IN THE MISSOURI SUPREME COURT

STATE ex rel. MISSOURI PUBLIC DEFENDER COMMISSION, J. MARTY ROBINSON & KEVIN O'BRIEN Relators, vs. THE HON. GENE HAMILTON & THE HON. GARY OXENHANDLER, Respondents.	)	No. SC90195

ON THE COURT'S GRANT OF RELATORS' APPLICATION FOR TRANSFER
FROM THE COURT OF APPEALS FOR THE WESTERN DISTRICT

ON WRIT OF PROHIBITION
FROM THE CIRCUIT COURT OF BOONE COUNTY, MISSOURI
13TH JUDICIAL CIRCUIT
THE HONORABLE GENE HAMILTON & GARY OXENHANDLER, JUDGES

RELATORS' SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal presents two different cases in which Relators seek a Writ of Prohibition. The cases were consolidated in the Western District, which decided the cases in a single opinion.

I. Writ To The Hon. Gary Oxenhandler

This case seeks a writ of prohibition. On November 20, 2008, Relators Missouri Public Defender Commission, J. Marty Robinson, Director of the Missouri State Public Defender, and Kevin O'Brien, District Public Defender for District 13 at Columbia, Missouri, filed in the Missouri Court of Appeals, Western District, an application for a writ of prohibition against the Respondent, the Hon. Gary Oxenhandler, Circuit Judge of the Boone County Circuit Court, to prohibit Judge Oxenhandler's order of November 10, 2008. That order appointed the Public Defender to represent Jacqueline A. Pickrell in her probation revocation case following a previously imposed suspended execution of sentence, even though the Public Defender had determined that Pickrell was not eligible for representation because the District 13 Public Defender Office had been certified as of limited availability under 18 CSR 10-4.010 and was not accepting new probation revocation cases in which an SES sentence had been imposed previously. The issue thus involves the validity of an agency regulation and its relationship with the relevant statutory authority. On April 14, 2009, the Western District issued an opinion denying Relators a permanent writ of prohibition in this case. On June 30, 2009, this Court granted transfer. Pursuant to Rule 83.04 and Article V, §4 of the Missouri Constitution, jurisdiction for this petition now lies with the Supreme Court of Missouri.

II. Writ To The Hon. Gene Hamilton

This case also seeks a writ of prohibition. On November 17, 2008, the same Relators filed in the Missouri Court of Appeals, Western District, an application for a writ of prohibition against the Respondent, the Hon. Gene Hamilton, Circuit Judge of the Boone County Circuit Court, to prohibit Judge Hamilton's order of November 3, 2008. That order appointed District Defender O'Brien in his private capacity to represent Mark A. Lobdell in his probation revocation case following a previously imposed suspended execution of sentence, even though the Public Defender had determined that Lobdell was not eligible for representation because the District 13 Public Defender Office had been certified as of limited availability under 18 CSR 10-4.010 and was not accepting new probation revocation cases in which an SES sentence had been imposed previously. The issue thus involves the validity of an agency regulation and its relationship with the relevant statutory authority and the validity of a statute prohibiting public defenders from practicing law outside their official capacity as public defenders. On April 14, 2009, the Western District issued an opinion granting Relators a permanent writ of prohibition in this case. On June 30, 2009, this Court granted transfer. Pursuant to Rule 83.04 and Article V, §4 of the Missouri Constitution, jurisdiction for this petition now lies with the Supreme Court of Missouri.

STATEMENT OF FACTS

I. Writ To The Hon. Gary Oxenhandler

Pursuant to 18 CSR 10-4.010, the Missouri State Public Defender Commission maintains a caseload standards protocol identifying the maximum caseload each district (area) office can be assigned without compromising effective representation. See 18 CSR 10-4.010(1)(A). (E-1, 2; A1, 2.) [1]

In August 2008, Public Defender Director J. Marty Robinson (hereinafter Director) determined that the District 13 Public Defender Office had exceeded the maximum caseload standard for a period of three consecutive calendar months. (E-9; A9.)

The District 13 Public Defender Office provides representation to eligible Public Defender clients in the Thirteenth Judicial Circuit in Boone County, Missouri.

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[1] Pursuant to Rule 83.08(a), the record in this Court consists of the record of appeal filed with the Missouri Court of Appeals. Exhibits attached to Relators' Petitions filed with the Missouri Court of Appeals, Western District, constitute the record of appeal, upon which this brief is based. Each attached exhibit was numbered consecutively from E-1. This brief refers to these exhibits by the "E" page numbers. Where the same "E" page number applied in both writs, only that number is used. Where different exhibits were attached to the writs, the "E" page number is used with the added designation of "Hamilton" or "Oxenhandler," representing whether the exhibit is from the writ case against the Hon. Gene Hamilton or the Hon. Gary Oxenhandler. Citations to the Appendix to this brief are designated pages "A1," etc.

Pursuant to 18 CSR 10-4.010(2)(B), the Director on August 29, 2008, notified the Hon. Gene Hamilton, Presiding Judge of the Thirteenth Judicial Circuit, that the District 13 Public Defender Office was at risk of being certified for limited availability pursuant to 18 CSR 10-4.010. See 18 CSR 10-4.010(2)(B). (E-1; A1.)

On September 2, 2008, the District Public Defender and other MSPD management personnel consulted with the Boone County Circuit Court and State's attorney to discuss the category of cases to be designated for exclusion from Public Defender representation if the District 13 Office were to be certified by the Director as of limited availability. See 18 CSR 10-4.010(2)(C). (E-1; A1.) Specifically, on September 2, 2008, District 13 District Defender Kevin O'Brien and MSPD Deputy Director Dan Gralike met in person with Presiding Judge Hamilton and Boone County Prosecutor Dan Knight.

On October 1, 2008, the Director certified the District 13 Public Defender Office to be in limited availability status. (E-10; A10.) On October 6, 2008, Deputy Director Gralike notified Presiding Judge Hamilton that the District 13 Public Defender Office had been certified as being of limited availability. See 18 CSR 10-4.010(2)(A). (E-1; A1.) The District Public Defender for District 13 notified the Boone County Circuit Court that the Public Defender would not accept new probation revocation cases in which a suspended execution of sentence (SES) had been imposed previously, until the District 13 Office was reinstated to full availability. See 18 CSR 10-4.0l0(2)(E). (E-1; E-13; A1; A13.) The Deputy Director accompanied the certification with statistical verification showing that the District 13 Public Defender Office had exceeded its maximum allowable

caseload under the Public Defender Commission's caseload protocol for at least three consecutive calendar months. See 18 CSR 10-4.0l0(2)(D). (E-l; A1.)

On November 7, 2008, District Public Defender O'Brien received the application of Jacqueline A. Pickrell for defender services with respect to a probation violation hearing pending before Respondent, the Hon. Gary Oxenhandler, in Div. 2 of the Circuit Court of Boone County. District Public Defender O'Brien determined that Pickrell was indigent but that her probation violation case was within the category of cases for which the District 13 Public Defender Office was unavailable pursuant to 18 CSR 10- 4.010 in that Pickrell was on probation under a suspended execution of the three-year sentence imposed by the court on April 14, 2003. On November 10, 2008, District Public Defender O'Brien filed written notice with the court that the Public Defender was unavailable to represent Pickrell and objected to the appointment of the Public Defender. (E-14-19, Oxenhandler; A14.)

On November 10, 2008, Judge Oxenhandler (Respondent) appointed the Public Defender to represent Defendant Pickrell. (E-29, 31, Oxenhandler; A9.)

On November 20, 2008, Relators, Missouri Public Defender Commission, Director Robinson, and District Defender O'Brien filed in the Missouri Court of Appeals, Western District, a "Petition For A Writ Of Prohibition, And Suggestions In Support Of

The Petition, With Attached Exhibits." [2] Relators sought to prohibit Judge Oxenhandler's order of November 10, 2008.

Subsequently, this writ case was consolidated with the writ case involving Judge Hamilton, discussed below.

On April 14, 2009, the Western District issued an opinion denying Relators a permanent writ of prohibition in this case involving Judge Oxenhandler.

On June 30, 2009, this Court granted transfer.

II. Writ To The Hon. Gene Hamilton

Pursuant to 18 CSR 10-4.010, the Missouri State Public Defender Commission maintains a caseload standards protocol identifying the maximum caseload each district (area) office can be assigned without compromising effective representation. See 18 CSR 10-4.010(l)(A). (E-1; A1); see Caseload Standards Protocol. (E-2; A-2.)

In August 2008, Public Defender Director Robinson determined that the District 13 Public Defender Office had exceeded the maximum caseload standard for a period of three consecutive calendar months. (E-9; A9.)

The District 13 Public Defender Office provides representation to eligible Public Defender clients in the Thirteenth Judicial Circuit in Boone County, Missouri.

[2]While this case was pending in the Western District, O'Brien resigned his job as District Defender. He has been replaced by a new District Defender.

Pursuant to 18 CSR 10-4.010(2)(B), the Director on August 29, 2008, notified (E-9; A9) Presiding Judge Hamilton that the District 13 Public Defender Office was at risk of being certified for limited availability pursuant to 18 CSR 10-4.010. See 18 CSR 10-4.010(2)(B). (E-1; A1.)

On September 2, 2008, the District Public Defender and other MSPD management personnel consulted with the Court and State's attorney to discuss the category of cases to be designated for exclusion from Public Defender representation if the District 13 Office were to be certified by the Director as of limited availability. See 18 CSR 10-4.010(2)(C). (E-1; A1.) Specifically, on September 2, 2008, District 13 District Public Defender O'Brien and MSPD Deputy Director Gralike met in person with Presiding Judge Hamilton and Boone County Prosecutor Dan Knight.

On October 1, 2008, the Director certified the District 13 Public Defender Office to be in limited availability status. (E-10; A-4.) On October 6, 2008, Deputy Director Gralike notified Judge Hamilton that the District 13 Public Defender Office had been certified as being of limited availability. (E-13; A-6.) The District Public Defender for District 13 notified the Court that the Public Defender would not accept new probation revocation cases in which a suspended execution of sentence (SES) had been imposed previously, until the District 13 Office was reinstated to full availability. See 18 CSR 10-4.010(2)(E). (E-1; A1.) The Deputy Director accompanied the certification with statistical verification showing that the District 13 Public Defender Office had exceeded its maximum allowable caseload under the Public Defender Commission's caseload protocol for at least three consecutive calendar months. (E-12; A-5.)

On November 3, 2008, District Public Defender O'Brien received the application of Mark A. Lobdell for defender services with respect to a probation violation hearing pending before Judge Hamilton. District Public Defender O'Brien determined that Lobdell was indigent but that his probation violation case was within the category of cases for which the District 13 Public Defender Office was unavailable pursuant to 18 CSR 10-4.010 in that Lobdell was on probation under a suspended execution of the four-year sentence imposed by the court on September 26, 2005. On November 3, 2008, District Public Defender O'Brien filed written notice with the court that the Public Defender was unavailable to represent Lobdell and objected to the appointment of the Public Defender. (E-25, Hamilton; E-14-18a, Hamilton; A-8.)

On November 3, 2008, Judge Hamilton (Respondent) appointed District Public Defender Kevin O'Brien to represent Lobdell, "as a member of the local bar," instead of in his official capacity as a Public Defender. (E-19-21, 24, 26, Hamilton; A-8.)

On November 17, 2008, Relators, Missouri Public Defender Commission, Director Robinson and District Public Defender O'Brien filed in the Missouri Court of Appeals, Western District, a "Petition For A Writ Of Prohibition, And Suggestions In Support Of The Petition, With Attached Exhibits." Relators sought to prohibit Judge Hamilton's order of November 3, 2008.

Subsequently, the Western District consolidated this case with the writ case involving the Hon. Gary Oxenhandler, discussed above.

On April 14, 2009, the Western District issued an opinion granting Relators a permanent writ of prohibition in this case involving Judge Hamilton.[3]

On June 30, 2009, this Court granted transfer.

[3] On June 8, 2009, the Public Defender represented Mr. Lobdell in his probation violation proceeding, and that proceeding was concluded. See Case.net entry of June 8, 2009, in State v. Lobdell, Boone County Case No. 05BA-CR02127-01. Thus, the writ involving Judge Hamilton may have been rendered moot, though not necessarily if this Court were to exercise its discretion to decide the issue under the doctrine that the issue is one of public importance that is likely to recur and may escape appellate review if the Court did not exercise its discretion. See State ex rel. County of Jackson v. Missouri Public Service Comm'n, 985 S.W.2d 400, 403 (Mo. App. W.D. 1999). However, the probation violation proceeding regarding Ms. Pickrell is stayed pending determination of the instant appeal. The issues in the case involving Judge Oxenhandler remain, and are not moot.

POINTS RELIED ON

I.

Relators are entitled to an order in prohibition against Respondents, because Respondents lacked jurisdiction, exceeded their authority, and abused their discretion in appointing the Public Defender, in that such appointment was not authorized while the District 13 Public Defender Office was certified as of limited availability pursuant to a Missouri Rule, 18 CSR 10-4.010; the Rule was properly promulgated and adopted by the Public Defender Commission and is binding Missouri law; the Public Defender Commission has been delegated broad rulemaking power by the Legislature and the Public Defender Director given wide discretion in the provision of competent and effective legal representation; and the Rule does not conflict with nor attempt to modify Sections 600.042.3 and 600.042.4 and instead is a statutorily authorized guideline to prevent and cure conflicts of interest created by excessive caseloads. The Public Defender and its existing clients will be irreparably harmed if a writ does not issue since the Public Defender will face further case overload.

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

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

Spradlin v. City of Fulton, 982 S.W.2d 255 (Mo. banc 1998);

Section 600.042 RSMo. Cum Supp. 2007.

II.

Relators are entitled to an order in prohibition against Respondent Judge Hamilton, because Respondent lacked jurisdiction, exceeded his authority, and abused his discretion in appointing Kevin O'Brien in his private capacity, in that such appointment was not authorized while the District 13 Public Defender Office was certified as of limited availability pursuant to 18 CSR 10-4.010 and because Public Defenders are barred from appointment in their private capacity by Section 600.021.2.

Mid-Missouri Legal Servs. Corp. v. Kinder, 656 S.W.2d 309 (Mo. App. W.D. 1983);

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

State ex rel. Acocella v. Allen, 604 P.2d 391 (Or. 1979);

Section 600.021.2 RSMo 2000.

ARGUMENT

I.

Relators are entitled to an order in prohibition against Respondents, because Respondents lacked jurisdiction, exceeded their authority, and abused their discretion in appointing the Public Defender, in that such appointment was not authorized while the District 13 Public Defender Office was certified as of limited availability pursuant to a Missouri Rule, 18 CSR 10-4.010; the Rule was properly promulgated and adopted by the Public Defender Commission and is binding Missouri law; the Public Defender Commission has been delegated broad rulemaking power by the Legislature and the Public Defender Director given wide discretion in the provision of competent and effective legal representation; and the Rule does not conflict with nor attempt to modify Sections 600.042.3 and 600.042.4 and instead is a statutorily authorized guideline to prevent and cure conflicts of interest created by excessive caseloads. The Public Defender and its existing clients will be irreparably harmed if a writ does not issue since the Public Defender will face further case overload.

A. Standard of Review

"The extraordinary remedy of a writ of prohibition is appropriate … (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made

available in response to the trial court's order." State ex rel. T.W. v. Ohmer, 133 S.W.3d 41, 43 (Mo. banc 2004).

Prohibition may be used to "'undo' acts done in excess of a court's jurisdiction, as long as some part of the court's duties in the matter remain to be performed[,]" and may be used to restrain further enforcement of orders beyond or in excess of a court's authority. State ex rel. Robinson v. Franklin, 48 S.W.3d 64, 67 (Mo. App. W.D. 2001) (bracket in original; citation omitted).

Whether a trial court has exceeded its jurisdiction or authority is a question of law which the appellate court reviews independently of the trial court. See State ex rel. Teefey v. Bd. of Zoning Adjustment, 24 S.W.3d 681, 684 (Mo. banc 2000)(determination on appeal of whether administrative body's action exceeded the authority granted to it is a question of law for the "independent judgment of the reviewing court"); State ex rel. Beaird v. Del Muro, 98 S.W.3d 902, 906-07 (Mo. App. W.D. 2003) (determination on appeal of whether habeas court acted within its jurisdiction is a question of law).

Where a trial court exceeds its jurisdiction or authority under Chapter 600 RSMo. in appointing the Public Defender, a writ of prohibition must issue to prohibit or rescind the trial court's order. See State ex rel. Tanzey v. Richter, 762 S.W.2d 857, 858 (Mo. App. E.D. 1989); State ex rel. Shaw v. Provaznik, 708 S.W.2d 337, 341 (Mo. App. E.D. 1986).[4]

[4] Historically, Missouri courts have often viewed unauthorized appointment of the Public Defender as a matter of excess "jurisdiction." See Richter, 762 S.W.2d at 858; Provaznik,

B. The Caseload Rule Is Properly Promulgated, Valid, and Binding Missouri Law

The Public Defender's Rule for the Acceptance of Cases and Payment of Private Counsel Litigation Costs, 18 CSR 10-4.010 (hereinafter, "the Caseload Rule"), is properly promulgated and is not in conflict with Chapter 600, the Act establishing the Office of State Public Defender and Public Defender Commission. (A1.) The valid regulation is a proper and necessary exercise of the Commission's statutory power to administer the State Public Defender System and the Director's statutory power to coordinate the System's operations and supervise all personnel. The purpose of the regulation is to ensure that representation by the Public Defender meets 6th Amendment standards for competent and effective representation, and that the lawyers comprising the Office meet their professional obligations under Missouri's Rules of Professional Conduct.

1. The Public Defender Commission Has Broad Rulemaking Power

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.

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708 S.W.2d at 341. This Court's recent decision in Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009), however, calls into question whether these prior decisions properly framed the issue. In the instant cases, Relators contend that Respondents lacked jurisdiction to appoint as discussed in Richter and Provaznik, and alternatively, lacked authority (power) to do so and abused their discretion in doing so.

W.D. 1999) (citations omitted). The Legislature has chosen to delegate to the Public Defender Commission broad rulemaking power to carry out the Commission's mandate. Section 600.017 RSMo 2000 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(10) RSMo 2000 (emphasis added). (A27.)

The Caseload Rule certainly fits within the expansive category of "any rules." See State v. Bouser, 17 S.W.3d 130, 139 (Mo. App. W.D. 1999) (the word "any" in a statute means "all-comprehensive" or "every") (citations omitted). Additionally, the Caseload Rule is needed for the administration of the Public Defender System; this Court itself has recognized the burden of excessive caseload upon the Public Defender System. See Sullivan v. Dalton, 795 S.W.2d 389, 390 (Mo. banc. 1990) ("[T]his Court is not unmindful of the limited resources of the office of public defender and the ever increasing demand for legal services by indigent defendants."). The American Bar Association has also taken note of the problem. See ABA Formal Op. 06-441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation, p. 8 ("In dealing with

workload issues, supervisors frequently must balance competing demands for scarce resources.").

Further sections of Chapter 600 demonstrate the Legislature's intent to delegate its power. 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. [regarding administrative procedure and review].

Section 600.042.1(8) and .2, RSMo Cum. Supp. 2007. (A28.)

Section 600.086 applies to determining indigency and states:

> 1. A person shall be considered eligible for representation under sections 600.011 to 600.048 and 600.086

> to 600.096 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 and 2 RSMo 2000 (emphasis added).

The Public Defender Commission adopted the Caseload Rule pursuant to its rule-making authority granted it by Sections 600.017(10), 600.042.1(8), 600.042.2, and 600.086.2.

2. The Caseload Rule Is Valid Law

Properly adopted and promulgated administrative rules "have independent power as law." See United Pharmacal Co. v. Mo. Bd. of Pharmacy, 159 S.W.3d 361, 365 (Mo. banc 2005). The Caseload Rule was adopted and promulgated pursuant to the procedures set forth in Sections 536.021 and 536.024 RSMo Cum. Supp. 2007, with which the Public Defender Commission complied. See Section 536.021 and 536.024 RSMo Cum. Supp. 2007. Consequently, the Caseload Rule has the power and effect of law. See United Pharmacal v. Mo. Bd. of Pharmacy, 159 S.W.3d at 365.

A properly adopted and promulgated administrative rule is binding upon the agency adopting it. See State ex rel. Martin-Erb v. Mo. Comm'n on Human Rights, 77 S.W.3d 600, 607 (Mo. banc 2002). But it is also binding upon the courts. See Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 766 (Mo. App. E.D. 1999). "[A] court may no more substitute its judgment as to the content of a legislative rule than it may substitute its judgment as to the content of a statute." Id. (quoting Kenneth Culp Davis, Administrative Law Text, § 5.03, p. 126 (3d. ed.1972)).

Respondents exceeded their jurisdiction and authority, and abused their discretion, when they ignored the Caseload Rule, a valid Missouri law.

C. The Caseload Rule Does Not Conflict With Chapter 600

1. Rules Are Upheld Unless Unreasonable and Inconsistent With the Act

Agency rules and regulations will be upheld unless they are "unreasonable and plainly inconsistent with the act"; they will not be overturned except for "weighty reasons." PharmFlex Inc. v. Div. of Employment Sec., 964 S.W.2d 825, 829 (Mo. App. W.D. 1997); Termini v. Mo. Gaming Comm'n, 921 S.W.2d 159, 161 (Mo. App. W.D. 1996). The plan established by the Caseload Rule is consistent with the discretion given to the Director by Chapter 600 and is reasonably designed to carry out the statute's purpose: to provide Public Defender clients with effective representation. The plan is also consistent with the statute in that the Public Defender System is parallel to the courts' authority to appoint non-Public Defender members of the bar to represent indigent

criminal defendants. See State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 65-66 (Mo. banc 1981). Neither the Public Defender System nor the Caseload Rule supplant that authority.

2. The Caseload Rule Does Not Modify Chapter 600

It is true that administrative rules are invalid if they attempt to modify the corresponding statutes. See PharmFlex v. Div. of Employment Sec., 964 S.W.2d at 829. Specifically, Respondent argues that the Caseload Rule, as applied, conflicts with Section 600.042.4. See Respondents' Suggestions in Opposition to Writ of Prohibition, p. 6. The Section states in relevant part, "The director and defenders shall provide legal services to an eligible person . . . [w]ho is detained or charged with a violation of probation or parole." Section 600.042.4 The Caseload Rule does not conflict with this Section.

Section 600.042.3, immediately preceding Section 600.042.4, authorizes the very discretion carried out by the Caseload Rule. The Section states:

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

Section 600.042.3 RSMo Cum. Supp. 2007 (emphasis added). (A28.)

The primary goal of statutory construction is to determine the intent of the Legislature and to give the language of the statute its "plain and ordinary meaning." PharmFlex v. Div. of Employment Sec., 964 S.W.2d at 829; Section 1.090 RSMo ("Words and phrases shall be taken in their plain or ordinary and usual sense . . ."). "Statutory construction is a question of law, not judicial discretion." State v. Carroll, 165 S.W.3d 597, 602 (Mo. App. S.D. 2005). Rules of statutory construction require that every word of a statute be given meaning. Spradlin v. City of Fulton, 982 S.W.2d 255, 262 (Mo. banc 1998). The intent of the Legislature, based on the plain and ordinary meaning of every word in the statute, is to give the Commission discretion in providing competent and effective legal services.

a. Commission Guidelines Limit Acceptance of Requests and Provision of Legal Services

Section 600.042.3 states that the Director and Public Defender shall: 1) accept requests of legal services from eligible people entitled to counsel and 2) provide those services. A proviso, however, is stated, which applies to both actions: "within guidelines as established by the commission and as set forth in subsection 4 of this section." Such a proviso in a statute serves "to create a condition precedent; to except something from the enacting clause; to limit, restrict, or qualify the statute in whole or in part; or to ***exclude from the scope of the statute that which otherwise would be within its terms***." Lonergan v. May, 53 S.W.3d 122, 130 (Mo. App. W.D. 2001) (emphasis added). The Commission's guidelines and Section 600.042.4, ***together***, operate as such a proviso on the acceptance of requests for legal services and the provision of those services.

The term "guidelines" is not defined in Chapter 600. But guidelines should be considered to represent the rules, regulations, instructions, etc., which the Commission has been authorized to promulgate. The Caseload Rule is an outline of policy, which guides the acceptance of requests and the provision of legal services. The term and its effect cannot be ignored.

The guidelines form a proviso with Section 600.042.4. The proviso states "within guidelines . . . ***and*** as set forth in [Section 600.042.4]" (emphasis added). The "and" serves as a conjunction. Statutory phrases separated by the word "and" generally should be construed in the conjunctive. See 1A Norman J. Singer, Statutes and Statutory Construction, § 21:14, at 179-81 (6th ed. 2002). "'As a general rule, the use of the conjunctive, as in the word 'and,' indicates that the legislature intended for *all* of the listed requirements to be met." People v. 1945 North 31st Street, 841 N.E.2d 928, 940 (Ill. 2005) (emphasis original). "To ignore the significance of the conjunctive 'and' ... would destroy the meaning of the statute." M.S. v. State, 137 S.W.3d 131 (Tex. App. 2004).

Section 600.042.4 is the other part of the conjunctive proviso. The Section provides a list of the types of cases to which the Public Defender shall provide representation. Respondent argues that because the Caseload Rule limits the representation of a class of these cases, the Rule conflicts with the statute. But again, the Caseload Rule (as "guidelines") and Section 600.042.4 operate together. In their mutual operation, however, the Caseload Rule does not modify the list of cases stated in Section 600.042.4. Rather the Caseload Rule provides for a mechanism under which requests for

representation in these cases may not be granted because of the Public Defender's temporary unavailability due to excessive caseload. In contrast, if the Caseload Rule stated that the Public Defender would be prohibited from ever providing representation in the cases outlined in Section 600.042.4, then a true conflict would exist. As the Caseload Rule is designed and applied, however, it operates as "guidelines" and is a proviso working in conjunction with Section 600.042.4.

b. Director Discretion Limits Provision of Legal Services

There is a second proviso which operates within Section 600.042.3. The proviso is "when, in the discretion of the director or the defenders, such provision of legal services is appropriate." See Section 600.042.3. (A28). This proviso restricts or limits the clause immediately preceding it: "provide such persons with legal services." See Section 600.042.3. (A28). The Legislature could have written the Section in such a way as to remove the Director's or Public Defenders' discretion in deciding to provide legal service but chose otherwise.

The use of the words "discretion" and "appropriate" demonstrates that the Director and Public Defenders may consider a wide range of factors in determining whether to provide representation, such as a Public Defender District's caseload.

(1) Words in the statute must not be rendered meaningless

Respondents primarily argue that the Caseload Rule is inconsistent with the underlying statute, and, therefore, that this Court should strike it down. Supposedly,

Section 600.042.4 eliminates any discretion about when it is appropriate for the Public Defender to provide legal representation.

The flaw in this argument is that it reads Section 600.042.4 in isolation. See Martinez v. State, 24 S.W.3d 10, 18 (Mo. App. E.D. 2000) ("we are guided by the fundamental rule of construction that one part of a statute should not be read in isolation from the context of the whole act.") (citations omitted). In particular, Section 600.042.3 also defines when the Public Defender's Office should provide legal representation to indigent persons. However, Section 600.042.3 gives the Director and Public Defenders wide discretion in determining whether to provide representation:

> The director and defenders shall, ***within guidelines as established by the commission*** and as set forth in subsection 4 of this section, accept requests for legal services from eligible persons entitled to counsel under this chapter … and provide such persons with legal services ***when, in the discretion of the director or the defenders, such provision of legal services is appropriate***.

Section 600.042.3 RSMo Cum. Supp. 2007 (emphasis added). (A28.)

Indeed, Section 600.042.3 not only uses the word "discretion," it emphasizes the scope of that discretion by using the word "appropriate." Id. At least one federal court has highlighted the word "appropriate" when it concluded that the Clear Air Act gave the Environmental Protection Agency "extraordinarily broad" discretion:

> The Act states that '[t]he Administrator shall, from time to time, issue proposed ... standards applicable to the emission of any air pollutant from ... aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare.' 42 U.S.C. § 7571(a)(2)(A). After hearings, the Administrator is authorized to 'issue such regulations with such modifications *as he deems appropriate*.' *Id*. § 7571(a)(3) (emphasis added). This delegation of authority is both explicit and extraordinarily broad.

Nat'l Ass'n of Clean Air Agencies v. E.P.A., 489 F.3d 1221, 1229 (D.C. Cir. 2007) (emphasis in original).

Respondents would have the Court read the word "shall" in Section 600.042.4 as an independent provision that destroys all the discretion that the statute would otherwise give to the Commission and the Director in Section 600.042.3. This interpretation violates the basic rule of statutory construction that the Court should not render any provision of a statute meaningless. Spradlin v. City of Fulton, 982 S.W.2d at 262.

There is a better reading of the statute that harmonizes all the provisions of the statute and that renders no provision meaningless. See Martinez v. State, 24 S.W.3d at 18. In short, the statute gives the Commission the discretion to create "guidelines … [to] accept requests for legal services from eligible persons." Further, the statute gives the Director the "discretion" to determine when the provision of legal services is

"appropriate." This discretion is broad enough to include determinations of when a specific Public Defender's Office is unable to provide constitutionally sufficient representation to indigent defendants. Cf. In re Order on Prosecution of Crim. App. by Tenth Jud. Cir. Pub. Defender, 561 So. 2d 1130, 1134 (Fla. 1990) ("excessive caseload in the public defender's office creates a problem regarding effective representation.") (citations omitted). But, consistent with that discretion, the Public Defender "shall" take cases that meet the Commission's "guidelines" and the Director's "discretion" about when the provision of legal services is "appropriate."

There is one additional aspect of the statute that compels this construction. Specifically, Section 600.042.3 *incorporates* Section 600.042.4. See Section 600.042.3 RSMo Cum. Supp. 2007 ("The director and defenders shall, within guidelines as established by the commission *and as set forth in subsection 4 of this section*, accept requests for legal services ….") (emphasis added). (A28.)

This creates an important dynamic. Specifically, the list in Section 600.042.4 works *within* the framework of Section 600.042.3. Thus, Section 600.042.4 does not defeat the discretion that the Missouri Legislature explicitly delegated to the Commission and the Director. Instead, it creates part of the statutory framework within which the commission can create "guidelines … [to] accept requests for legal services from eligible persons," and the Director can exercise his "discretion … [to determine when] such provision of legal services is appropriate." See Section 600.042.3 RSMo Cum. Supp. 2007. (A28.)

(2) Sullivan and Bonacker are not controlling

At least two opinions have addressed the discretion of the Public Defender to refuse appointment to cases. Both Sullivan v. Dalton, 795 S.W.2d 389 and State ex rel. Public Defender Commission v. Bonacker, 706 S.W.2d 449 (Mo. banc 1986) appear to limit the Public Defender's discretion in certain situations. These cases, however, are distinguished from the instant case and are not controlling.

In Sullivan, the Public Defender sought to set aside an order appointing a Public Defender to represent a defendant charged with violation of a city ordinance. The Public Defender argued, in part, that the defender should not be appointed to provide representation in ordinance violations because of limited staff resources. The parties did not dispute that the state and federal constitutions required "appointment of counsel when a defendant is faced with a deprivation of liberty." Sullivan, 795 S.W.2d at 390. Because the defendant faced such deprivation and had been determined indigent, the Court noted "the appointment of the public defender is, *at the very least*, authorized by statute." Id. (emphasis added). The Court also explained that the issue of limited resources was up to the Legislature to resolve. For these reasons, there was no showing that the respondent judge abused his discretion in appointing the Public Defender.

Sullivan, however, is distinguishable. First, Sullivan was not before the Court on a writ of prohibition. The Public Defender filed a petition invoking this Court's jurisdiction pursuant to its general superintending control over all courts. Therefore, in Sullivan, the Public Defender was not arguing that the judge acted in excess of his jurisdiction or exceeded his authority. See Sullivan, 795 S.W.2d at 392 (Blackmar, C.J.,

dissenting) (stating that the petition does not implicate jurisdiction but instead invokes the Court's supervisory authority). In the instant case, the Public Defender is explicitly arguing that Respondents have acted in excess of their jurisdiction or authority, a far different question from mere abuse of discretion in which jurisdiction or authority have been conceded.

Second, the Court's holding that the appointment is "at the very least, authorized by statute" is not at odds with Relators' present argument. Relator agrees that appointment in the instant case may be "authorized" but maintains that the authorization, as provided in Section 600.042.3-4 is constrained by the Director's or Public Defenders' statutorily provided discretion ***and*** the Caseload Rule (an example of Section 600.042.3 "guidelines"). Both the discretion and guidelines limit Respondents' jurisdiction or authority. In Sullivan there were no "guidelines" (promulgated rules) at issue restricting appointment to defend ordinance violators. Furthermore, the Sullivan opinion did not address the Director's discretion to accept or limit cases. The opinion only addressed the judge's discretion (because his jurisdiction was assumed).

Finally, the Court states that "the primary authority and responsibility for relieving the problem of limited public defender resources remains with the General Assembly." Sullivan, 795 S.W.2d at 391. Relator, in the instant case, agrees with this statement. One way in which the Legislature has chosen to deal with limited resources is by delegating its lawmaking authority to the Commission and by statutorily granting the Director discretion over the provision of legal services. Again, the Sullivan Court did not

repudiate this concept, as the Commission's lawmaking power and the Director's discretion were not at issue in the case.

The 1986 decision in Bonacker is also distinguishable. In Bonacker, the Public Defender Commission brought a writ to prohibit judges from appointing Public Defenders to represent prisoners in post-conviction proceedings. Specifically, the Commission argued that the appointments violated a rule adopted by the Commission that representation would not be provided to such defendants. The Court held that indigent post-conviction prisoners fell within the classes of cases laid out in Section 600.042.4 and, therefore, the judges did not exceed their jurisdiction.

The most distinguishing point between Bonacker and the instant case is the nature of the implicated Commission rules in both cases. In Bonacker, the Commission rule purported to eliminate an entire class of cases, which the Court held was properly within the definitions of Section 600.042.4. The Court focused on this point in stating:

> Clearly, the circuit courts have the requisite jurisdiction to appoint members of the public defender system to represent indigent prisoners in custody who seek to pursue post-conviction proceedings under our Rule 27.26. The Commission by rule or regulation, cannot oust the courts of such jurisdiction.

Bonacker, 706 S.W.2d at 451.

In the context of the full opinion, this passage means that jurisdiction to appoint the Public Defender to post-conviction cases is created by Section 600.042.4, which

defines the class of cases to which the public defender shall provide legal services. In the Court's view, this jurisdiction cannot be eliminated by a Commission rule that attempts to change the class of cases stated in Section 600.042.4. Indeed, the Public Defender, in the instant case, agrees. A rule attempting to eliminate one of the statutorily defined cases would conflict with the statute, be invalid, and improperly try to oust the court of statutorily created jurisdiction or authority.

The Caseload Rule, however, *does not* attempt to modify the class of cases laid out in the statute. Instead, the Caseload Rule provides the Director with a means of curing any deficiencies in competent and effective representation by making Public Defenders *temporarily unavailable* for appointments. The rule in Bonacker sought to abrogate the statute. The Caseload Rule, instead, represents statutorily authorized "guidelines" which serve as a proviso on the acceptance of requests for legal services and their provision.

Controlling caseload is essential for the Public Defender to be able to provide competent and effective representation and is implicit in the statutory scheme granting the Director discretion over provision of legal services. To illustrate most dramatically, the Public Defender System handles approximately 80,000 cases per year. If there were only one Public Defender attorney in Missouri, it would obviously be physically impossible for that one attorney to provide effective and competent representation in 80,000 cases. Clearly, the Legislature did not intend such an absurd result. Instead, the Legislature granted the Director discretion to accept cases, which allows the Public Defender System to prioritize cases so that effective and competent representation can be provided.

There is no doubt that if courts are allowed to eliminate the Public Defender's ability to control caseload, irreparable harm will result because ***excessive caseload is a conflict of interest***, which damages fundamental rights. "When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created." In re Order on Prosecution of Criminal App. by Tenth Jud. Cir. Public Defender, 561 So. 2d at 1135. Under Missouri Rules of Professional Conduct, a conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Missouri Rule of Professional Conduct 4-1.7; see, e.g., Comment 3 to Rule 4-1.7 ("A conflict of interest may exist before representation is undertaken, in which event the representation must be declined . . ."); Rule 1-1.6 ("[A] lawyer shall not represent a client . . . if the representation will result in violation of the rules of professional conduct or other law."); Missouri Rule of Professional Conduct 4-1.1 ("A lawyer shall provide competent representation to a client."); Comment 2 to Missouri Rule of Professional Conduct 4-1.3 ("A lawyer's work load must be controlled so that each matter can be handled competently."); Missouri Rule of Professional Conduct 4-5.1(a) (A managerial lawyer in a law firm "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."). Missouri Supreme Court Rules, like the Caseload Rule, have "**the *force and effect of law***." Sullivan v. Dalton, 795 S.W.2d at 390 (emphasis added).

The Bonacker Court noted "the Commission is authorized by statute to cure and resolve any potential conflicts of interest by employing private counsel under contract or on a case-by-case basis." Bonacker, 706 S.W.2d at 451 (citing Section 600.042.1(10)). The section referenced and indeed the entire Chapter, however, never mention "conflicts of interest." Instead, the Supreme Court *inferred* that the Commission had the authorized power to eliminate conflicts of interest. The Court's inference that the statutory authority addresses conflicts of interest should also apply to any other relevant statutory authorization in the Chapter, particularly those enumerated in the same section (600.042) cited by the Court. The Court's analysis, therefore, must also extend to the Commission's authorization to establish "guidelines" relating to the provision of legal services and the Director's or Public Defenders' "discretion" to provide legal services when "appropriate." See Section 600.042.3. (A28). It is these "guidelines," in the form of the Caseload Rule, and "discretion" that the ***General Assembly has authorized*** the Commission, Director, and Public Defenders ***to employ in order to cure the conflicts of interest*** so dangerously created by an excessive caseload.

Bonacker aptly highlights the paramount duty of Public Defenders—indeed, every lawyer—to prevent conflicts of interest:

> Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants . . . *His principal responsibility is to serve the undivided interests of his client.*

Bonacker, 706 S.W.2d at 451 (emphasis original) (quoting Ferri v. Ackerman, 444 U.S. 193, 204 (1979)); see also Moore v. State, 934 S.W.2d 289, 292 (Mo. banc 1996) (Public Defender Commission has "general authority" to address conflicts of interest and is expected by the Court to resolve conflicts).

Should this Court, however, disagree with Relators' analysis and find that Bonacker and Sullivan are controlling, Relators submit that Bonacker and Sullivan misconstrue the relevant statutes, infringe on legislative power, and unconstitutionally expand the power of the judiciary as it relates to the Public Defender System. In short, the Legislature has the power to delegate rulemaking authority to the Commission and discretion to the Director that can limit the power of the Missouri courts to appoint the Public Defender.

c. Given the Full Context of Chapter 600, "Shall" in Section 600.042.4 Is Discretionary, Rather Than Mandatory

Additionally, based on a proper construction of Chapter 600, the "shall" in Section 600.042.4 is discretionary, rather than mandatory, befitting the discretion and broad rulemaking authority the General Assembly gave to the Director and Commission. Whether the word "shall" in a statute or regulatory provision is directory or mandatory when the provision does not impose a sanction for failing to comply is dependent on its context. Citizens for Environmental Safety, Inc. v. Missouri Dept. of Natural Resources, 12 S.W.3d 720, 725 (Mo. App. S.D. 1999); Hedges v. Dept. of Social Services, 585 S.W.2d 170, 172 (Mo. App. W.D. 1979). "Where the legislature fails to include a sanction for failure to do that which 'shall' be done, courts have said that 'shall' is

directory, not mandatory." Citizens for Environmental Safety, Inc., 12 S.W.2d at 725 (quoting Farmers and Merchants Bank v. Director of Revenue, 896 S.W.2d 30, 32-33 (Mo. banc 1995)). Neither the Public Defender statute, Chapter 600, nor the Public Defender's regulations impose a sanction for the Director and defenders to fail to provide legal services to eligible persons.

Assuming, *arguendo*, that the "shall" in Section 600.042.4 is mandatory, not directory, then that statute is unconstitutional under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, at least as applied, because it has resulted in a caseload that is too large and burdensome to allow the District 13 Public Defender Office and its attorneys to provide effective assistance of counsel to their clients. See In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d at 1134-35.

d. The Public Defender Must Have Discretion to Manage Its Resources, as Required by the General Assembly, to Ensure Competent and Effective Representation

A state agency, properly empowered by the General Assembly, is in the best position to carry out its lawful discretionary power. The courts must provide a check on agency power that exceeds its remit, and indeed this is appropriate and necessary. When it comes to human and budgetary resources, however, the agency has the better information, knowledge, and skill required to make fact-based decisions. For example, the Western District in its opinion denying Relators a permanent writ, held that the commission rule was invalid, in part, because the Public Defender could possibly employ

these measures to resolve excessive caseloads: contract cases to private counsel, have another Public Defender office handle the case, and seek continuances. See State ex rel. Missouri Public Defender Comm'n v. Hamilton, 2009 WL 987468 at *7 (Mo. App. W.D. April 14, 2009). While these considerations may go to whether the Commission may wish to implement its Caseload Rule in particular offices, these considerations are not relevant to the legal issue of the validity of the Caseload Rule—i.e. whether it conflicts with Chapter 600.

Nevertheless, Relators will address these issues. First, the Public Defender cannot contract all of its overload cases, because the Public Defender is not funded sufficiently to do this.[5] Second, the Public Defender cannot readily send an attorney from another of its offices to Boone County because currently ***all*** of the Public Defender's other offices are also over the Commission protocol.[6] To send an attorney from, for example, Cape

[5] The cost of contracting with private attorneys far exceeds the contract funds available to the Public Defender. See the following public records: MSPD FY09 Budget Request (estimating cost of contracting excess caseload at $14.165 million) (A35); HB12 FY10, Section 12.400 (appropriating approximately $2.558 million for contracting representation ***and*** the expenses associated with the defense of violent crimes) (A36); HB22 FY10, Section 22.260 (appropriating only an additional $2 million to contract representation) (A37).

[6] See July 2009 Caseload Protocol (most recent Protocol Report for three-month period, April-June 2009, showing all offices over the calculated capacity under the Caseload

Girardeau to Boone County not only decreases the number of attorneys available to handle cases in overloaded Cape Girardeau, but adds to the Public Defender's administrative costs in paying for attorney travel. The Public Defender Commission has statutory authority to divide the State into Public Defender Districts, Section 600.021.4, and has done so in order to fiscally and managerially administer the Public Defender System. Here, the Public Defender showed that the District 13 Office as a whole was overloaded. Just as a private law firm must be able to set some ethical limit to the number of cases the firm accepts, so, too, must the Public Defender be able to set an ethical, reasonable caseload for its offices. Finally, while attorneys might use continuances to assist in managing their caseload (with the permission of trial courts), where an office is overloaded, that only pushes the caseload problem into the future.

For all the reasons above, Respondents lacked jurisdiction, exceeded their authority, and abused their discretion in appointing the Public Defender when that appointment was not authorized by law while the District 13 Public Defender Office was certified as of limited availability. The Public Defender and its existing clients will be irreparably harmed if a writ does not issue since the Public Defender will face further case overload.

Rule and Protocol) (A38). At the time of the oral argument in the Western District, there was one Public Defender Office which was not over the Commission protocol. State ex rel. Missouri Public Defender Comm'n v. Hamilton, 2009 WL 987468 at * 7 (Mo. App. W.D. April 14, 2009). That is not currently the case.

II.

Relators are entitled to an order in prohibition against Respondent Judge Hamilton, because Respondent lacked jurisdiction, exceeded his authority, and abused his discretion in appointing Kevin O'Brien in his private capacity, in that such appointment was not authorized while the District 13 Public Defender Office was certified as of limited availability pursuant to 18 CSR 10-4.010 and because Public Defenders are barred from appointment in their private capacity by Section 600.021.2.

A. Standard of Review

"The extraordinary remedy of a writ of prohibition is appropriate … (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order." State ex rel. T.W. v. Ohmer, 133 S.W.3d 41, 43 (Mo. banc 2004).

Prohibition may be used to "'undo' acts done in excess of a court's jurisdiction, as long as some part of the court's duties in the matter remain to be performed[,]" and may be used to restrain further enforcement of orders beyond or in excess of a court's authority. State ex rel. Robinson v. Franklin, 48 S.W.3d 64, 67 (Mo. App. W.D. 2001) (bracket in original; citation omitted).

Whether a trial court has exceeded its jurisdiction or authority is a question of law which the appellate court reviews independently of the trial court. See State ex rel. Teefey v. Bd. of Zoning Adjustment, 24 S.W.3d 681, 684 (Mo. banc 2000)(determination on appeal of whether administrative body's action exceeded the authority granted to it is a question of law for the "independent judgment of the reviewing court"); State ex rel. Beaird v. Del Muro, 98 S.W.3d 902, 906-07 (Mo. App. W.D. 2003) (determination on appeal of whether habeas court acted within its jurisdiction is a question of law).

Where a trial court exceeds its jurisdiction or authority under Chapter 600 RSMo. in appointing the Public Defender, a writ of prohibition must issue to prohibit or rescind the trial court's order. See State ex rel. Tanzey v. Richter, 762 S.W.2d 857, 858 (Mo. App. E.D. 1989); State ex rel. Shaw v. Provaznik, 708 S.W.2d 337, 341 (Mo. App. E.D. 1986).

B. Public Defenders Can Only Practice Law in Their Official Capacity

With regard to Mr. Lobdell's case, Respondent Judge Hamilton appointed District Defender Kevin O'Brien "as a member of the local bar," instead of in his official capacity as a Public Defender. Section 600.021.2 RSMo 2000 prohibits Public Defenders from practicing law except in their official capacity as public defenders. (A31.) Respondent contends that "this section, which appears to be an attempt to avoid any potential conflict, cannot usurp a trial court's duty to provide justice." (Resp. Suggestions at p. 10.)

The section, however, is more than an attempt to avoid potential conflicts. Its purpose is to ensure that Public Defender clients receive competent and effective representation by having an attorney who ***works solely on Public Defender cases***, and

does not slight those clients by simultaneously having an outside private practice of additional clients. This purpose would be thwarted if courts could appoint Public Defender attorneys to additional cases beyond those assigned to them by the Public Defender System in the course of their employment.

The Legislature may reasonably determine how government attorneys are to be used. In Mid-Missouri Legal Services Corp. v. Kinder, 656 S.W.2d 309 (Mo. App. W.D. 1983), the Western District granted a writ of prohibition to prohibit a circuit judge from appointing a Legal Services attorney to a criminal case. The circuit judge contended that he had an established practice of appointing attorneys who regularly appear before him to represent indigents in criminal cases. Id. at 311. However, the Western District held that since Congress had provided by statute that Legal Services attorneys be funded solely to provide representation in noncriminal cases, the circuit judge lacked authority to appoint. Id. See also State ex rel. Acocella v. Allen, 604 P.2d 391, 395-96 (Or. 1979)(holding trial court cannot appoint Public Defender under its inherent authority to appoint, where Public Defender notified court it could not serve due to case overload; "[T]he decision to appoint the Public Defender is not entrusted entirely to the discretion of the trial court. When the [Public Defender] Committee has determined that the Defender is unable to serve, the trial court has a nondiscretionary duty to honor that finding."); State ex rel. Robinson v. Franklin, 48 S.W.3d 64 (granting writ of prohibition to prohibit trial judge from ordering particular Public Defenders to enter appearances for defendants).

Judge Hamilton's appointment of Mr. O'Brien in a private capacity was contrary to Section 600.021.2 and the overall purpose of Chapter 600, which is to ensure that

Public Defender clients receive competent and effective representation. Judge Hamilton may, of course, appoint private, non-Public Defender counsel for Mr. Lobdell. State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 65-66 (Mo. banc 1981). His actions were in excess of his jurisdiction and authority, and an abuse of discretion, in that such appointment of a Public Defender in his private capacity was prohibited by statute and because the District 13 Public Defender Office had also been certified as of limited availability as provided for by the Caseload Rule.

CONCLUSION

WHEREFORE, Relators respectfully request that this Court grant permanent writs in prohibition against the Respondents, to rescind their orders of November 3 and 10, 2008. Relators request this relief because Respondents lacked jurisdiction, exceeded their authority, and abused their discretion in appointing the Public Defender or Kevin O'Brien, in that such appointment was not authorized while the District 13 Public Defender Office was certified as of limited availability pursuant to the Caseload Rule and because Defenders are barred from appointment in their private capacity. Furthermore, the Public Defender Office and its existing clients will be irreparably harmed if a writ does not issue since the Public Defender will face further case overload.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, J. Gregory Mermelstein, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, 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 10,170 words, which does not exceed the 31,000 words allowed for relators' 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 July, 2009. According to that program, the disks provided to are virus-free.

One true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 30th day of July 2009, to the offices of the Hon. Gene Hamilton and Hon. Gary Oxenhandler, Boone County Circuit Court, 705 East Walnut St., Columbia, MO 65201, Telephone: (573) 886-4050, FAX: (573) 886-4070; and Dan Knight, Boone County Prosecutor, and Stephanie Morrell, Assistant Prosecutor, 705 East Walnut St., Columbia, MO 65201, Telephone: (573) 886-4100, FAX: (573) 886-4148; and Christy Blakemore, Circuit Clerk, Boone County Circuit Court, 705 East Walnut, Columbia, MO 65201, Telephone: (573) 886-4000; and Jacqueline A. Pickrell, 10303 Eagle Wood Ct., St. Louis, MO 63114, Telephone: (314) 498-7821; and Mark A. Lobdell, 3033 Rt. M, Ashland, MO 65010, Telephone: (573) 268-7804.

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J. Gregory Mermelstein