No. SC91150

IN THE

Supreme Court of Missouri

STATE EX REL. MISSOURI PUBLIC DEFENDER COMMISSION, CATHY R. KELLY & ROD HACKATHORN

Relators,

v.

THE HONORABLE JOHN S. WATERS & THE HONORABLE MARK ORR, Associate Judge and Presiding Judge, Christian County Circuit Court

Respondents.

On Preliminary Writ of Prohibition from the Supreme Court of Missouri
to the Honorable John S. Waters, Associate Circuit Judge
and the Honorable Mark Orr, Presiding Judge,
Christian County Circuit Court, Thirty-eight Judicial Circuit

RESPONDENTS' BRIEF

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STATEMENT OF FACTS

In 1972, the Missouri State Legislature created the public defender system (in a more blended form than our current system) as a response to both the landmark case of *Gideon vs. Wainwright*, 372 U.S. 335 (1963), and this Court's decision in *State v. Green*, 470 S.W. 2d 571, 572 (Mo. banc 1971), which held that it was the State's responsibility to provide for the defense of indigent criminal defendants (and not the private bar).

In the nearly forty years that have followed, the public defender system has been modified by the legislature to become the system that we use today. It cannot be emphasized enough that Missouri's public defender system is a creature of statute. It only came into existence when the State Legislature passed it into existence, and while § 600.017(10), RSMo, authorized the Public Defender Commission to "Make any rules needed for the administration of the state public defender system," the statute does not allow the Public Defender to have limitless rule making power. Any and all rules and regulations that the public defender attempts to promulgate through its administrative power must not conflict with Missouri State statutes. *State ex rel. Public Defender Commission v. Pratte*, 298 S.W.3d 870, 882 (Mo. banc 2009).

The Respondents agree with the majority of the statement of the facts as stated by the Relators. But the Relators did fail to state certain facts that the Respondents believe are vital to the proper resolution to this case. The primary

factual issue in this case has been the Caseload Protocols created by the Missouri State Public Defender Commission and the Missouri Public Defender's Office, their claimed fear of providing incompetent and unethical representation by public defenders, and the supposed fact that this Court mandated a procedure to deal with alleged caseload overload in the *Pratte* case.

The Protocol was created by the Missouri Public Defender Commission and the staff of the Missouri Public Defender's office. *See* Relators' exhibit E-26 to E-32. Peter Sterling testified the caseload study was prepared by several public defenders and was done completely internally within the public defender system without the assistance of any outside agencies (*See* Transcript of Hearing on August 10, 2010 at E-299 to E-300). He testified the caseload study had not been reviewed by any outside agency or submitted for peer review (*See* E-300).

This Court appointed the Honorable J. Miles Sweeney as Special Master on October 14, 2010. One of the questions that this Court requested Special Master Sweeney to determine was "Is the factual basis for the caseload standards protocol referenced in 18 CSR 10-4.010 accurate and appropriate?" (See Court's Commission to Take Testimony dated October 14, 2010). Special Master Sweeney conducted a hearing on November 12, 2010. He submitted his report to this Court on February 9, 2011. In answering the question of the accuracy and appropriateness of the protocol, Special Master Sweeney found "The MSPD protocol is not inaccurate but there is serious question as to whether it is

sufficiently accurate to justify the imposition of the negative consequences on the rest of the criminal justice system" (Special Master's Report). The Special Master further had the protocols reviewed by National Center for State Courts (NCSC) (See Special Master's Report). The independent review had serious questions about three parts of the Protocol. First, the reliance of the Relators on the National Advocacy Center (NAC) standards; second, the failure of the Relators' protocols to take into account the use of support staff to assist attorneys in performance of their jobs; third, the protocol's reliance on mere volume of cases and the protocol's failing to factor in the use of diversion programs or other stresses on the system (*See* NCSC report attached to Special Master's report).

Two of the chief complaints by the Relators regarding case overload are possible incompetent representation and possible ethical violations by the attorneys of the public defender system. Both Peter Sterling and Rod Hackathorn of the Public Defender's office were questioned regarding these two alleged fears. Peter Sterling testified at the hearing on August 10, 2010 as follows:

> Q. In the last years how many bar complaints have there been against your attorneys for failure to do their job?
>
> A. I do not know how many, I'm aware of dozens.
>
> Q. How many in the 31st District?
>
> A. I don't keep track of this, we're not, bar complaints go to the office of Chief Disciplinary Counsel, they don't come to us.

Q. So you don't represent, for caseload violation you don't represent your Public Defenders if they're accused of not doing their job due to the fact of the caseload, not any other reason?

A. If they come to us we consider and have provided representation in many instances.

Q. Do you have any documentation to show all the bar complaints that were listed against Public Defenders due to the caseloads, not for any other reason?

A. No we don't maintain documentation on all of them because we don't know all of them.

(E-297 to E-298).

While Mr. Sterling did testify that there had been a dozen "complaints," he could not furnish evidence to corroborate that testimony. Mr. Hackathorn was asked regarding bar complaints and ineffective assistance of counsel claims at the hearing on August 10, 2010. He testified:

Q. But again you don't have any documentation today to support that any of the attorneys in the last five (5) years have had a bar complaint due to the fact of their caseload?

A. I do not have, no. Well, I should add I do not have it and it does not exist because that is not the function of the Public Defender System.

Q. Mr. Hackathorn, how long have you been District Director for District 31?

A. Seven (7) years.

Q. Seven (7)?

A. Yes.

Q. In that seven (7) years how many bar complaints have been made against your Public Defenders based on caseload?

A. There have been complaints made to the Office of Chief Disciplinary Counsel, I couldn't tell you exactly how many complaints have been made.

Q. We have all this documentation you've presented, do you have any documentation on the number of Public Defenders either a complaint filed or sanctions brought due to them being affected based on the caseload?

A. No I don't have that documentation.

Q. Okay. How many times in the last five (5) years are you aware were specifically alleged in a post conviction motion that one of your Public, Assistant Public Defenders were ineffective due to them not being able to work on the case?

A. How many times has that occurred?

Q. Specifically alleged that they not, not because of a trial tactic but specifically alleged "my attorney was ineffective because he didn't have time to spend on my case"?

A. As to being specifically alleged, I couldn't, I don't know.

Q. So you don't have any, you're not aware of any, is that fair to say?

A. That's fair to say.

Q. and so you're not aware of any cases being reversed due to ineffective assistance of counsel based on an attorney not being able to spend the proper amount of time on the case?

A. I'm not aware of any.

The Respondents note that on January 28, 2011, Respondents filed a Motion to Modify Preliminary Writ, requesting that this Court's preliminary writ be modified to allow Mr. Blacksher to plead guilty, if he so chose, and be sentenced. On February 3, 2011, the Public Defender filed a reply to that motion, taking no position on whether Mr. Blacksher should be allowed to plead guilty as long as a guilty plea by Mr. Blacksher would not cause the Court to deem this writ case moot, citing *Pratte*, 298 S.W.3d at 855 n. 33. On February 8, 2011, this Court granted Respondents' Motion to Modify Preliminary Writ. Mr. Blacksher's cases were resolved by guilty plea on February 10, 2011.

ARGUMENT

A. The Relators' request for a writ of prohibition should be denied as moot because the underlying cases have been resolved by guilty pleas.

On February 28, 2011, Jared Blacksher pleaded guilty in Case No. 10CT-CR00470 to Forgery and was sentenced to five years in the Missouri Department of Corrections with the execution of the sentence suspended (Appendix to this Brief ("Resp.App.") A1-A3). On the same date, Mr. Blacksher also pleaded guilty in Case No. 10CT-CR00905 to Burglary in the Second degree. He received five years in the Missouri Department of Corrections with the execution of the sentence suspended and with the sentence to run concurrent with 10CT-CR00470 and any other cases (Resp.App. A4-A6). The remaining case 10CT-CR00906 was dismissed by the State pursuant to a plea agreement.

The ability of Judge Mark Orr to hear and accept the plea was authorized by this Court's order of February 8, 2011, granting the Respondents' Motion to Modify Writ. This Court in the order of February 8th made no ruling on the Relators' request that the writ not be rendered moot if the Court granted the Respondents' request for modification. The Respondents submit that the petition for a writ of prohibition is now moot as a result of the February 8th order and subsequent plea and sentencing of Mr. Blacksher.

"A threshold question in any appellant review of a controversy is the mootness of the controversy." *Armstrong v. Elmore*, 990 S.W.2d 62, 64 (Mo.App. W.D. 1999); *Kile v. McGuire*, 326 S.W.2d 538, 539-540 (Mo.App. S.D. 2010). This Court in *Bank of Washington v. McAuliffe*, 676 S.W.2d 483, 487 (Mo. 1984), stated, "A cause of action is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy." If a controversy is moot then the appeal should be dismissed. *Id*.; *Kile*, 326 S.W.2d at 539-540; *State ex rel. Chastain v. City of Kansas City*, 968 S.W.2d 232, 237 (Mo.App. W.D. 1998).

In the present case, the controversy arose when the Honorable Judge John Waters appointed the Relators to represent Mr. Blacksher in Case Nos. 10CT-CR00470, 10CT-CR00905, 10CT-CR00906. Relators objected to this appointment and requested the Southern District Court of Appeals to grant a preliminary writ of prohibition, which was denied. After the case was before the Honorable Judge Mark Orr, this Court granted a preliminary writ staying all proceedings in the above cases.

After Mr. Blacksher had been in jail for over six months, the Respondents' requested this Court to grant a modification of the writ to allow Mr. Blacksher to plead guilty if he so desired. This Court granted the Respondent's request. As stated previously, all cases in which the Relators represent Mr. Blacksher before either Judge John Waters or Judge Mark Orr have been resolved and are no

longer pending for resolution before the Circuit Court. As a result, there is no actual controversy still pending in this case. Any controversy that had existed in this case is moot.

There are two narrow exceptions to the general rule a case that the proper remedy for mootness is dismissal. First, when a case has been submitted and argued before a court, that court has the discretion to not dismiss the case and continue through to final resolution. *Cross v. Cross*, 815 S.W.2d 65, 66 (Mo.App. E.D. 1991). However, the current case has not been submitted nor argued to this Court; therefore, this exception does not apply.

The second is when the issue "(a) is of general public interest and importance; (b) will evade appellate review unless the court exercises its special jurisdiction; and (c) will recur, then dismissal for mootness is discretionary." *Id*.

The Relators' statutory duty to represent indigent clients and their refusal to follow their statutory duty is an issue of general public interest and importance. However, the narrow exception does not apply.

This exception does not apply if the issue "is likely to be present in a future live controversy practically capable of appellate review." *Chastain v. City of Kansas City*, 968 S.W.2d at 237. The issue of whether or not the Relators can decline to represent indigent clients once they have been appointed by a judge of a circuit court will come up again if this Court dismisses the present request for writ as being moot. When the Relators decide they have exceeded their own

caseload protocols, they will again request that they not be appointed to an indigent defendant. If another court appoints them over their objection, then they will have the opportunity at that time to seek another writ from this Court. This would be a live controversy that would be ripe for review by this Court.

On the issue of mootness, this Court in *Pratte* stated "Prohibition may be used to 'undo' acts done in excess of a court's authority '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 that are beyond or in excess of a [court's] authority….'" *State ex rel. Missouri Public Defender Commission v. Pratte*, 298 S.W.3d 870, 880 (Mo. banc 2009). The present case is moot because no cases are currently pending regarding Mr. Blacksher before either Judge John Waters or Judge Mark Orr. Nothing done in the circuit court was beyond the authority of the circuit judges. There are no exceptions that are applicable to this controversy. This Court should dismiss the Relators' Request for a Writ of Prohibition.

B. If the request for a writ is not denied as moot, the Relators' request should nevertheless be denied because the Respondents did not exceed their authority in appointing the Public Defender to represent Mr. Blacksher.

The writ of prohibition is a creation of the common law and not of statute. *State ex rel. Rogers v. Rombauer et. al.*, 16 S.W. 695 (Mo. 1891). The "purpose of the writ of prohibition is to prevent an inferior court from assuming jurisdiction with which it is not legally vested, in cases where wrong, damage, and injustice are

likely to follow from such action." *State ex. Rel. Henry v. Cracraft*, 168 S.W.2d 953, 954 (Mo. App. St.L.D. 1943). "It does not lie as a rule for grievances which may be redressed in the ordinary course of judicial proceedings by other remedies provided by law." *Id*. "It is to be used with great caution and forbearance for the furtherance of justice and to secure order and regularity in judicial proceedings and should be used only in cases of extreme necessity." *Id*.

The writ of prohibition is not a tool used in the general course of court business, but a tool that should only be used "with great caution, forbearance, and only in cases of extreme necessity." *Scott County Reorganized R-6 School District v. Missouri Commission on Human Rights*, 872 S.W.2d 892, 893 (Mo.App. S.D. 1994). The writ should only issue when the right to do so is clear. *State ex.rel. Lahammer v. Franklin*, 756 S.W.2d 956 (Mo.App. S.D. 1988).

Recently, this Court stated: "The extraordinary remedy of a writ of prohibition is available: (1) to prevent the usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, 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 granted." *Pratte*, 298 S.W.3d at 880. Here, the orders appointing the Public Defender to represent Mr. Blacksher did not fall within any of these categories.

Section 600.042.4(1), RSMo 2000, states that "The director and defenders *shall* provide legal services to an eligible person who is detained or charged with

a felony" (emphasis added). This Court in *Pratte* explained that "the word 'shall' generally prescribes a mandatory duty." *Id*. at 882. In the case at hand, there is no dispute that Mr. Blacksher was in the custody of the Christian County Jail for the charges in this case; there is no dispute that Mr. Blacksher was charged with a felony—in fact he was charged with three felonies; and there is no dispute that Mr. Blacksher was an eligible person. The district defender for the 31st District stated in open court that Mr. Blacksher was, in fact, eligible for services according to the Public Defender's own guidelines. Given these circumstances, the Respondents were authorized under the provisions of Chapter 600 to appoint the Public Defender to represent Mr. Blacksher.

In addition to the Public Defender's statutory obligation to represent certain criminal defendants, the Respondents also had a duty imposed on them by this Court's rules regarding the representation of indigent defendants. Supreme Court Rule 31.02(a) states in part that "Upon a showing of indigency, it shall be the duty of the court to appoint counsel to represent him." The Court in *Pratte* recognized this obligation and duty. *See Pratte*, 298 S.W.3d at 885-886. Given the mandate of Rule 31.02(a), the Respondents had a plain duty to appoint counsel for Mr. Blacksher. And inasmuch as the appointment was valid under the provisions of Chapter 600, the Respondents neither acted beyond their authority nor abused their discretion.

The Respondents are, of course, cognizant of the pressures that can affect

the Public Defender's ability to represent every eligible defendant in the state, *i.e.*, the ethical demands that accompany the practice of law and the compelling need to provide effective assistance of counsel to each and every criminal defendant. But while these are important interests, in Respondent's view they are not (and were not) sufficiently implicated in this case to warrant the issuance of a writ of prohibition. Indeed, inasmuch as Mr. Blacksher has already pleaded guilty in the underlying cases, it should be presumed—absent specific contrary allegations and concomitant proof—that the assistant public defender who actually represented Mr. Blacksher did so in accordance with his or her duties. In other words, at this point, any questions regarding Mr. Blacksher's attorney's ethical obligations and the effectiveness of counsel's representation are more appropriately left to proceedings in a civil case, a motion under Rule 24.035, or a complaint filed with disciplinary counsel.

The Relators implicitly recognize that prohibition has no useful place in Mr. Blacksher's cases, as the Relators' brief attempts to expand this case to include appointment orders that might be made in cases with "other similarly situated and otherwise eligible defendants" (*see* Rel.Br. 22). In support of their arguments, the Relators aver that the Respondents "lacked authority and abused their discretion" in light of various rules and legal principles, namely, (1) the provisions of a rule promulgated by the Public Defender (18 CSR 10-4.010) and the Court's decision in *Pratte*, (2) an alleged "significant risk" that assistant

public defenders will not be able to abide by the ethical rules that govern attorney performance, and (3) an alleged "significant risk" that assistant public defenders will provide ineffective assistance of counsel to indigent defendants (Rel.Br. 22-23). And, in support of the latter two allegations, the Relators point to the Public Defender's internally-produced caseload standards protocol (the "Protocol"), as proof that these important competing concerns may be implicated by the appointment of the Public Defender in this case (Rel.Br. 23). But there are several problems with the Relators' various arguments.

First, this Court in *Pratte* did not hold that the Public Defender's internally-promulgated rule (and all of its provisions) was valid; thus, the Court did not hold that circuit judges must abide by all of the rule's various provisions or find themselves divested of authority to appoint the Public Defender in a given case.

More specifically, the Court did not hold in *Pratte* (as suggested by the Relators) that it would be permissible for the Public Defender to promulgate a rule making "the [Public Defender's district] office unavailable for any appointments until the caseload falls below the commission's standard." Rather, in *dicta*, in discussing potential "remedies" for the Public Defender's reported "caseload crisis," the Court merely stated that "[w]hen the public defender, prosecutors and presiding judge confer [in an effort to address the public defender's "limited availability" under the rule], they *may* agree on measures to reduce the demand for public defenders." *Pratte*, 298 S.W.3d at 887 (emphasis

added). The Court then indicated that "[s]uch measures *might* include" certain actions on the part of the various parties. *Id*. (emphasis added). The Court then observed that "in the absence of agreement by prosecutors and judge to any resolution, *the rule authorizes* the public defender to make the office unavailable for any appointments until the caseload falls below the commission's standard." *Id*. (emphasis added). But, importantly, while the court reasonably expected that the parties would attempt a cooperative resolution, the Court did not hold either that refusing all appointments was the required outcome for a failed attempt to reach resolution or that that particular provision of the rule was valid, *i.e.*, the Court did not determine whether that provision of the rule was consistent with the Public Defender's commission under Chapter 600.

The Public Defender's Office is a creature of statute. It came into existence through acts of the legislature. *See id*. at 875-877. It must, therefore, abide by the statutory provisions of Chapter 600. And, while § 600.017(10) authorizes the Public Defender Commission to "Make any rules needed for the administration of the state public defender system," the commission does not have limitless rule making power. To the contrary, "Though the commission and director are granted the authority to promulgate necessary rules, the rules may not conflict with statutes." *Pratte*, 298 S.W. 3d at 882. Thus, for example, in *Pratte*, this Court invalidated certain provisions of 18 CSR 10-2.010 and 18 CSR 10-4.010, because they conflicted with the Public Defender's statutory duties.

In *Pratte*, the Court invalidated the provision of 18 CSR 10-2.010 that would have allowed the public defender to decline representation to an indigent defendant who had retained private counsel at some point during the pendency of the criminal case. *Id*. at 881-882. The Court reasoned that this rule was inconsistent with § 600.086.1, which "provides, 'A person *shall* be considered eligible for representation [by the public defender] . . . when it appears from all the circumstances of the case . . . that the person . . . is indigent.' " *Id*. at 882. The Court then held that because the defendant in that case was eligible under the provisions of Chapter 600, "the rule [18 CSR 20-2.010] is beyond the authority of the public defender commission." *Id*. Accordingly, the Court held "that the portion of 18 CSR 10-2.010 that prohibits public defender services to an indigent person who previously has retained counsel is invalid; its promulgation exceeds the statutory authority provided to the public defender commission and director in sections 600.017(10), 600.042.1(8) and 600.086." *Id*. at 883.

Next, the Court considered whether a portion of 18 CSR 10-4.010 was valid. The pertinent provision of the rule allowed a district office in "limited availability" status to decline to represent defendants at probation revocation hearings. *Id*. at 883. The Court observed that the rule purported to allow the public defender to select "categories of cases to be designated for exclusion from public defender representation once the district is certified by the director as of limited availability." *Id*. But the Court concluded that this rule exceeded the

commission's authority because the rule "directly contradicts section 600.042.4(3), requiring the public defender's office to represent indigent defendants who are charged with violating probation." *Id*.

Similarly, here, the rule is being used to decline representation to an eligible defendant. And the rule is not being applied to decline representation because of any actual conflict of interest; rather, the rule is being applied mechanically to decline representation simply because Mr. Blacksher requested representation after a certain date. And, presumably, if the Public Defender is permitted to decline representation in this case, the Public Defender will be able to categorically decline representation to all "similarly situated" indigent defendants who are otherwise eligible for services. This sort of categorical refusal to represent eligible defendants is not consistent with the provisions § 600.042.4, RSMo 2000, and, thus, to the extent that 18 CSR 10-4.010 permit such a categorical refusal, it should be invalidated.[1]

[1] In *Pratte*, the Court also held that an attempt to appoint a public defender in his private capacity as an attorney could not be allowed because, under § 600.021.2, those who work as public defenders "shall not otherwise engage in the practice of law except as authorized by this chapter or by commission rule." *Pratte*, 298 S.W.3d at 885-886. This holding further confirms that public defenders must abide by the provisions of Chapter 600.

The Relators' other claims regarding the alleged "significant risk" of ethical violations and ineffective assistance of counsel also do not compel a finding that the Respondents exceeded their authority or abused their discretion in appointing the public defender to represent Mr. Blacksher. These concerns rest in large part upon the Public Defender's internally-produced caseload standards protocol. But there are serious questions surrounding the Protocol, and Respondents would note that the special master assigned to review the Protocol concluded that while the Protocol is "not inaccurate" in some respects, "there is serious question as to whether it is sufficiently accurate to justify the imposition of the negative consequences [that flow from allowing the Public Defender to categorically decline representation] on the rest of the criminal justice system." It cannot be overlooked, for example, that the Protocol is a self-serving document based upon a study that was conducted in 1972. The Public Defender is, thus, relying (at least in part) on standards for caseload hours that were created in an age before word processing, pleading templates, e-mail and text messaging, and electronic law libraries. What took hours in times past can be done in minutes today. If Missouri courts are to seriously consider the reported "caseload crisis," a more inclusive and modern study—independent of outdated information—should be conducted with the assistance of private attorneys, public defenders, prosecutors, judges, and lay persons. In short, due to the self-serving nature of the Protocol, it alone is not sufficient to compel any conclusion that the

appointment in this case resulted in the denial of competent, conflict-free counsel for Mr. Blacksher.

Respondents believe that the public defenders serve the State of Missouri admirably, and that they sincerely desire to provide effective and ethical representation to criminal defendants. (This does not mean, however, that the Public Defender is unmindful of the opportunity to use Mr. Blacksher's case as a vehicle to compel greater appropriations from the legislature. And, in fact, in the Relators' brief, they make the point that "While courts may not appropriate funds, they are not powerless to act in this situation" (Rel.Br. 51). The obvious implication being, of course, that the Public Defender would like the Court to take action that will compel further appropriations.) But in the Respondents' view, a categorical refusal by the Public Defender to provide services is an untenable approach to the Public Defender's reported caseload crisis.

It is a laudable goal for the Public Defender's Office to seek to ensure that all of its attorneys abide by the ethical rules. But the ethical rules do not purport to limit the Respondents' authority to act according to other provisions of law and appoint the Public Defender in an appropriate case. The Preamble to the ethical rules states that "Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process." Rule 4, Preamble [19]. "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal

duty has been breached." *Id*. at [20]. "Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." *Id*. "The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule." *Id*.

In other words, while the ethical obligations imposed by the rules should provoke individual public defenders to introspection and appropriate action, *i.e.*, a motion to withdraw if an appointment and assignment leads the attorney to believe that she or he cannot ethically continue the representation due to a conflict of interest, the ethical rules themselves present no bar to the initial appointment of the Public Defender in any given case. Rather, once the appointment and case assignment is made, an individual public defender should be expected to act according to ethical norms and take appropriate actions to inform the circuit court of any actual conflict of interest. The circuit court can then make a ruling and, if appropriate, permit the public defender to withdraw. For instance, if the circuit court were convinced that the individual public defender could not reasonably provide effective assistance of counsel (*e.g.*, in light of obligations owed to other clients), the circuit court could permit the public defender to withdraw at that point, and the circuit court could then consider other avenues. (And, of course, if the individual public defender were

not permitted to withdraw, any claims of complete deprivation of counsel or ineffective assistance of counsel could be resolved on direct appeal or collateral review.) Such an approach is preferable to allowing the Public Defender to categorically refuse services to eligible defendants who apply for services after a certain date, as it requires the public defender to fulfill its statutory mandate while providing circuit courts with the ability to preserve the eligible defendants' constitutional right to the effective assistance of counsel.

In *Strickland v. Washington*, 466 U.S. 668, 696 (1984), the Court made a point of stating that the standards for evaluating claims of ineffective assistance of counsel are not "mechanical rules."[2] Similarly, in their brief, the relators aver that

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[2] The standards announced in cases like *Strickland v. Washington*, *United States v. Cronic*, 466 U.S. 648 (1984), and *Hill v. Lockhart*, 474 U.S. 52 (1985), are the appropriate standards for determining whether counsel in a given case was ineffective. Here, the Relators urge this Court to prohibit the Respondents on the basis of a standard applied in *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988)—a "likelihood of substantial and immediate irreparable injury" (Rel.Br. 48). But *Luckey* involved a civil suit under 42 U.S.C. § 1983, where the defendants sought injunctive relief "on behalf of a bilateral class consisting of all indigent persons presently charged or who will be charged in the future with criminal offenses in the courts of Georgia and of all attorneys who represent or will represent

their rule and the Protocol are "unequivocally discretionary" and designed to "facilitate[e] the exercise of professional judgment" (Rel.Br. 62). But the Relators' assertion is belied by the blanket nature of the rule in question. Indeed, under the rule, once the Director decides that no more cases should be accepted, the district office closes its doors and categorically refuses to represent eligible defendants. This is not an exercise of professional judgment—this is an exercise of limited institutional judgment, followed by a lack of professional judgment altogether.

Professional judgment occurs in the minds of individual attorneys. And, accordingly, that judgment should remain in the hands of the individuals who actually provide the representation for a given defendant. In other words, as outlined above, if an individual public defender believes that she or he cannot ethically provide effective assistance, that individual should bring the issue before the court and seek to withdraw from the case. Here, the individual public defender assigned to represent Mr. Blacksher lodged no such objection; rather, the individual public defender represented Mr. Blacksher to the resolution of his

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indigent defendants in the Georgia courts." It was in that context that the court in *Luckey* stated that the *Strickland* "standard is inappropriate for a civil suit seeking prospective relief." 860 F.2d at 1017. Here, of course, the relators have not filed a similar civil suit; rather, they are merely seeking to prohibit an order in Mr. Blacksher's underlying criminal cases. As such, *Luckey* is inapplicable.

criminal cases. Accordingly, there is no justification for the Relators to supplant their "professional judgment" for that of the individual who actually represented Mr. Blacksher.

In short, to the extent that there may be a systemic problem in the public defender system (which Respondents do not concede), Mr. Blacksher's criminal cases are not the proper vehicle for asserting such claims. The Respondents' appointment of the Public Defender to represent a single client simply did not render Rule 31.02(a) and the provisions of Chapter 600 unconstitutional as applied in this case, and in the Respondent's view, the Public Defender's categorical refusal to provide services to eligible defendants is not consistent with the mandates of Chapter 600. In short, while Mr. Blacksher's cases may provide an opportunity to focus some attention on the reported caseload crisis, the issue in Mr. Blacksher's case is much simpler: Did Respondents exceed their authority or abuse their discretion in appointing the Public Defender to represent Mr. Blacksher? The Respondents submit that the answer to that question is no.

C. The Court should not use the power of a writ of prohibition to assist the Relators in stymieing the criminal justice system when the Relators make the request with unclean hands.

In the present proceedings, the Relators are requesting that this Court use its inherent power to stymie the criminal justice system. The writ of prohibition should "be used with *great caution and forbearance* for the furtherance of justice

and to secure order and regularity in judicial proceedings and should be used only in cases of extreme necessity." *State ex. Rel. Henry v. Cracraft*, 168 S.W.2d at 954 (emphasis added).

The Relators in their brief cite the proposition that requiring them to represent more defendants than they deem sufficient is a violation of the United States and Missouri Constitutions. The Relators state they seek "nothing more than an opportunity to discharge their obligations, namely the statutory, ethical, and constitutional requirements which represent the first duty of the profession, *cf. Pratte*, 298 S.W.3d at 880, and the last hope of the accused" (Rel.Br. 47). The Relators point out that "[t]his request is made in recognition of the fact that those accused depend on their counsel to defend them in cases where liberty, and even life, hang in the balance" (Rel.Br. 47). While this noble goal should be the position of any lawyer defending those accused by the State of criminal wrongdoing, the Relators have shown in this case that this is not their primary goal. Instead of putting Mr. Blacksher's interest first and foremost, the Relators have put their own interests above all others.

Jared Blacksher was charged in three cases with forgery and burglary in the second degree. All three cases carried punishment up to seven years in the Missouri Department of Corrections. All parties agree that Mr. Blacksher was incarcerated in the Christian County Jail at the time of the hearing before the Honorable Judge John Waters on August 10, 2010. Mr. Blacksher remained

incarcerated until his plea and sentencing on February 10, 2011. The plea occurred not because the Relators were defending the rights of Mr. Blacksher, but because the State requested the Court to allow Mr. Blacksher the opportunity to plead if he so desired. The Relators did not object to this so long as they did not lose their rights to pursue this writ.

The Relators point to various ethical rules as support for their attempts to deny Mr. Blacksher representation. Supreme Court Rule 4-1.2 states "A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to Rule 4-1.2(c), (f) and (g), and shall consult with the client as to the means by which they are to be pursued." Rule 4-1.2(a). "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." *Id*. "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." *Id*. The same rule states that "when a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct." Rule 4-1.2(g).

The Relators also have the ethical obligation to "(1) keep the client reasonably informed about the status of the matter; (2) promptly comply with reasonable requests for information; and (3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client

expects assistance not permitted by the Rules of Professional Conduct or other law." Rule 4-1.4. Section (b) of Rule 4-1.4 also states, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Here, the Relators have provided all the courts in this case with volumes of evidence that they believe support their position. There are protocols created by the Relators. There is a report from Norman Lefstein, a professional who is sympathetic to the Relators' position. But in all that the Relators have provided, they have never provided any statements from Mr. Blacksher stating that they had advised him of their course of action and that he consented to wait in jail while they proceeded to do what was best for them. Mr. Blacksher did communicate with the prosecutor's office to inquire what was going on in his case and the case before this court (*see* exhibit 1 attached to Respondents' Motion to Modify Preliminary Writ).

While the doctrine of unclean hands is a doctrine primarily found in actions in equity, its principle have clear application to this case. Coming to court with "clean hands" is a cardinal rule which "touches to the quick the dignity of a court of conscience itself." *Leeper v. Kurth*, 163 S.W.2d 1031, 1033 (Mo. 1942). It does not have to be pleaded to be considered by a court. *Id*. A court should not grant a party the relief when the party "seeks to set the judicial machinery in motion and obtain some remedy, (they) has violate (violated) conscience, or good

faith, or other equitable principle, in his prior conduct." *Franklin v. Franklin*, 283 S.W.2d 483, 486 (Mo. 1955). The heart of the unclean hands doctrine is that a party should not request a court to grant them relief when they have failed to act in good faith or fairly in the proceedings prior to the request.

In the present case, the Relators are requesting this Court to grant a writ of prohibition against the Honorable Judge Waters and Honorable Judge Mark Orr, but they are, in fact, requesting this Court to sanction and approve their caseload protocol and their ability to limit whom they represent without interference from anyone or any controls over them. The Relators stated in their brief that "That exercise of professional judgment, as noted above, has been entrusted by Chapter 600 to the Public Defender – not to prosecutors or courts" (Rel.Br. 64). The Relators claim in their brief that not allowing them to use the Protocol as they see fit violates their ethical obligations. (Rel.Br. 29-38). Yet they come to this Court not having performed their basic ethical obligation to Mr. Blacksher. While he remained in jail without any of the communication required under Rule 4-1.2 and 4-1.4, they proceeded to file writs with the aid of six attorneys. When Mr. Blacksher wanted to know the status of his case, he had to contact the prosecutor because the Relators had failed to keep him informed (*see* exhibit A attached to Respondents' Motion to Modify Writ). The Relators left Mr. Blacksher in the dark while trying to bring light to their supposed need for less work. There is nothing fair or equitable about someone claiming to do right while at the same time

doing wrong. This conduct by the Relators should shock the conscious of this Court. This Court should not grant the writ requested by the Relators when they make the request with "unclean hands."

CONCLUSION

The Relators have failed to meet their burden that Judge John Water or Judge Mark Orr either abused their discretion or violated the law when they ordered the Relators to represent Jared Blacksher. For this reason and those stated above, the Respondents respectfully request this Court to deny the Relators' request for a writ of prohibition.

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. The attached brief complies with Rule 84.06(b) and contains 7,149 words, excluding the cover, this certification, the signature block, and the appendix, as counted by Microsoft Word;

2. The disk filed with this brief, containing an electronic copy of this brief, has been scanned for viruses and is virus free;

3. A true and correct copy of the attached brief, and a disk containing an electronic copy, were mailed, postage prepaid, this _____ day of June, 2011, to:

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