" is probation revocation cases. Respondents are not aware of any "class of cases" in which the Public Defender accepts appointments that they are not statutorily obligated to represent.

> this section, accept requests for legal services from eligible persons entitled to counsel under this chapter or otherwise so entitled under the constitution or laws of the United States or of the State of Missouri and provide such persons with legal services when, in the discretion of the director or the defenders, such provision of legal services is appropriate.

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

The problem with Relators argument is that if this subsection allowed the director to turn down any case within his discretion then, it also would allow any "defender" to turn down any case even if the statute provides that representation "shall" be given. The subsection reads that "…when, in the discretion **of the director or the defenders,** such provision of legal services is appropriate." Section 600.042.3, RSMo 2000. Relator attempts to choose part of the subsection but ignore the rest that does not support his argument. The legislature did not intend for the defenders to be able to turn down any case in which they did not chose to represent, nor did the legislature intend to allow the director the ability to turn down cases in which the public defender is mandated to represent.

What Section 600.042.3, RSMo 2000 provides is that the "legal services" that the defenders provide to those eligible persons is within their discretion. In

other words, the defender or the director **shall** represent those persons that they are charged to represent under the statute but may provide those legal services, (e.g. filing motions to suppress, going to trial, holding a hearing, conducting investigation) that they, as the attorney, deem are appropriate.

This reading of the statute is also supported by another part of the subsection that Relator ignores. Section 600.042.3, RSMo provides that the director and defenders "shall" "**as set forth in subsection 4 of this section,** accept requests for legal services." Contrary to Relator's assertion, Section 600.042.3 does not give the director and the defenders discretion to refuse to accept cases they are mandated by statute to accept under Section 600.042.4; rather, it reinforces that the Public Defender **shall** accept those appointments.

Relators also claim that they are allowed to reject cases in which the person is charged with a violation of probation because Section 600.042.4 states that the Public Defender shall provide legal services "within guidelines as established by the commission and as set forth in subsection 4 of this section." Relators claim that "guidelines" must refer to all of the rules, regulations, instructions, etc. which the Commission has been authorized to promulgate. Although that may be true, again Relators ignore the rest of the sentence which holds that they must provide legal services, within the guidelines **and** as set forth in subsection 4 which provides all of the cases which the Public Defender **must**

represent indigent criminal defendants. Relators must accept cases designated by the statute.

In a similar case, Sullivan v. Dalton, 795 S.W.2d 389 (Mo.banc 1990), the Missouri Public Defender's Office applied for a writ, asking the Missouri Supreme Court to find that the trial judge could not require the Public Defender to represent an indigent defendant in prosecution under city ordinance where the city was seeking incarceration. The Supreme Court, in holding that the trial court was within its discretion to appoint the Public Defender's office to represent the indigent defendant noted that Section 600.042.4 and 600.042.5[5], RSMo, required the Public Defender's Office to provide legal services to an eligible person for whom the federal constitution or the state constitution requires the appointment of counsel and for whom, in cases in which he faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel. Just as in Sullivan, in the case at bar, Respondents were well within their discretion to appoint the Public Defender's Office to represent Mr. Lobdell and Ms. Pickrell where the statute so requires.[6] The statute requires the Public Defender to

[5] The statute has since been changed to not require the Public Defender to represent those charged with violations of county or municipal ordinances.

[6] Respondents also note that Section 600.044, RSMo, provides that:

represent these individuals and the Director has no discretion to turn these people away.

Relators attempt to distinguish Sullivan from the case at bar. In Sullivan, Relators argue that the Supreme Court was asked to find if the court abused its discretion in appointing the Public Defender but say that, unlike Sullivan, this Court is being asked whether the trial court has jurisdiction to appoint the Public Defender to represent the indigent defendants. This is a distinction without meaning. Surely, a court without jurisdiction would have abused its discretion in

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> A defender who undertakes to represent an eligible person shall continue to do so **at every stage of the case or proceeding**, including the filing of a motion for new trial and the processing, briefing, and argument of an appeal, until the defender is relieved of his duties by the director or is permitted by a court to withdraw.

In the underlying criminal cases, the public defender system represented both Mr. Lobdell and Ms. Pickrell from the beginning of the cases. The attorneys never withdrew from the cases. Thus, because the Public Defender never withdrew and neither counsel were relieved of their duties, the Public Defender System still were counsels of record for Mr. Lobdell and Ms. Pickrell and thus, must continue to represent them.

appointing the Public Defender. Respondents here, as in Sullivan, have jurisdiction to appoint the Public Defender to represent the indigent defendants in cases in which the Public Defender is charged with representing. Moreover, although Sullivan did not deal with a "rule" promulgated by the Public Defender Commission to limit those cases in which the District Office could accept, Sullivan did say that the statute requires the Publice Defender to represent indigent defendants in those class of cases covered by Section 600.042. The "rule" promulgated here is in conflict with that statute and thus, is invalid. Moreover, as discussed above, whether the trial court properly appointed the public defender is not a question of jurisdiction. See Webb, supra.

Relators also attempt to distinguish this Court's holding in State ex. Rel. Public Defender Commission v. Bonacker, 706 S.W.2d 449 (Mo.banc 1986), which held that the Public Defender Commission could not promulgate a rule excluding representation of those persons seeking post-conviction relief. The Public Defender Commission had promulgated a rule that the Public Defenders would not represent that class of cases. Id. The Missouri Supreme Court held that circuit courts had jurisdiction to appoint members of the public defender system to represent indigent prisoners seeking post-conviction proceedings. Id. In so holding, this court rejected the claim that the Public Defender System can strip the trial court of jursidiction to appoint the Public Defender. "The Commission by rule or regulation, cannot oust the courts of such jurisdiction".

Bonacker, supra at 451. This Court recognized that such cases were included under Section 600.042.4 and thus, the Public Defender Commission could not decline representation. Id.

Although nearly right on point to the case at bar, Relators attempt to distinguish Bonacker by claiming that the rule promulgated now does not eliminate a class of case but instead "provides the Director with a means of curing any deficiencies in competent and effective representation by making public defenders *temporarily unavailable* for appointments." (Relators Brief at 33-34). Relators' attempt to disguise the rule as something different than Bonacker does not work. The rule in the case at bar is only different from Bonacker in that here, it is not the Commission who decided exactly what class of case to eliminate, but delegated that authority to the director. In fact, the rule specifically refers to class of cases. See 18 CSR10-4.010. The effect is the same—the Public Defender Commission and the Director are attempting to eliminate a class of cases in which the legislature has dictated that it must represent (Certainly as to Mr. Lobdell and Ms. Pickrell, the effect of making the Public Defender "temporarily unavailable" for several months is practically indistinguishable from refusing to represent them).

Relators argue that the Director is attempting to make sure that his public defenders provide effective and competent representation to their clients and that, the rule had to be promulgated because the District 13 office has exceeded

their maximum caseload and the office had to avoid any conflict of interest due to the excessive caseloads of the attorneys in the District 13 office (Relator's Substitute Brief at 34-35). However, Relators do not explain why **this** particular rule, refusing to represent those persons facing probation violations—persons the public defender is mandated by statute to regulate--was necessary. Relators do not explain why Public Defenders in other offices could not assist in the alleged excessive caseload. Relators have not explained what other avenues have been explored to relieve any specific burdens such as scheduling. Respondents note that never did Kevin O'Brien or any of the public defenders inform Respondents that they were overworked, had too many cases, or could not effectively represent their clients. Moreover, the Director offers no authority or explanation as to why persons facing jail or prison commitments due to violating their probation are being denied representation.

Assuming that Relators were concerned about the caseload capacity of District 13, why didn't the Director or the Commission simply use the mechanism for excessive caseloads already in place through the statute? Section 600.042.5, RSMo, provides that "The director may: (1) Delegate the legal representation of any person to any member of the state bar of Missouri…" And, Section 600.042.1(10), RSMo, provides that the Director may "contract for legal services with private attorneys on a case-by case basis and with assigned counsel as the Commission deems necessary considering the needs of the area, for fees

approved and established by the commission." The Director, as it has in the past, has the authority to delegate representation to other members of the bar. Section 600.042.1(10), RMSo, specifically deals with this very situation—"**considering the needs of the area.**" If excessive caseload is an issue, then a mechanism is already in place to divert some cases, on behalf of the Public Defender, to other members of the bar. In fact, the Supreme Court in Bonacker, supra at 451, citing Section 600.042.1(10), noted that the Director has the ability under the statute to employ private counsel under contract or on a case-by-case basis. The Director cannot thwart his directive from the legislature to represent those persons specifically named in the statute by having the Public Defender Commission simply promulgate a rule that says he can.

Relators now argue that the Public Defender cannot contract all of its overload cases, because the Public Defender is not funded sufficiently to do this (Relator's Substitute Brief at 39). That claim, however, is not supported by the record. And, moreover, the very rule promulgated by the Public Defender Commission, at issue in this writ, states that private counsel that are appointed by the court may request the public defender to pay for litigation costs. See 18 CSR 10-4.010(5)(A).

Respondents were within their discretion and had jurisdiction in which to appoint the Public Defender to represent Mr. Lobdell and Ms. Pickrell who were charged with violation of their probation. The statute provides that the Public

Defender is charged with representing these individuals and the Public Defender Commission and the Director cannot attempt to thwart their responsibility by promulgating a rule that is in conflict with the statute. Respondents respectfully submit that the writ should be denied.[7]

[7] Respondents note that although the Relators contend that without this Rule their caseloads are excessive and they may be unable to effectively represent these criminal defendants, with the exception of these two cases, Relators, after filing affidavits stating that they are unavailable due to limited availability for the District 13 office, have continued to take appointments of indigent defendants facing probation violations in the 13th District.

II.

APPOINTMENT OF MR. O'BRIEN AS MEMBER OF BAR

Respondent, the Honorable Gene Hamilton, was within his discretion and had jurisdiction to appoint Kevin O'Brien, as a member of the bar, to represent Mr. Lobdell in his probation violation case despite the Public Defender Commission's attempt to prevent the District 13 office and Mr. O'Brien as District Defender from representing those persons charged with probation violations.

Respondent respectfully incorporate all arguments from Point I. Relators claim that Respondent could not appoint Mr. O'Brien as a member of the local bar because it was not within his official capacity as a public defender (Relators' Substitute Brief at 38).

Respondents contend that this claim or request for a writ of prohibition is now moot. As noted in Relator's Substitute Brief, Mr. Lobdell's probation violation hearing was held after the Western District Court of Appeals opinion. Moreover, Mr. O'Brien, the attorney that was appointed as a member of the bar, is no longer an employee of the Missouri Public Defender System. Finally, Respondent does not appoint Public Defenders as members of the bar but appoints the Public Defender Office as a whole. This Claim is moot.

However, should this Court deem the issue not moot, Respondents assert that the appointment was appropriate. Section 600.021.2, RSMo states that

public defenders shall be attorneys and shall not otherwise engage in the practice of law except as authorized by this chapter or by commission rule. However, in Mr. Lobdell's underlying criminal case, the Court appointed Mr. O'Brien, as a member of the bar, to represent Mr. Lobdell. Mr. O'Brien, a member of the public defender's office, is mandated by statute to represent those charged with a violation of probation or parole. As stated above, a court has the inherent power to appoint counsel to represent indigent defendants. Mid-Missouri Legal Services Corp. v. Kinder, 656 S.W.2d 309, 311 (Mo.App. W.D. 1983). Moreover, Respondents submits that it had jurisdiction to appoint Mr. O'Brien as a member of the bar pursuant to Missouri Supreme Court rules.[8] Supreme Court Rule 37.50(a) provides that:

> In all criminal cases the defendant shall have the right to appear and defend in person and by counsel. If any person charged with an offense, the conviction of which would probably result in confinement, shall be without counsel upon his first appearance before a judge, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. Upon a

[8] Article V, Section 5 of the Missouri Constitution gives all rules established by the Missouri Supreme Court the force and effect of law. Sullivan, supra.

> showing of indigency, it shall be the duty of the court to appoint counsel to represent him. If after being informed as to his rights, the defendant requests to proceed without the benefit of counsel, and the court finds that he has intelligently waived his right to have counsel, the court shall have no duty to appoint counsel. If at any stage of the proceedings it appears to the court in which the matter is then pending that because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in injustice to the defendant, the court shall then appoint counsel. Appointed counsel shall be allowed a reasonable time in which to prepare the defense.

Clearly this rule contemplates that a trial court has discretion in appointing counsel, which is exactly what occurred in the underlying criminal case. The rule puts no limit on which counsel the trial court can appoint. Here, Respondent, faced with a State agency refusing to abide by its directive given by the legislature, had the responsibility to ensure that due process was afforded to the defendant and that the constitutional rights of the defendant and victims were protected. This rule provides that a trial court may appoint counsel where circumstances are warranted. Respondent submits that such was the case where a defendant who had received a suspended execution of sentence, was facing a probation violation and deprivation of his liberty, was indigent, and was

entitled to counsel. Moreover, this section, which appears to be an attempt to avoid any potential conflict, cannot usurp a trial court's duty to provide justice. Respondent was within its jurisdiction to appoint counsel.

A defendant has a right to counsel and where a statute or a regulation deprives a defendant of their right to counsel, it is unconstitutional. A circuit court has the inherent power to appoint attorneys to represent indigents accused of a crime. Kinder, supra. A trial court must ensure that a defendant is afforded due process and his constitutional rights. Thus, where the Public Defender has attempted to thwart the defendant's right to counsel, a court has the inherent power to appoint an attorney to represent that indigent defendant to protect that Defendant's right to counsel.

In State ex. rel Robinson v.Franklin, 48 S.W.3d 64 (Mo.App. W.D. 2001), the Western District Court of Appeals was faced with the question as to whether a trial court had exceeded its authority in ordering J. Marty Robinson, Director of the Missouri State Public Defender System, and Peter N. Sterling, Trial Division Director of the Missouri State Public Defender System, to enter their personal appearances as counsel for a defendant charged with murder in the first degree. The Court, in issuing the permanent writ, held that the trial court did not have the authority to personally appoint any particular public defender; that Chapter 600 authorized only the Director of the Public Defender System to determine which public defender would represent a particular defendant when the Public Defender

Office was appointed by a trial court. Id. Unlike Franklin, in the underlying criminal cases, the Public Defender, contrary to their statutory mandate, **refused** to appoint a Public Defender, thus, thwarting the defendant's constitutional right to counsel. Moreover, unlike Franklin, supra, the Court did not appoint a particular Public Defender, rather the Court appointed Mr. O'Brien as a member of the bar. The Public Defender could not refuse to accept this representation as it is statutorily mandated to do so. The courts have the discretion and the authority to appoint these attorneys where the Public Defender is attempting to side-step their responsibility to the indigent criminal defendants in Boone County, Missouri.

Respondent respectfully submit that he had jurisdiction to appoint the Public Defender's Office and Mr. O'Brien to represent the criminal defendant facing violations of their probation and deprivation of their liberty. Thus, the writ should be denied.

CONCLUSION

WHEREFORE, Respondents respectfully submit that the Relator's petitions for writ of prohibition be denied.

Respectfully submitted,

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I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains 5,712 words, excluding the cover, this certification and the appendix, as determined by MicroSoft Word software; and

2. That the CD-Rom filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

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