IN THE
MISSOURI SUPREME COURT

STATE ex rel. MISSOURI PUBLIC DEFENDER COMMISSION, CATHY R. KELLY & ROD HACKATHORN,	)	
Relators,	)	
vs.	)	No. SC91150
THE HON. JOHN S. WATERS & THE HON. MARK ORR, Associate Judge & Presiding Judge, Christian County Circuit Court,	)	
Respondents.	)	

ON PRELIMINARY WRIT OF PROHIBITION
FROM THE MISSOURI SUPREME COURT
TO THE HONORABLE JOHN S. WATERS, ASSOCIATE CIRCUIT JUDGE & THE HONORABLE MARK ORR, PRESIDING JUDGE, CIRCUIT COURT OF CHRISTIAN COUNTY, MISSOURI 38TH JUDICIAL CIRCUIT

RELATORS' STATEMENT, BRIEF AND ARGUMENT

Michael P. Gunn, Mo. Bar #20654
John R. Gunn, Mo. Bar #50341
The Gunn Law Firm, P.C.
1714 Deer Tracks Trail, Ste. 240
St. Louis, Missouri 63131
Telephone: (314) 965-1200
Facsimile: (314) 965-1054
Email: mgunn@thegunnlawfirm.com, jgunn@thegunnlawfirm.com

Stephen F. Hanlon, Mo. Bar #19340
Laura A. Fernandez (admitted *pro hac vice*)
Holland & Knight, LLP
2099 Pennsylvania Avenue, N.W., Ste. 100
Washington, DC 20006
Telephone: (202) 828-1871
Facsimile: (202) 955-5564
Email: stephen.hanlon@hklaw.com, laura.fernandez@hklaw.com

Attorneys for Relators (cont'd on next page)

J. Gregory Mermelstein, Mo. Bar #33836
Appellate Division Director
Woodrail Centre
1000 West Nifong
Building 7, Ste. 100
Columbia, Missouri 65203
Telephone: (573) 882-9855 x314
Facsimile: (573) 882-9468
Email: greg.mermelstein@mspd.mo.gov

Stacey H. Wang (admitted *pro hac vice*)
Holland & Knight, LLP
400 S. Hope St., 8th Floor
Los Angeles, California 90071
Telephone: (213) 896-2400
Facsimile: (213) 896-2450
Email: stacey.wang@hklaw.com

Attorneys for Relators

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

STATEMENT OF FACTS 3

A. The Public Defender's Caseload Standards Protocol 3

B. The District 31 Defender's Efforts to Reduce Caseload to Capacity under the Caseload Protocol 6

C. Proceedings in the Trial Court 10

D. Subsequent Proceedings in this Court 15

E. Proceedings Before the Special Master 16

POINTS RELIED ON 19

ARGUMENT 22

Standard of Review 23

A. Respondents Lacked Authority to Appoint the Public Defender While District 31 was on "Limited Availability" Status Under the Rule and *Pratte* 25

B. Requiring the Public Defender to Represent More Eligible Defendants after the Public Defender has Determined Pursuant to the Protocol that it is Unavailable for Further Appointments Violates Ethical Obligations 29

C. Requiring the Public Defender to Represent More Eligible Defendants after the Public Defender has Determined Pursuant to the Protocol that it is Unavailable for Further Appointments Violates the United States and Missouri Constitutions 39

1. The statute should be interpreted to preserve its constitutionality 41

2. *Luckey*'s test for pretrial relief, not *Strickland*'s test for post-conviction relief, applies in this structural or systemic challenge case 47

3. Separation of powers principles support judicial relief in chronically underfunded public defender cases..... 50

D. The Protocol is Sufficiently Reliable to Justify the Public Defender's Decision to Decline Representation 52

1. Record in the proceedings before the Special Master - the November 12, 2010 hearing..... 52

i. Testimony of Peter Sterling 52

ii. Testimony of Norman Lefstein 55

2. Post-Hearing Sterling and Lefstein supplemental testimony 58

3. The role of the Rule and the Protocol in the Public Defender's decision to decline representation - facilitating the exercise of professional judgment 62

CONCLUSION..... 67

CERTIFICATE OF COMPLIANCE AND SERVICE 69

TABLE OF AUTHORITIES

Page(s)

CASES

Argersinger v. Hamlin,

407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) 43-44

Cannon v. Cannon,

280 S.W.3d 79 (Mo. banc 2006) 45

Doe v. Roman Catholic Diocese of Jefferson City,

862 S.W.2d 338 (Mo. banc 1993) 45

In re Edward S.,

92 Cal. Rptr. 3d 725 (Cal. Ct. App. 2009)..... 31

Gideon v. Wainwright,

372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) 41

Lavallee v. Justices in Hampden Superior Court,

442 Mass. 228 (2004) 47, 51, 52

Luckey v. Harris,

860 F.2d 1012 (11th Cir. 1988) 20, 41, 47-48

Luckey v. Miller,

976 F.2d 673 (11th Cir. 1992) 48

Maas v. Olive,

992 So.2d 196 (Fla. 2008) 46

Makemson v. Martin County,
491 So.2d 1109 (Fla. 1986) 52
In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130 (Fla. 1990) 21, 51, 52
Padilla v. Kentucky,
-- U.S. --, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) 44
Ponce v. Ponce,
102 S.W.3d 56 (Mo. App. W.D. 2003) 32
Reproductive Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon, 185 S.W.3d 685 (Mo. banc 2006) 45
Simmons v. State Public Defender,
791 N.W.2d 69 (Iowa 2010) 40, 48, 49
State ex rel. Mo. Public Defender Comm'n v. Pratte,
298 S.W.3d 870 (Mo. banc 2009) ..... passim
State ex rel. Robinson v. Franklin,
48 S.W.3d 64 (Mo. App. W.D. 2001) 24
State ex rel. Shaw v. Provaznik,
708 S.W.2d 337 (Mo. App. E.D. 1986) 24
State ex rel. Tanzey v. Richter,
762 S.W.2d 857 (Mo. App. E.D. 1989) 24

State ex rel. Wolff v. Ruddy,

617 S.W.2d 64 (Mo. banc 1981) ..... passim

State v. Kennell,

605 S.W.2d 819 (Mo. App. S.D. 1980)..... 32

State v. Smith,

140 Ariz. 355, 681 P.2d 1374 (Ariz. banc 1984) 48

Strickland v. Washington,

466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ... 39, 40, 47, 48, 49

CONSTITUTIONS

MO. CONST.

Art. I, § 10..... 11, 21

Art. I, § 18(a) 11, 20-21, 23, 39, 41

Art. V, § 3 2

Art. V, § 4 2

U.S. CONST.

Amend. V.....11, 20-21, 23, 39

Amend. VI 11, 20-21, 23, 39

Amend. XIV 11, 20-21, 23, 39

STATUTES

Fla. Stat.

§ 27.7002 46

Mo. Rev. Stat.

§ 600.017 ..... 21, 25, 35, 38

§ 600.042 ..... 13, 20, 21, 23, 25, 35, 37, 38, 44

§ 536.024 ..... 21, 25, 35

RULES & REGULATIONS

Mo. Code of State Reg.

18 CSR 10-4.010 ..... passim

Mo. Rules of Civ. Proc.

Rule 68.03(g) 18

Rule 84.23 2

Rule 84.24 2

Rule 97.01 2

Mo. Rules of Prof. Conduct

Rule 4 29

Rule 4-1.1 ..... 11, 21, 29, 32

Rule 4-1.3 ..... 11, 21, 29, 32, 36, 49-50

Rule 4-1.4 ..... 11, 21, 29, 32

Rule 4-1.7 ..... 11, 21, 29, 30, 36, 50

Rule 4-1.16 ..... 11, 21, 19, 22, 29, 30

OTHER AUTHORITIES

Am. Bar Assoc. Standing Com. on Ethics & Prof. Resp., Formal Opinion 06-441 (May 13, 2006) 11, 20, 23, 29, 30

AM. BAR ASSOC., ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORK LOADS (Aug. 2009) 56, 65

REPORT OF THE NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (Apr. 2009), available at www.ConstitutionProject.org 40, 56

Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751 (2010) 45-46, 52

JURISDICTIONAL STATEMENT

This original writ case seeks a writ of prohibition. Relators are the Missouri Public Defender Commission ("the Public Defender"); Cathy R. Kelly, Director of the State Public Defender System ("the Director"); and Rod Hackathorn, District Defender for the District 31 office of the Public Defender in Springfield, Missouri ("the District 31 Defender"). Respondents are the Hon. John S. Waters, Associate Circuit Judge, and the Hon. Mark Orr, Presiding Judge, of the Circuit Court of Christian County, Missouri.

After the Missouri Court of Appeals, Southern District, denied Relators' petition for a writ of prohibition without an opinion, the Public Defender filed in this Court an application for a writ to prohibit Judge Waters' orders of July 28, August 10 and August 24, 2010, which appointed the Public Defender to represent Jared B. Blacksher in three criminal cases, Christian County Case Nos. 10CT-CR00905, 10CT-CR00906 and 10CT-CR00470. The Public Defender sought a writ because the District 31 office of the Public Defender ("District 31") was unavailable to accept Blacksher's cases pursuant to 18 CSR 10-4.010 and ***State ex rel. Mo. Public Defender Comm'n v. Pratte***, 298 S.W.3d 870 (Mo. banc 2009).

On September 3, 2010, this Court issued a preliminary writ of prohibition. On October 5, 2010, the Respondents filed a Return.

On October 8, 2010, this Court stayed the briefing schedule and, on October 14, 2010, *en banc* appointed the Honorable J. Miles Sweeney to be a special master. The Special Master filed his report on February 9, 2011. The Public Defender filed Exceptions to the Report of the Special Master on March 11, 2011. The Special Master accepted the additional evidence attached to the Exceptions but overruled the Exceptions on April 14, 2011. On that same day, the Court lifted the stay on the briefing schedule.

This Court has jurisdiction under Article V, Sections 3 and 4 of the Missouri Constitution, and Rules 84.23, 84.24 and 97.01 of the Missouri Rules of Civil Procedure.

STATEMENT OF FACTS

A. The Public Defender's Caseload Standards Protocol

After years of increasing caseloads without a corresponding increase in staff to handle the caseloads, the Missouri Bar Public Defender Task Force and the Missouri Senate Interim Committee concluded that the Missouri Public Defender System was in a caseload crisis. (E179J-179M.) The Public Defender thereafter promulgated Title 18 of the Missouri Code of State Regulations (CSR), division 10, chapter 4.010 ("the Rule"). (E25; A104.)[1] *See* 18 CSR 10-4.010. This Rule was promulgated as an emergency

[1] This brief's references are as follows: "E" citations are to the exhibits attached to Relators' "Petition For A Writ Of Prohibition, And Suggestions In Support Of The Petition, With Attached Exhibits" filed with this Court on September 2, 2010. Each exhibit is separately identified in the index preceding the exhibits, with the pages numbered consecutively from E1 ("E" for exhibit) to E362. Respondents' Return filed with this Court on October 5, 2010, is referred to as "Return." Most of the citations to the concurrently filed Appendix to this brief, designated by "A," refer to proceedings before or select documents filed with the Special Master. The transcript of the hearing before the Special Master on November 12, 2010, is referred to as "Special Master Hrg. Tr."

rule in 2007 and became permanent in 2008. (E25; A104.) Pursuant to the Rule, the Public Defender maintains a caseload standards protocol identifying the maximum caseload each district (area) Public Defender office can be assigned without compromising effective, competent and ethical representation (the "Protocol"). (E25-32; A122-128.)

The Protocol is built upon national standards recommended by the National Advisory Council (NAC) of the United States Department of Justice Task Force on the Courts in 1972 (the "NAC Standards"), and modified by an internal workload study by the Public Defender. (E27-28; A123-124.) The NAC Standards have historically formed the basis for most public defender caseload standards currently in existence in the United States. (E27; A123.) However, the NAC Standards have been criticized as not empirically based and for failing to distinguish between different types of felony cases. (*See, e.g.,* A53.) Over time, the American Bar Association, the American Council of Chief Defenders (ACCD) and commentators have come to view the NAC Standards as an absolute outer limit on caseloads that should never be exceeded. (A53.)

The Public Defender modified the NAC Standards to conform to findings from its workload study and recommendations by the American Bar Association on additional factors to take into account in setting a caseload

standard. (E28-29; A124-125.) For example, because the NAC Standards have been criticized for failing to distinguish between various types of felony offenses, the Protocol made this distinction. (E28; A124.) Through the workload study, the Public Defender found that its defenders spend an average of 31 hours on sex offense cases -- a number higher than the general felony category in the NAC Standards -- so the Protocol assigns 31 hours to weigh sex offense cases. (E28; A124.)

Once a district office's maximum caseload is exceeded for three consecutive months as prescribed in the Rule, the "proper remedy" is for the Director to determine whether he or she should limit that office's availability for additional appointments by filing a certification of limited availability with the presiding judge. ***State ex rel. Mo. Public Defender Comm'n v. Pratte***, 298 S.W.3d 870, 887 (Mo. banc 2009). The Rule then requires the District Defender and such other Public Defender management personnel as the Director shall designate to consult with the court and the State's attorney. *See id.* When the Public Defender, prosecutors and presiding judges confer, they may agree on measures to reduce the demand for public defender services. Such measures might include:

- the prosecutors' agreement to limit the cases in which the state seeks incarceration;

- [the judges'] determin[ation of] cases or categories of cases in which private attorneys are to be appointed;
- [the] determination by the judges not to appoint any counsel in certain cases (which would result in the cases not being available for trial or disposition); or
- in the absence of agreement by prosecutors and judge[s] 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.

* * *

By applying the caseload management provisions of the commission's rule, the public defender system is allowed to manage its offices and control its caseload.

Id. at 877 (footnotes omitted).

B. The District 31 Defender's Efforts to Reduce Caseload to Capacity under the Caseload Protocol

In 2008, the Public Defender initiated the procedures under the Rule for District 31, which serves the 31st and 38th Judicial Circuits, comprising Greene, Christian and Taney counties. (E266.) The procedures were initiated by beginning meetings with presiding judges, other judges and court

personnel, and representatives of prosecutors' offices in the 31st and 38th Judicial Circuits. The meetings were an attempt to reduce District 31's caseload to capacity through mutual agreements with judges and prosecutors. (E268-273, 331-336.) In August 2008, Public Defender management personnel met with the presiding judge, court administrator and prosecutors from the 31st Circuit. (E331-333.) In September 2008, a similar meeting was held with the Respondent Judge Mark Orr, Respondent Judge John Waters, and the prosecutors in the 38th Circuit. (E333.) Subsequently, there were additional meetings in both the 31st and 38th Circuits, as well as efforts to set up voluntary programs with local bar associations to take some District 31 cases. (E335-336.) The bar association in Greene County organized such a voluntary program, which temporarily reduced the District 31 caseload, but never reduced it to its maximum caseload capacity. (E277-278.) The bar in Christian County did not implement such a program. (E335.)

After this Court's decision in ***Pratte*** in December 2009, the Public Defender continued its efforts regarding the CSR and the new ***Pratte*** decision.

On January 6, 2010, the Director of the Public Defender[2] gave notice to the Presiding Judge of the 38th Circuit (Respondent Judge Orr) that District 31 was at risk of certification for limited availability because its caseload had exceeded the Public Defender Commission's maximum caseload standard for three consecutive months. (E32A, E265-266.) The Director provided statistical verification showing that District 31 was operating at 146.54% of capacity in October 2009, 119.91% in November 2009, and 131.41% in December 2009. (E34, 275.) The Director also gave similar notice to the Presiding Judge of the 31st Circuit. (E266-267.)

In March 2010, Public Defender management personnel again met with Judge Orr and prosecutors in the 38th Circuit. (E268-269.) No specific agreements were reached that would reduce caseload, including no agreement on prosecutors waiving jail time or on judges appointing private counsel to District 31's cases. (E269-270.) In April 2010, Judge Orr, the Christian County Prosecutor and Public Defender management personnel met again. (E270-273.) And again, no agreements were reached. (E273.) Meanwhile, similar meetings took place in the 31st Circuit. (E277.)

[2] The Director at that time was J. Marty Robinson. On February 28, 2011, Cathy R. Kelly was sworn in as the Public Defender Director.

Throughout 2010, District 31's caseload continued to exceed the maximum caseload standard. (E280.) In January 2010, District 31 operated at 147.47 % of capacity; in February at 128.71%; in March at 131.30% (E181); in April at 113.54%; in May at 132.46%; and in June at 133.83% (E38).

Because the Public Defender's meetings with judges and prosecutors were not successful in reducing District 31's caseload to capacity, and in the face of the continuing, unacceptably high risk of compromising effective, competent and ethical representation, on June 30, 2010, the Director certified District 31 as being on limited availability status beginning July 1, 2010. (E41, 279-280.) The Director provided statistical verification showing that District 31 had exceeded the maximum caseload standard in each of the three preceding months. (E38, 280.)

Pursuant to the Protocol, while in limited availability status, a district office accepts new cases each month up to 100% of capacity under the caseload standard, and declines all additional cases for the rest of the month after its capacity is reached. (E31, 63, 281-282; A127.) The district office continues this process each month thereafter – accepting all new cases from the first of the month until 100% of capacity is reached, and then declining all additional cases that month.

On July 21, 2010, District 31 reached 100% of its monthly capacity. (E64-65, 282.) The Public Defender notified the presiding judges in the 31st and 38th Judicial Circuits that District 31 was unavailable to accept any additional cases in July. (E64, 282.) Also on July 21, 2010, Public Defender management personnel met with Judge Orr personally to discuss the certification procedure in the 38th Circuit. (E277.)

C. Proceedings in the Trial Court

After July 21, 2010, the Public Defender received Jared B. Blacksher's application for defense services, and determined that Blacksher was indigent. (E13.) Blacksher was charged in Christian County Cases 10CT-CR00905 and 10CT-CR00906 with two Class C felonies of second degree burglary. (E5, 9.) He was charged in Christian County Case 10CT-CR00470 with one Class C felony of forgery. (E12A.) Blacksher had been represented by privately retained counsel in his forgery case, but private counsel had filed a motion to withdraw, which was subsequently granted by the trial court on August 5, 2010. (E4A-4C; A5-7.)

On July 27, 2010, the Public Defender filed a notice with Respondent Judge Waters notifying him that although Blacksher was indigent, District 31 was not available to represent him because no additional cases would be accepted by District 31 after July 21, 2010 pursuant to the Protocol; ***Pratte***,

298 S.W.3d 870; the Missouri Rules of Professional Conduct 4-1.1, 4-1.3, 4-1.4, 4-1.7 and 4-1.16(a); the American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-441 (May 13, 2006) ("ABA Opinion 06-441"); and the rights to counsel, effective assistance of counsel, conflict-free counsel and due process under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 10 and 18(a) of the Missouri Constitution. (E13.)

On July 28, 2010, over the Public Defender's objection, Judge Waters appointed the Public Defender to represent Blacksher in the two burglary cases, CT-CR00905 and CT-CR00906. (E1, 3; A1, 3.)

On August 2, the Public Defender filed a motion to set aside the July 28, 2010 appointment on the same grounds as the prior notice, and requested an evidentiary hearing. (E16.) The motion asked the court to ensure competent, effective and ethical representation of Blacksher by implementing a remedy that did not require appointment of the overburdened District 31, specifically by: (1) announcing that the court would not impose a jail or prison sentence upon Blacksher if he were convicted; (2) appointing private counsel to represent Blacksher on a *pro bono* basis or through payment from the court (with reasonable and necessary case expenses such as expert witness fees and fees for depositions

and transcripts to be paid by the Public Defender under 18 CSR 10-4.010(5)(A)); (3) not appointing any counsel in the case (which might leave the case unavailable for trial or disposition); (4) dismissing the case; or (5) implementing some other remedy which did not require representation by the Public Defender. (E21-22.)

On August 10, shortly after the withdrawal of private counsel, Judge Waters held an evidentiary hearing at which the Public Defender's General Counsel Peter Sterling, and the District 31 Defender Rod Hackathorn, testified, and various exhibits were introduced. (E241-359.) The Public Defender introduced 88 pages of exhibits documenting District 31's caseload and case schedules (E66-154), showing that --

- The District 31 office has 18 attorneys and two managing attorneys (E330-331);
- the District 31 office received 405 new cases in June 2010, and 386 new cases in July 2010 (E286);[3]
- in addition to these new cases, the District 31 office worked on cases which it completed and closed in June and July;

[3] Those cases are listed by name at pages E102 to E129 and do not include cases assigned in prior months.

- the District 31 office closed 415 cases in June and 287 cases in July (E287);[4] and
- the District 31 office's July scheduling calendar comprised 35 pages of single spaced, small text listing hundreds of cases requiring the attention of the office's 18 attorneys in July alone (E66-101, 290-291).

Also on August 10, 2010, the State filed a response to the Public Defender's motion to set aside the July 28 order. (E51-56.) The State contended that the Public Defender was required to represent Blacksher under Section 600.042.4(1) which states that "defenders shall provide legal services to an eligible person … [w]ho is detained or charged with a felony"; that the trial court had a duty to appoint counsel; that the Public Defender was relying on "dicta" in the ***Pratte*** decision; and that the Protocol was "self-serving." (E51-55.)

At the conclusion of the hearing, Judge Waters overruled the Public Defender's motion and again appointed the Public Defender to represent Blacksher in the two burglary cases. (E2, 4, 355-356; A2, 4, 14-15.) Judge Waters then raised the question of the forgery case in which private counsel had represented Blacksher, saying "[i]t's the Court's intention to appoint the

[4] Those cases are listed by name at pages E130 to E154.

Public Defender to defend you on that matter" and then asked General Counsel Sterling about that case. (E356; A15.) Sterling responded that the Public Defender's usual practice would be to accept a current client's new case if the Public Defender were already representing the same client in other pending cases (such as the two burglary cases to which the Public Defender had just been appointed), so under that practice the Public Defender would take the additional case. (E356; A15.)[5] Judge Waters then appointed the Public Defender to Blacksher's forgery case. (E4C, 356; A7, 15.)

On August 24, 2010, Blacksher appeared with Public Defender counsel for his preliminary hearings. The Public Defender objected to representing Blacksher in all three cases. Judge Waters maintained his prior rulings. Blacksher waived preliminary hearings in his cases, and arraignment was scheduled before Respondent Judge Orr.

---

[5] Sterling's statement was made in recognition of the fact that the court had just appointed the Public Defender in Blacksher's burglary cases and was an explanation of the Public Defender's standard practice of representing its current clients in additional cases. It was in no way intended to suggest that the Public Defender was abandoning its objections to representing Blacksher. (E355-356; A14-15.)

D. Subsequent Proceedings in this Court

On September 2, 2010, Relators -- the Public Defender and the District 31 Defender -- filed for a preliminary writ of prohibition in this Court to prohibit Judge Waters' July 28, August 10 and August 24 orders.

On September 3, 2010, this Court issued a preliminary writ, and ordered that Judge Orr be added as a respondent.

On October 5, 2010, Respondents filed a Return.

On October 8, 2010, this Court stayed the briefing schedule and, on October 14, 2010, *en banc* appointed the Honorable J. Miles Sweeney as a special master to answer three questions: (1) "whether the factual basis of the caseload standard protocols referenced in 18 CSR 10-4.010 is accurate and appropriate"; (2) "whether the procedures in 18 CSR 10-4.010(2) were followed"; and (3) "if such procedures were followed," "why such procedures did not resolve the issues of representation by the public defender."[6]

---

[6] On January 28, 2011, Respondents filed a Motion to Modify Preliminary Writ, requesting that this Court's preliminary writ be modified to allow 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 Blacksher should be allowed to plead guilty as long as a guilty plea

E. Proceedings Before the Special Master

The Special Master held a public hearing on November 12, 2010. (A18.) At the hearing, the Special Master heard testimony from various witnesses including prosecutors Donovan Dobbs (Special Master Hrg. Tr. 8-20), Christopher Lebeck (Special Master Hrg. Tr. 21-38), and Dean Dankelson (Special Master Hrg. Tr. 39-55); Senator Jack Goodman's chief of staff, Patrick Morrow (Special Master Hrg. Tr. 56-82); Missouri Association of Criminal Defense Lawyers board member, Bruce H. Galloway (Special Master Hrg. Tr. 84-102); Springfield Metropolitan Bar Association executive director, Christa Hogan (Special Master Hrg. Tr. 103-113); Professor Jeff Milyo (Special Master Hrg. Tr. 114-137); attorneys for the Public Defender, Michael Gunn (Special Master Hrg. Tr. 137-143) and Stephen Hanlon (Special Master Hrg. Tr. 226-237); General Counsel for the Public Defender, Peter Sterling (Special Master Hrg. Tr. 179-221); and former Missouri Bar President and current Public Defender Commissioner,

---

by 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. Blacksher's cases were resolved by guilty plea on February 10, 2011.

Douglas Copeland (Special Master Hrg. Tr. 141, 143-179, 222-225), among others.

The Special Master took documentary testimony from Peter Sterling (A58-69); public defender Rod Hackathorn; associate professor Sean O'Brien (A87-97); Missouri Association of Criminal Defense Lawyers president Travis Noble (A98-99); and dean Norman Lefstein (A33-57), among other evidence. (*See* A28-30.)

On February 9, 2011, the Special Master filed the Report of the Special Master (the "Report"). (A17-30.) In the Report, the Special Master determined that the Public Defender had followed the Protocol and that it was unsuccessful because the prosecutors and judges had failed to agree to any action that would reduce the caseload. (A20.) Nor did the regulation require any concessions from the Public Defender. (A20.) The Special Master's response to the foundational question of whether the "factual basis" of the Protocol was "accurate and appropriate" was that the Protocol was "not inaccurate," but that there remained a "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." (A24.)

In so finding, the Special Master relied in part upon two papers prepared at the Special Master's direction and published by the National

Center for State Courts (NCSC) after the public hearing held on November 12, 2010 (collectively the "NCSC Papers"). (*See* A29-30.)

Pursuant to Rule 68.03(g) of the Missouri Rules of Civil Procedure, the Public Defender filed Exceptions to the Report of the Special Master on March 11, 2011 and attached the Supplemental Affidavit of the Counsel for the Public Defender, Peter Sterling, and the Supplemental Declaration of the Public Defender's expert witness in this case, Norman Lefstein, in response to the NCSC Papers. (A73-86.)

On April 14, 2011, the Special Master ruled on the Public Defender's Exceptions. (A31-32.) The Supplemental Declaration of Dean Norman Lefstein and Supplemental Affidavit of Peter Sterling were admitted into the record by the Special Master. (A31.) However, the Special Master overruled the Exceptions on the issue of the Protocol's propriety "in light of the grave consequences to be imposed on the rest of the criminal justice system by the implementation of caseload limitation by monthly cutoff." (A31.)

This Court lifted the stay on the briefing schedule on April 14, 2011.[7]

[7] To avoid undue repetition, additional facts will be presented in the argument portion of this brief.

POINTS RELIED ON

I.

Relators are entitled to a permanent writ prohibiting Respondents from appointing the Public Defender to represent Blacksher or other similarly situated and otherwise eligible defendants after the Public Defender has declined additional representation pursuant to the Protocol, because Respondents lacked authority and abused their discretion, in that:

(A) pursuant to 18 CSR 10-4.010 and *State ex rel. Public Defender Commission v. Pratte,* the District 31 office was on "limited availability" status and was not available to represent Blacksher or any other similarly situated and otherwise eligible defendant after meetings with judges and prosecutors failed to reduce District 31's caseload to capacity;

(B) there is a significant risk that eligible defendants in District 31 will not receive competent or ethical representation under the Missouri Rules of Professional Conduct since District 31's overwhelming caseload will force attorneys to choose between working competently on their new clients' cases instead of on their existing clients' cases, and Rule 4-1.16 of the Missouri Rules of Professional

Conduct and ABA Opinion 06-441 require District 31 to decline representation under these circumstances;

(C) the language of Section 600.042 must be interpreted to preserve its constitutionality which may only be done by allowing the Public Defender to limit its caseload; a contrary interpretation would create a significant risk that eligible defendants in District 31 will be denied their rights to effective, conflict-free counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution; and

(D) the Protocol is sufficiently reliable so as to justify the decision of the Director of the Public Defender to decline to provide representation to eligible defendants when doing so would require the lawyers of the District 31 office to accept more cases than the Protocol permits, thereby violating the Public Defender's obligations under ethical rules and the United States and Missouri constitutions.

- ***State ex rel. Mo. Public Defender Comm'n v. Pratte***, 298 S.W.3d 870 (Mo. banc 2009);
- ***State ex rel. Wolff v. Ruddy***, 617 S.W.2d 64 (Mo. banc 1981);
- ***Luckey v. Harris***, 860 F.2d 1012 (11th Cir. 1988);

- ***In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender***, 561 So.2d 1130 (Fla. 1990);
- U.S. CONST., Amends. V, VI, XIV;
- MO. CONST., Art. I, §§ 10, 18(a);
- Mo. Code of State Reg.,18 CSR 10-4.010;
- V.A.M.S. §§ 536.024-160, 600.017, 600.042.2; and
- Mo. Rules of Prof. Conduct 4-1.1, 4-1.3, 4-1.4, 4-1.7, 4-1.16(a).

ARGUMENT

Relators are entitled to a permanent writ prohibiting Respondents from appointing the Public Defender to represent Blacksher or other similarly situated and otherwise eligible defendants after the Public Defender has declined additional representation pursuant to the Protocol, because Respondents lacked authority and abused their discretion, in that:

(A) pursuant to 18 CSR 10-4.010 and *State ex rel. Public Defender Commission v. Pratte,* the District 31 office was on "limited availability" status and was not available to represent Blacksher or any other similarly situated and otherwise eligible defendant after meetings with judges and prosecutors failed to reduce District 31's caseload to capacity;

(B) there is a significant risk that eligible defendants in District 31 will not receive competent or ethical representation under the Missouri Rules of Professional Conduct since District 31's overwhelming caseload will force attorneys to choose between working competently on their new clients' cases instead of on their existing clients' cases, and Rule 4-1.16 of the Missouri Rules of Professional

Conduct and ABA Opinion 06-441 require District 31 to decline representation under these circumstances;

(C) the language of Section 600.042 must be interpreted to preserve its constitutionality which may only be done by allowing the Public Defender to limit its caseload; a contrary interpretation would create a significant risk that eligible defendants in District 31 will be denied their rights to effective, conflict-free counsel under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution; and

(D) the Protocol is sufficiently reliable so as to justify the decision of the Director of the Public Defender to decline to provide representation to eligible defendants when doing so would require the lawyers of the District 31 office to accept more cases than the Protocol permits, thereby violating the Public Defender's obligations under ethical rules and the United States and Missouri constitutions.

I.

Standard of Review

"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." ***State ex rel. Mo. Public Defender Comm'n v. Pratte***, 298 S.W.3d 870, 880 (Mo. banc 2009) (citation omitted).

"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." *Id*. at 880-81 (citing ***State ex rel. Robinson v. Franklin***, 48 S.W.3d 64, 67 (Mo. App. W.D. 2001) (bracket in original)).

"Whether a trial court has exceeded its authority is a question of law, which an appellate court reviews independently of the trial court." ***Pratte***, 298 S.W.3d at 881 (citations omitted).

"When a trial court exceeds its authority in appointing the public defender, a writ of prohibition should issue to prohibit or rescind the trial court's order." *Id*. (citing ***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)).

A. Respondents Lacked Authority to Appoint the Public Defender While District 31 was on "Limited Availability" Status Under the Rule and *Pratte*

18 CSR 10-4.010 is a duly enacted administrative rule. *See* V.A.M.S. §§ 536.024-160, 600.017, 600.042.2. (A100-103.) The Public Defender has rule-making authority under its governing statute, and the management of the system is assigned to the Public Defender and the Director. ***Pratte***, 298 S.W.3d at 882, 886-87 (citing Section 600.017(10), which "empower[s]" the commission "to make 'any rules needed for the administration of the public defender system,'" and Section 600.042.1(8), which provides that the Director shall, "[w]ith 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"). (E238, 240; A101, 103.)

In ***Pratte***, this Court addressed the operation of 18 CSR 10-4.010. As relevant to the instant writ, the Public Defender in ***Pratte*** sought to limit its availability under the Rule in one of its district offices by not accepting new probation revocation cases in which a suspended execution of sentence had been imposed until the office was reinstated to full availability under the

Rule. 298 S.W.3d at 883. This Court held that "[w]hile the Court notes that the commission's rule authorizes the public defender to limit when an office is available . . . , the rule cannot authorize the public defender to decline *categories* of cases that the statute requires the public defender to represent." *Id*. at 884 (emphasis in original).

Instead, this Court held that the "proper remedy" for the Public Defender under the Rule would be to invoke the provisions of the Rule requiring the Public Defender to confer with prosecutors and the presiding judge, at which meetings the parties could agree on measures to reduce the demand for public defender services. *Id*. at 887. This Court stated that such measures might include: (1) the prosecutors' agreement to limit the cases in which the State seeks incarceration; (2) determining cases in which private attorneys are to be appointed; and (3) a determination by judges not to appoint any counsel in certain cases (which would result in the cases not being available for trial or disposition). *Id*.

Importantly, this Court held that "in the absence of agreement by prosecutors and the 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). "This prevents the rejection of categories of cases," the Court explained. *Id*.

"By applying the caseload management provisions of the commission's rule, the public defender is allowed to manage its offices and control its caseload." *Id*. This Court concluded by adding that it "expects that presiding judges, prosecutors and the public defender will work together cooperatively to decide the appropriate measures to take when a public defender office is on 'limited availability' status because its caseload exceeds the commission's standards as determined by the maximum caseload protocol." *Id*. at 887-88.

Here, the Public Defender complied with each and every element of this Court's mandate in ***Pratte***. The Public Defender met with presiding judges, other judges and court personnel, and prosecutors in the 38th and 31st Judicial Circuits from 2008 to 2010, and sought to reach agreements to reduce demand for Public Defender services to capacity. (E268-273, 331-36.) Those meetings ultimately were not successful in reaching any agreements to accomplish that objective. (E279-280.)

Specifically in the 38th Circuit, the prosecutors rejected requests to limit cases in which the State would seek incarceration, and judges rejected requests to appoint private counsel. (E269, 273.) In Blacksher's cases, the Public Defender specifically asked Judge Waters to fashion a remedy that would not require appointment of the Public Defender, including appointing private counsel to represent Blacksher. (E14, 22, 349; A8.) Pursuant to 18

CSR 10-4.010(5)(A), the Public Defender offered to pay private counsel's reasonable and necessary litigation expenses such as expert witness fees and fees for depositions and transcripts, so that private counsel would not have any out-of-pocket litigation expenses. (E14, 22, 349; A8.) Courts are authorized to appoint private counsel in indigent criminal defense cases on a *pro bono* basis provided counsel will not have to provide out-of-pocket litigation expenses. ***Pratte,*** 298 S.W.3d at 887-89; *see also* ***State ex rel. Wolff v. Ruddy***, 617 S.W.2d 64, 66-67 (Mo. banc 1981).

Pursuant to ***Pratte***, District 31 did not decline "categories" of cases, but declined *all* cases which were presented to District 31 during the period of limited availability once the month's maximum caseload was reached. (E63-E64.)

Therefore, Respondent Judge Waters exceeded his authority when he appointed the Public Defender to Blacksher's cases because District 31 was on limited availability status under 18 CSR 10-4.010 and ***Pratte***, and was thus unavailable to take Blacksher's cases or the cases of other similarly situated and otherwise eligible defendants. This Court must issue a writ of prohibition to rescind the orders of appointment.

B. Requiring the Public Defender to Represent More Eligible Defendants after the Public Defender has Determined Pursuant to the Protocol that it is Unavailable for Further Appointments Violates Ethical Obligations

While a writ should be granted on the basis of violations of the Rule and ***Pratte***, Respondent Judge Waters exceeded his authority or abused his discretion in appointing the Public Defender on other grounds as well. Respondents' orders contravene Missouri Rules of Professional Conduct 4-1.1, 4-1.3, 4-1.4, 4-1.7 and 4-1.16(a); and ABA Opinion 06-441.

This Court recognized in ***Pratte*** that there is no exception to Rule 4 of the Missouri Rules of Professional Conduct for public defenders who represent indigent criminal defendants. *Id*. at 880. The Court noted that an excessive caseload for public defenders implicates their ethical duties of competent and diligent representation, and also implicates constitutional issues. *Id*.

Missouri Rule of Professional Conduct 4-1.16(a) provides, in relevant part, that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or

other law[.]" (E235; A119.) *See also* ABA Opinion 06-441. (E42; A129-137.)

"A lawyer's primary ethical duty is owed to existing clients." ABA Opinion 06-441 at 4. (E45; A132.)

Under the 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[.]" Rule 4-1.7(a)(2) (E227; A111); *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 . . .") (E228; A112); Rule 4-1.16(a) ("[A] lawyer shall not represent a client . . . if (1): the representation will result in violation of the rules of professional conduct or other law[.]") (E235; A119).

District 31 defenders do not have adequate time or resources to competently, effectively and ethically represent more eligible defendants than are permitted under the Protocol, in addition to District 31's existing clients. (E340.) At the evidentiary hearing, the Public Defender introduced 88 pages of exhibits, documenting District 31's caseload and case schedules. (E66-154.) Although District 31 has only 18 attorneys and two managing attorneys (E330-331), it received 405 *new* cases in June 2010, and 386 *new*

cases in July 2010 (E286; *see also* E102-129 for a list of cases by name). Those pages do not include cases assigned to attorneys in prior months. In addition to these new cases, District 31 worked on cases which it concluded (closed) in June and July as well. District 31 closed 415 cases in June and 287 in July. (E287; *see also* E130-154 for a list of cases by name.) In addition, the July scheduling calendar of District 31's attorneys (offered as an example of monthly workload) filled 35 pages of single spaced, small text listing hundreds of cases requiring attention in July alone. (E66-101, 290-291.)

If District 31 is forced to represent more eligible defendants than are permitted under the Protocol, it will create a significant risk that its attorneys will be forced to choose among their clients as to whom to provide competent, effective ethical representation. District 31 Defender Hackathorn testified that the attorneys in his office did not have sufficient time and resources to adequately handle their caseload. (E340.) Hackathorn has had to triage cases due to excessive caseload and support staff shortages. (E337.) "[A] conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing." ***In re Edward S.***, 92 Cal. Rptr. 3d 725, 746-47 (Cal. Ct. App. 2009).

By forcing District 31 to represent more eligible defendants than are permitted under the Protocol, Respondent Judge Waters created a significant risk that District 31 defenders will be unable to fulfill their ethical obligations of competence (Rule 4-1.1) (E221; A105), diligence (Rule 4-1.3) (E223; A107), and communication (Rule 4-1.4) (E225; A109). "A lawyer's work load must be controlled so that each matter can be handled competently." Comment 2 to Rule 4-1.3. (E223; A107.)

Respondents lacked authority to appoint District 31 while that office was on "limited availability" status under the Rule, ***Pratte***, and ethical obligations, but Respondents' orders also constituted an abuse of discretion. Like an attorney's request to withdraw, whether an attorney is permitted to withdraw is within the trial court's discretion, and reviewed for abuse of discretion. ***State v. Kennell***, 605 S.W.2d 819, 820 (Mo. App. S.D. 1980). Abuse of discretion will be found if a court's ruling is against the logic of the circumstances, or is arbitrary or unreasonable. ***Ponce v. Ponce***, 102 S.W.3d 56, 62 (Mo. App. W.D. 2003).

Respondent Judge Waters' orders appointing the Public Defender were against the logic of the circumstances and unreasonable. Not only was District 31 on "limited availability" and without sufficient time and resources to adequately handle its caseload (E340), but Judge Waters had

alternatives available which would not create a significant risk that Blacksher would be denied competent, effective and ethical counsel, including the remedy of appointing a private attorney to represent him. ***Pratte,*** 298 S.W.3d at 887-89; *see also* ***Ruddy***, 617 S.W.2d at 66-67. This is not a case where other attorneys could not be found; indeed, Blacksher had been represented by private counsel in one of his cases, but Respondent Judge Waters allowed that counsel to withdraw. (E4C; A7.) Pursuant to 18 CSR 10-4.010(5)(A), the Public Defender offered to pay a private counsel's reasonable and necessary litigation expenses such as expert witness fees and fees for depositions and transcripts, so that the private counsel would not have any out-of-pocket litigation expenses. (E14, 22, 349; A8.) Respondent Judge Waters abused his discretion in not appointing private counsel to represent Blacksher, and in appointing the overburdened District 31 office instead.

Respondents' Return

Respondents contend that the Protocol is "self serving" and suggest it is so because it was not reviewed by an "outside" agency or "peer review[ed]" and because the Public Defender is "demanding more money." (Return 2.) However, the Public Defender adopted the Rule and Protocol only after years of increasing caseloads without a corresponding increase in

staff to handle the caseloads, and after work by the Missouri Bar Public Defender Task Force and the Missouri Senate Interim Committee showed that the Public Defender was experiencing a caseload crisis. (E179J-179M.) Both the Missouri Bar Public Defender Task Force and the Missouri Senate Interim Committee were "outside" bodies. This Court recognized in ***Pratte*** the tremendous increase in the number of Missourians in prison, jail or on probation or parole in recent decades, without corresponding increases in resources to cope with the problem. ***Pratte***, 298 S.W.3d at 877. This Court should not now close its eyes to the very same facts.

Furthermore, the National Advisory Council caseload standards -- the most widely accepted and followed caseload standards for public defender offices in the United States -- are only the starting point of the Public Defender's caseload standard. (E27; A123.) The Public Defender *improved* those standards to conform to findings from its workload study as well as recommendations by the American Bar Association on additional factors to take into account in setting a caseload standard. (E28-29; A124-125.) Reliance upon the most widely accepted caseload standards in the United States, recommendations by the American Bar Association, and a workload study can hardly be said to be unreasonable or arbitrary in setting a caseload standard.

More fundamentally, Chapter 600 "assigns the management of the public defender system to the commission and the director" -- not prosecutors or courts -- and authorizes the Public Defender and Director to make rules needed for administration of the system. ***Pratte***, 289 S.W.3d at 882, 886-87 (citing Sections 600.017(10) and 600.042.1(8)). Thus, while Respondents may disagree with the caseload standard set by the Public Defender, the authority to set the caseload standard lies with the Public Defender and Director, not Respondents or prosecutors. The Public Defender's Rule was adopted pursuant to the Administrative Procedure and Review Act, Chapter 536, and subjected to review by the Joint Committee on Administrative Rules, as well as public notice and comment. V.A.M.S. §§ 536.024-160, 600.017, 600.042.2. (A100-103.) There is simply no requirement that an administrative agency have its rules approved further before implementing them, let alone approved by those with adverse interests such as prosecutors, as Respondents urge. (Return 11.)

Respondents contend that the Public Defender has not been subject to many Bar complaints. (Return 3-4.) However, neither the Public Defender -- nor any attorney -- must wait until they are overwhelmed with Bar complaints before seeking to control their caseload to be able to provide competent, effective and ethical representation. To the contrary, the ethical

rules require that attorneys act proactively to avoid problems due to excessive caseload. "A lawyer's work load must be controlled so that each matter can be handled competently." Comment 2 to Rule 4-1.3. (E223; A107.) Lawyers must decline representation 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[.]" Rule 4-1.7(a)(2); Comment 3 to Rule 4-1.7. (E227-28; A111-112.)

Respondents contend that the Protocol is "not intended to relieve any supposed case overload but is designed as a means to shackle the judicial system until the Public Defender System gets more money." (Return 10-11.) This writ proceeding is not about the Public Defender "getting more money." The Public Defender is not asking this Court to "order more money." Appropriation of funds is the prerogative of the legislature. ***Ruddy***, 617 S.W.2d at 65.

This Court has, however, long recognized that "[i]t is our first obligation to secure to the indigent accused all of his constitutional rights and guarantees" to counsel, and has fashioned appropriate remedies for doing so. *Id*. at 67. Today, public money for indigent defense services is inadequate to ensure competent, effective and ethical representation through the overburdened public defender system. As it did in ***Ruddy***, this Court

should act to remedy this grave problem – by granting the instant writ and upholding the Rule and the Protocol. The Rule and the Protocol are not attempts to "shackle" the criminal justice system, but are reasoned efforts to limit the Public Defender's caseload to ensure competent, effective and ethical representation to indigent Missourians represented by the Public Defender. The Rule and the Protocol thus *free* the system so that it may provide the meaningful, adversarial truth-seeking functions envisioned and guaranteed by the ethical rules and the United States and Missouri constitutions.

Finally, Respondents contend that this Court's discussion of the Rule in ***Pratte*** was "dicta" and that the Rule conflicts with Section 600.042.4(1), which states that "defenders shall provide legal services to an eligible person … [w]ho is detained or charged with a felony." (*See* Return 8-10). However, this Court in ***Pratte*** approved a detailed "proper remedy," which it "expects" judges, prosecutors and public defenders to follow. 298 S.W.3d at 887. That remedy allows the Public Defender, in the absence of agreement by prosecutors and judges, to reduce its caseload so as "to make the office unavailable for *any* appointments until the caseload falls below the commission's standard." *Id*. (emphasis added). This Court would not have set forth such a detailed procedure, which it "expects" judges, prosecutors

and the Public Defender to follow, if the Court did not actually expect them to comply with it.

Respondents' argument simply ignores that Chapter 600 "assigns the management of the public defender system to the commission and the director" -- not prosecutors or courts -- and authorizes the Public Defender and the Director to make rules needed for administration of the system. ***Pratte***, 289 S.W.3d at 886-87 (citing V.A.M.S. §§ 600.017(10) and 600.042.1(8)). Those rules must include some limit on the number of cases Public Defender attorneys can be forced to take without compromising competent, effective and ethical representation. As this Court recognized in ***Pratte***, 298 S.W.3d at 880, there is no loophole for public defenders when it comes to their ethical or constitutional obligations. The Public Defender System handles approximately 84,616 cases each year. (A72.) If there were just one public defender in Missouri, would Respondents seriously contend that he or she must represent every defendant in each of the 84,616 cases alone? The current caseload of the District 31 defenders is more than they can competently handle. (E340.)

C. Requiring the Public Defender to Represent More Eligible Defendants after the Public Defender has Determined Pursuant to the Protocol that it is Unavailable for Further Appointments Violates the United States and Missouri Constitutions

Blacksher and all similarly situated and otherwise eligible defendants have a federal and state constitutional right to effective and conflict-free counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (right to effective assistance of counsel); U.S. CONST., Amends. V, VI, XIV; MO. CONST., Art. I, § 18(a). Respondent Judge Waters had a duty to ensure that Blacksher received competent, effective and conflict-free representation. *See* ***Ruddy***, 617 S.W.2d at 67 (noting that it is the first obligation of courts to secure to indigent defendants all of their constitutional rights and guarantees to counsel). By forcing the overburdened District 31 office to represent additional eligible defendants, including Blacksher, Respondents created a significant risk that such eligible defendants would not receive the competent, effective, and conflict-free representation guaranteed to them by the United States and Missouri constitutions.

The gravamen of the Public Defender's argument in this case is that there has been a systemic or structural collapse of the indigent defense system in the State of Missouri, and specifically for purposes of this action, in District 31, due to chronic lack of funding for the Public Defender by the legislature. This Court has squarely addressed this problem in both ***Pratte*** and ***Ruddy, supra***; in both cases, this Court specifically endorsed the remedy sought by the Public Defender in this case. So have many other courts across the country.[8] In general, three distinct principles emerge from these cases:

- The mandate of the public defender statute ("shall represent") should be construed so as to preserve its constitutionality;
- In a pretrial structural or systemic challenge to an indigent defense system such as here, the post-trial test for relief from judgment articulated in ***Strickland*** is inapplicable. Rather the

[8] Many of the cases are discussed in JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, chapter 3, Report of the National Right to Counsel Committee, issued April 2009, available at www.ConstitutionProject.org. Relators' expert Dean Norman Lefstein was one of the reporters for this report. This line of cases is brought up to date in the recent decision of the Iowa Supreme Court, ***Simmons v. State Public Defender***, 791 N.W.2d 69 (Iowa 2010).

appropriate test for relief in pretrial structural or systemic challenges seeking prospective relief is the ***Luckey v. Harris*** test of likelihood of substantial and immediate irreparable injury stemming from an unacceptably high risk of ineffective assistance of counsel;

- Due regard for separation of powers principles in this context means that while the legislature is responsible for appropriation of state money, the judiciary has as its "first obligation" the duty to ensure effective assistance of counsel. ***Ruddy***, 617 S.W.2d at 67.

1. The statute should be interpreted to preserve its constitutionality

The Sixth Amendment to the United States Constitution guarantees the right to counsel in all criminal prosecutions. ***Gideon v. Wainwright***, 372 U.S. 335, 339, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Constitution of the State of Missouri provides its own guarantee to those charged with criminal conduct, namely "[t]hat in all criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel." MO. CONST., Art. 1, § 18(a). The duty of the courts to appoint counsel is, however, two-fold. As this Court made clear in ***Pratte***, "[b]eyond simply ensuring that counsel

is appointed to assist every defendant who faces the possibility of imprisonment, a judge must also ensure that the defendant has *effective* assistance of counsel." ***Pratte***, 298 S.W.3d at 875 (emphasis in original). Effective representation "requires appropriate investigation, preparation and presentation of the client's case by counsel." *Id*.

In ***Pratte***, this Court outlined the remedy to inadequate funding under the Public Defender Commission's Rule, observing that "[w]hen current state funding is inadequate to provide the effective representation to all of Missouri's indigent defendants" as required by both the federal and the state constitutions, "the commission's rules present an approach to dealing with the situation." *Id.* at 886. The Court in ***Pratte***, however, was not confronted with the record now before it, one in which the Public Defender has made every effort to follow these procedures, but where *none* of the remedial objectives have been achieved.

The record in this case demonstrates unequivocally that District 31 caseloads "are excessive and unacceptably high" (A78) and that there is "an unacceptably high risk that many of the clients represented by public defenders will not receive effective representation and thus their constitutional right to counsel will be violated" (A46). The conclusion of

Relators' expert, Dean Lefstein, is consistent with the Court's initial conclusions in ***Pratte***, namely that:

> [t]he excessive number of cases to which the public defender's offices currently are being assigned calls into question whether any public defender fully is meeting his or her ethical duties of competent and diligent representation in all cases assigned. The cases presented here to this Court show both the constitutional and ethical dilemmas currently facing the Office of [the] State Public Defender and its clients.

298 S.W.3d at 880. Indeed, the Special Master recognized the "sheer enormity" of the caseload problem. (A20.)

The caseload crisis in District 31 has reached a tipping point. If uncontrolled appointments are permitted to continue, there is no question that indigent defendants in District 31 will be deprived of competent counsel. Without competent counsel, indigent defendants will be forced to confront many of the same perils as the individual with no counsel whatsoever, including trial on an improper charge, conviction upon improper evidence, lack of either skill or knowledge to adequately prepare a defense, and conviction of the innocent due to inadequate investigation, preparation, and presentation of evidence. ***Cf. Argersinger v. Hamlin***, 407 U.S. 25, 31,

92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (assistance of counsel is "the very essence of the adversary system"). As the United States Supreme Court recently emphasized in ***Padilla v. Kentucky***, -- U.S. --, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010), it is the constitutional responsibility of the courts "to ensure that no criminal defendant . . . is left to the 'mercies of incompetent counsel.'"

The Respondents argue that the command of the statute in Section 600.042.4(1) is clear and unambiguous: "The director and defenders shall provide legal services to an eligible person . . ." However, if the statute is applied in the rigid, categorical manner suggested by the Respondents, it will curtail the courts' ability to ensure adequate, competent representation. Such an interpretation of the statute would therefore render its application unconstitutional. The Respondents have long urged that a rule may never trump a conflicting statute. The facts before the Court now suggest, however, that the statute -- if applied in the manner suggested by Respondents -- would conflict with the United States and Missouri constitutions. In order to preserve the constitutionality of Section 600.042.4, then, this Court should construe the statute to permit a limit on the number of cases the Public Defender must accept in the midst of an unmitigated

caseload crisis. Otherwise, the statute, while constitutional on its face, will be unconstitutional as applied.

A long line of this Court's cases support such a construction of this statute. *See* ***Cannon v. Cannon***, 280 S.W.3d 79, 83-84 (Mo. banc 2006). A "statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision." *Id.* (quoting ***Doe v. Roman Catholic Diocese of Jefferson City***, 862 S.W.2d 338, 340 (Mo. banc 1993)). "This Court 'will resolve all doubt in favor of the act's validity' and 'make every reasonable intendment to sustain the constitutionality of the statute.'" *Id.* (quoting ***Reproductive Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon***, 185 S.W.3d 685, 687 (Mo. banc 2006)).

Such a construction of this statute would be entirely consistent with the recently expressed intent of the legislature. In 2009, the Public Defender advocated for and obtained a unanimous vote in the Missouri Senate and a vote of 139 to 16 in the Missouri House of Representatives for a statute that essentially codified the Rule.[9]

---

[9] *See* Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751, 763 (2010). Although Governor Jay Nixon vetoed the bill creating the statute, in the statement explaining his

The Florida Supreme Court confronted an analogous situation in ***Maas v. Olive***, 992 So.2d 196 (Fla. 2008), where it held that a statutory cap on compensable attorneys' fees would be unconstitutional as applied, *if applied* in a manner that would limit the courts' authority to ensure the rights of defendants to effective assistance of counsel. The command of the statute could not have been more straightforward: "The use of state funds for compensation of counsel appointed . . . above [the statutory caps] is not authorized." *Id.* at 200 (quoting Fla. Stat. § 27.7002(5) (2007)). Nonetheless, the Florida Supreme Court construed the statute to permit compensation above the statutory caps, "in order to preserve the constitutionality of" the statute. *Id.* at 202.

Respondents here urge the Court to follow slavishly the language of a statute, irrespective of the context or the consequences, and however absurd or unjust or unconstitutional. On the contrary, this Court, like the Florida Supreme Court in ***Maas v. Olive***, should construe the statute to permit the

---

veto he acknowledged that "the public defender system is operating under significant stresses" and that "the problem is one of resources." *Id*. at 764. Thus, all three branches of Missouri government have explicitly recognized that the State has long been faced with a chronically underfunded system of public defense.

Public Defender to appropriately limit the number of cases she can ethically and constitutionally accept.

Relators do not seek to "shirk their . . . duties" (Return 13), duties which Respondents whittle down to a statutory duty simply to be appointed. Indeed, what Relators seek is 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. This 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.

2. *Luckey*'s test for pretrial relief, not *Strickland*'s test for post-conviction relief, applies in this structural or systemic challenge case

The post-conviction standard of review set forth in ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), is not applicable to a case such as this. ***Strickland***'s two-pronged performance-and-prejudice test applies to a hindsight, post-conviction determination about whether a conviction must be reversed. *See* ***Lavallee v. Justices in Hampden Superior Court***, 442 Mass. 228, 238 (2004); ***Luckey v. Harris***, 860 F.2d 1012, 1017 (11th Cir. 1988) ("*Luckey*"), cert. denied, 495 U.S. 957,

110 S.Ct. 2562, 109 L.Ed.2d 744 (1990);[10] ***Simmons v. State Public Defender***, 791 N.W.2d 69, 75-77 (Iowa 2010).

The policies underlying the development of the ***Strickland*** case-specific test -- *e.g.*, the finality of criminal judgments and the fear of opening the floodgates to ineffectiveness claims -- are inapposite to a determination of whether a state has satisfied its obligation to provide an adequate system of indigent defense to ensure the constitutional right to effective representation of counsel. ***Luckey***, 860 F.2d at 1017. Thus, ***Luckey*** squarely held that ***Strickland*** considerations and the deference to counsel's actions "do not apply when only prospective relief is sought." *Id.* Rather, the appropriate test for prospective injunctive relief is "likelihood of substantial and immediate irreparable injury." *Id*.; *see also* ***State v. Smith***, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (Ariz. banc 1984) (there is an "inference that the adequacy of representation is adversely affected by the system [of indigent defense]" where the system fails to take into account the hours expected to competently and adequately represent clients by appointed counsel); ***Simmons***, 791 N.W.2d at 76, 79-80, 85.

[10] Overturned on abstention grounds in ***Luckey v. Miller***, 976 F.2d 673, 676-79 (11th Cir. 1992).

In ***Simmons***, the Iowa Supreme Court expressly rejected the post-conviction standard set forth in ***Strickland***, which applies in hindsight to determine whether a conviction must be reversed. ***Simmons***, 791 N.W.2d at 76,79-80, 85. The ***Simmons*** Court surveyed the analyses from a number of jurisdictions and ultimately concluded that the policies underlying the development of the ***Strickland*** case-specific test cannot set the bar for a state's obligation to provide an "adequate framework for ensuring that the right to counsel is realized in cases involving indigent defense" on a prospective and structural basis. *See* ***Simmons***, 791 N.W.2d at 76, 79-80, 85 (and cases discussed therein).

Here, too, the problem presented in this case is one of a structural infirmity. This Court has the constitutional obligation to ensure that the system, on a prospective basis, provides indigent criminal defendants with competent counsel. The record here demonstrates that the public defenders' lack of time to give adequate attention to their cases and their clients is a *structural* issue having nothing to do with the particular performance of a specific attorney. Neither the Public Defender -- nor any attorney -- must wait until he or she is unquestionably ineffective in case after case. To the contrary, the ethical rules require that attorneys act proactively to avoid problems due to excessive caseload. "A lawyer's work load must be

controlled so that each matter can be handled competently." Comment 2 to Rule 4-1.3. (E223; A107.) Lawyers must decline representation 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[.]" Rule 4-1.7(a)(2); Comment 3 to Rule 4-1.7. (E227-28; A111-112.)

Dean Lefstein's expert opinion could not be more clear with regard to District 31's capacities: "I believe the caseloads of the District 31 public defenders pose an unacceptably high risk that many of the clients represented by public defenders will not receive effective representation and thus their constitutional right to counsel will be violated." (A46.) The "sheer enormity" of the problem, as described by the Special Master (A20), places public defenders in a "unique dilemma" as the only part of the criminal justice system forced to put their "license . . . on the line" (A21) as they try to meet their ethical and professional obligations in the face of increasing caseloads with stagnant resources.

3. Separation of powers principles support judicial relief in chronically underfunded public defender cases

For years, the caseload of the Public Defender has been more than they can competently bear and increased without a corresponding increase in staff. The obvious heart of the Public Defender's caseload problem is

inadequate funding. However, the appropriation of state funds is the prerogative of the legislature, not the courts. *See* ***Lavallee***, 442 Mass. at 242 (acknowledging that "appropriating funds is a legislative matter"); ***In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender***, 561 So.2d 1130, 1136 (Fla. 1990) ("*In re Order on Prosecution*") ("[W]hile it is true that the legislature's failure to adequately fund the public defenders' offices is at the heart of the problem . . . [a]ppropriation of funds for the operation of government is a legislative function.").

While courts may not appropriate funds, they are not powerless to act in this situation. Ensuring that the system is designed to provide effective and competent counsel to indigent defendants is the duty of the judiciary. *See* ***Ruddy***, 617 S.W.2d at 67 (explaining that the Court's "first obligation," is "to secure to the indigent accused all of his constitutional rights and guarantees"). Courts in a number of jurisdictions, including this Court, have recognized their branch of government's unique obligation to take action to ensure that the system does not fail to provide constitutional guarantees to

indigent criminal defendants. *See id*. at 65; ***Lavallee***, 442 Mass. at 232; ***In re Order on Prosecution***, 561 So.2d at 1139.[11]

Nor may trial courts impose ineffective and incompetent representation upon indigent defendants by forcing them to accept overloaded defenders; indeed, it is the "first obligation" of the judicial branch of government to ensure that does not happen. *See* ***Ruddy***, 617 S.W.2d at 65; ***Lavallee***, 442 Mass. at 246 ("[t]he burden of a systemic lapse is not to be borne by defendants"); ***Makemson v. Martin County***, 491 So.2d 1109, 1112 (Fla. 1986) (court has inherent power to ensure adequate representation of the criminally accused and the legislature may not interfere with a defendant's constitutional right to effective representation).

D. The Protocol is Sufficiently Reliable to Justify the Public Defender's Decision to Decline Representation

1. Record in the proceedings before the Special Master - the November 12, 2010 hearing

i. Testimony of Peter Sterling

In the proceedings before the Special Master, Peter Sterling, General Counsel for the Public Defender, testified both by affidavit and at the

[11] *See* Hanlon, *supra* note 9 (describing state constitutional challenges in Florida, Massachusetts and Missouri).

hearing. With 35 years of experience as a public defender, Sterling testified that the Protocol was adopted as a last resort and only after numerous other efforts to address the system's growing caseload failed. (A58.) Sterling noted that, in the first half of the decade, *i.e.*, from 2000-2005, the Public Defender's caseload increased by over 12,000 cases with no increase in the number of attorneys or support staff. (A59.) Sterling testified that the purpose of the Protocol is to establish the maximum caseload the attorneys in an office can accept consistent with their obligation to provide ethical and competent representation to every client in every case. (A59.)

Sterling testified in graphic detail concerning the systemic failures of public defender lawyers, noting that the Public Defender managing attorneys have observed serious and dangerous compromises of a public defender's obligations. (A59-60.) Specifically, he testified that some misdemeanors, probation revocations and lower level felonies have received "little to no case investigation prior to the attorney visiting the client to take the state's offer." (A59.)

In 2006, the Public Defender conducted a time-sufficiency survey of its attorneys and staff. (E27.) That survey demonstrated significant gaps in public defender representation, including the facts that more than 80% of the time, lab reports are taken at face value because there is no time to conduct

an independent fact check; and that in 60% to 80% of the cases involving scientific evidence, not so much as a Google search was undertaken to investigate the prosecution's expert witness. (A59.) Moreover, it is not uncommon for clients to remain in jail for weeks before even seeing a lawyer. (A60.)

Sterling likewise testified in great detail with respect to the development of the Protocol at issue in this case. (A60-61; Special Master Hrg. Tr. 179:21-221:3.) Sterling also testified as to how the Protocol was applied to District 31, *i.e.*, that caseloads had continued to exceed Protocol limits and that in June 2010, District 31 was operating at 133.83% of capacity under the Protocol. (Special Master Hrg. Tr. 200:12-201:23.) Finally, Sterling testified about how the Public Defender complied with the Rule and the directives of this Court in ***Pratte*** with respect to convening meetings with the presiding judge and representatives from the county prosecuting attorneys' offices in District 31 in March and April 2010. (Special Master Hrg. Tr. 199:8-202:14, 205:14-109:18; A61-63.)

Notably, Sterling testified that he has never mechanically applied the Rule the moment that the office exceeds 100% of caseload capacity. (Special Master Hrg. Tr. 199:15-19.) Rather, he has opted to "hold[] back and wait[] and see[]." (Special Master Hrg. Tr. 199:23.) However, "when it goes on in a

situation where we've been in a meet-and-discuss process and it goes on and on to 120, 130, 140 percent and it isn't getting anywhere, then we do go ahead and institute the limited availability process." (Special Master Hrg. Tr. 199:8-200:4.)

ii. Testimony of Norman Lefstein

Relators' expert, Norman Lefstein, Dean Emeritus and Professor of Law at the Indiana University School of Law - Indianapolis, testified by affidavit filed with the Special Master. For almost 40 years, Dean Lefstein has been actively engaged in studying and writing about issues related to the quality of legal representation of criminal defendants and juveniles throughout the nation. (A34.) He has testified as an expert in these areas on more than 30 occasions. (A40-41.) Among his numerous activities in this area, he has served as a chair of the American Bar Association Section of Criminal Justice and as a reporter for the American Bar Association Standing Committee on Associations Standards for Criminal Justice. (A34.)

Dean Lefstein chaired a Task Force on behalf of the American Bar Association Section of Criminal Justice, which guided the preparation of the current, third edition of Criminal Justice Standards pertaining to PROVIDING DEFENSE SERVICES, the PROSECUTION FUNCTION, and the DEFENSE

FUNCTION. (A34-35.) These Standards were approved by the American Bar Association House of Delegates in 1992 and 1993. (A34-35.)

Dean Lefstein served as a member of the National Right to Counsel Committee organized by The Constitution Project and also served as a co-reporter for the Committee's comprehensive report on indigent defense in the United States, published in 2009, entitled JUSTICE DENIED; AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL. (A36-37.)[12] As co-reporter for this study, Dean Lefstein drafted much of the report and served as the publication's editor. (A37.)

For the last four years, Dean Lefstein was a consultant to the ABA Standing Committee on Legal Aid and Indigent Defendants, and in that capacity, in cooperation with others, drafted the ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORK LOADS. (A37.) These "Eight Guidelines," attached as Exhibit B to the First Affidavit of Norman Lefstein, were approved by the ABA House of Delegates as ABA policy in August 2009. (A37.) Dean Lefstein is currently working on a book dealing with public defense caseloads, and is a consultant to the ABA Standing Committee on Legal Aid and Indigent Defendants. (A38.)

[12] The report is available at www.constitutionproject.org.

The Public Defender asked Dean Lefstein to assess the reasonableness of the Public Defender caseload, with particular attention to District 31. (A41.) Dean Lefstein testified with respect to his specific knowledge about the number of lawyers in the District 31 office, the number of investigators, legal assistants and secretaries. (A41-44.) He concluded that the caseloads of the Public Defender lawyers at the District 31 office are "much too high and must necessarily prevent public defenders from providing competent and diligent representation to all of their clients as required by the Missouri Rules of Professional Conduct." (A45-46.) Moreover, Dean Lefstein testified that the caseloads of the District 31 public defenders posed "an unacceptably high risk that many of the clients represented by public defenders will not receive effective representation and thus their constitutional right to counsel will be violated." (A46.)

Dean Lefstein testified that he was familiar with the pending caseloads of District 31 lawyers and that he had examined: " . . . pending current caseloads, cases assigned to lawyers over a 12-month period, and the number of cases that lawyers closed during a recent 12-month period." (A46.)

Dean Lefstein noted that he has been critical of the NAC Standards. (A53.) However, he testified that he strongly agreed with the

recommendations of the American Bar Association which have urged that the NAC Standards should never be exceeded, as he believed that "they set an absolutely outer limit on caseloads that defense lawyers for the indigent should be permitted to handle." (A53.)

Dean Lefstein explained that the Public Defender had modified the NAC Standards by considering categories of cases not addressed in the NAC Standards (a "primary reason" he considers NAC Standards to be "deficient"), and that it is thus "entirely reasonable for a Missouri office of public defenders to decline additional appointments if maximum caseloads are exceeded." (A55.) Dean Lefstein testified that utilization of the Protocol "will significantly minimize the unacceptably high risk that exists today of indigent clients not receiving effective representation and having their constitutional right to counsel violated." (A55.)

2. Post-Hearing Sterling and Lefstein supplemental testimony

As noted above, the Special Master found that there was a "serious question" as to whether the Protocol is "sufficiently accurate to justify the imposition of the negative consequences on the rest of the criminal justice system." (A24.) In making that finding, the Special Master relied in part upon two papers published by the National Center for State Courts

("NCSC") submitted to him after the public hearing held on November 12, 2010. (*See* A31.) Relying in part on the NCSC papers, the Special Master summarized the three categories which he believed affected "the accuracy" of the Protocol, that is: (1) its reliance on the NAC Standards; (2) the failures to take into account "the utilization of support staff"; and (3) "other factors in the system" such as the number of prosecutors.[13] (*See* Report at 6-8.)

Since Relators did not have the opportunity to respond to the NCSC publication at the public hearing held on November 12, 2010, the Relators filed Exceptions to the Report of the Special Master along with a Supplemental Declaration of Dean Lefstein and a Supplemental Affidavit of Peter Sterling. (A73-86.) Sterling's Supplemental Affidavit pointed out numerous factual errors in the NCSC data reported in both NCSC reports, primarily with respect to the actual number of various public defenders and prosecutors in various circuits across the state. (A84-85.)

Dean Lefstein testified in his Supplemental Declaration that the focus of this Court's inquiry with respect to the accuracy and appropriateness of

[13] There was a plethora of additional testimony presented to the Special Master in both NCSC papers and otherwise, but none of it was relevant to this Court's foundational question concerning the accuracy and appropriateness of the Protocol.

the Protocol was not, as stated by the Special Master, its impact on "the rest of the criminal justice system," but rather, "whether or not the [Protocol] is *sufficiently reliable* so as to justify the decision of a district public defender office to refuse additional case appointments when doing so would require lawyers of the office to accept more cases than the Protocol permits." (A74) (emphasis in original.)

Turning his attention to papers of the NCSC published and filed after the November 12, 2010 hearing, Dean Lefstein noted that he agreed with the NCSC's view that a more refined study would provide more information on the workload capacity of the Public Defender and the need for additional public defenders and other staff. (A77.) But Dean Lefstein viewed that conclusion as inapposite to the primary question before this Court because the existing Protocol "errs on the side of permitting MSPD [Missouri State Public Defender] lawyers to handle too many cases, not too few." (A78.) In Dean Lefstein's expert opinion, the Protocol is "most certainly sufficiently reliable at this time as a basis to allow the MSPD to reject additional cases." (A77-78.)

Notably, Dean Lefstein thoroughly examined the specific data concerning the number of active District 31 lawyers, investigators, paralegals, support staff and cases, including felonies, misdemeanors, traffic

violation and probation revocation cases, and concluded *independently of the Protocol* that these caseloads for District 31 public defenders were "excessive and unacceptably high," noting further that the "situation is substantially exacerbated by the lack of adequate support staff available to MSPD lawyers." (A41-51, 77-79.) On the other hand, Dean Lefstein noted, the NCSC Papers make "no mention of the current caseloads of the lawyers in District 31 nor does it appear that the authors of this document even considered the current caseloads of the MSPD when they drafted their report." (A78.)

Finally, Dean Lefstein noted that the NCSC had itself conducted workload studies of other state public defender programs and concluded in each instance that additional lawyers and other staff were necessary in order for the program to deliver effective representation for its clients. (A79.) One of those workload studies was a 2010 report about the public defenders' program in Virginia. (A79.) According to the most recent available data, the expenditures for indigent defense are $12.48 per capita in Virginia, whereas in Missouri the expenditures per capita for indigent defense are $5.85;

Virginia ranks 26th in terms of per capita expenditures among the 50 states whereas Missouri ranks 49th. (A79, 81.)[14]

In sum, Lefstein reasoned that the Protocol sets an absolute ceiling, one that already errs on the side of allowing more cases, and thus the Protocol is sufficiently reliable for the purpose of determining whether the Public Defender may decline representation beyond the Protocol's limits.

3. The role of the Rule and the Protocol in the Public Defender's decision to decline representation - facilitating the exercise of professional judgment

The Rule does not require the Director to file a certification of limited availability once he or she determines that a district office has exceeded its maximum caseload pursuant to the Protocol for three months. On the contrary, the Rule's language is unequivocally discretionary: "When the director determines that a district office has exceeded the maximum caseload

[14] In addition, Sean O'Brien (associate professor at the University of Missouri-Kansas City School of Law and former chief public defender in Kansas City, Missouri) and Travis Noble (the President of the Missouri Association of Criminal Defense Lawyers), each provided statements to the Special Master regarding the reasonableness of the Protocol caseload numbers. (A87-99.)

standard for three (3) consecutive calendar months the director may limit the office's availability to accept additional cases . . . ." 18 CSR 10-4.010(2)(A) (emphasis added) (A104.)

Thus, the Rule calls for the exercise of professional judgment by the Director. The Protocol plays an important, but not exclusive or automatic role, in informing the exercise of the Director's professional judgment. Once the Protocol's caseload limits are exceeded, the Director is placed on notice that -- absent some material facts or considerations not taken into account by the Protocol -- the district office in question lacks the capacity to provide the effective representation of counsel required by the ethical rules and the United States and Missouri constitutions. The Special Master observed that the Rule does not require concessions from the Public Defender, which is true (A20). However, the Rule does require the Public Defender to exercise discretion by limiting the office's availability only when, in her professional judgment, not doing so would pose an unacceptably high risk that the office's clients will not receive effective representation.

For that very reason, as the record in this case clearly demonstrates, both the Director and the District 31 Defender specifically considered, in addition to the application of the Protocol to the District 31 caseload, the entirety of that office's circumstances, including its caseload and available

attorneys, paralegals, investigators and support staff.[15] Dean Lefstein likewise conducted a similar analysis, specific to the office's circumstances, in addition to examining the application of the Protocol to District 31's caseload, in the process of rendering his expert opinion.

Neither the NCSC nor the Special Master conducted such an analysis of the District 31 caseload. It is perhaps this misunderstanding of the role of the Rule and Protocol that led both the Special Master and the NCSC to question the use of the Protocol by the Director pursuant to the Rule.

Moreover, the foundational question presented to the Special Master by this Court, as Professor Lefstein correctly noted, does not involve an examination of the Protocol's hypothetical "negative consequences on the rest of the criminal justice system." (*See* A24.) Rather, the question requires a concrete examination of the Protocol's reliability, as an important -- but not exclusive or automatic -- factor in the Director's exercise of professional judgment regarding whether to decline additional cases. That exercise of professional judgment, as noted above, has been entrusted by Chapter 600 to the Public Defender -- not to prosecutors or courts.

[15] This additional level of analysis specifically addresses the concerns of the Special Master and the NCSC about "other factors" in the system.

Importantly, that exercise of professional judgment by the Public Defender is the subject of Guideline 6 of the American Bar Association's "Eight Guidelines" described by Dean Lefstein above at page 56 and attached to his first affidavit as Exhibit B. The Comment to Guideline 6 specifically provides that the Public Defender "should be in an especially strong position to show that its workload is excessive, and its representations should be accepted by the Court." (A57p.) That Comment also recommends that the Public Defender's showing should, as here, include "statistical data, anecdotal information, as well as other kinds of evidence." (A57p.) The Comment to Guideline 7 then recommends that under such circumstances the Public Defender's request for relief "should be accorded substantial deference" because the Public Defender is "in the best position to assess the workload of their lawyers" and their representations to the court are made as officers of the court. (A57q.)

Finally, the Rule specifically requires the involvement of "management personnel" in this process. 18 CSR 10-4.010(2)(C). In that regard, it is noteworthy that the management team of the Public Defender has well over a century of experience which they bring to this task.[16] The exercise of

[16] The current Director, Cathy R. Kelly, has been a public defender for 27 years; Deputy Director Dan Gralike has been a public defender for 21 years;

professional judgment by that management team in developing the Rule and the Protocol, and in implementing the Rule and the Protocol in District 31, justifies the relief sought in this case. There is nothing in this record to suggest otherwise.

General Counsel Peter Sterling has been a public defender for 34 years; Division Director Greg Mermelstein has been a public defender for 20 years; Former Director J. Marty Robinson was a public defender for 22 years. Additionally, Division Directors Karen Kraft (27 years) and Ellen Blau (21 years) have contributed their expertise to the development and implementation of the Protocol.

CONCLUSION

For the reasons stated, Relators respectfully request that this Court make permanent its preliminary writ of prohibition and prohibit the orders of July 28, August 10 and August 24, 2010, appointing the Public Defender to represent defendant Blacksher and other similarly situated and otherwise eligible defendants.

Respectfully submitted,

_____

Stephen F. Hanlon, Mo. Bar #19340
Laura A. Fernandez (admitted *pro hac vice*)
Holland & Knight, LLP
2099 Pennsylvania Avenue, N.W., Ste. 100
Washington, DC 20006
Telephone: (202) 828-1871
Facsimile: (202) 955-5564
Email: stephen.hanlon@hklaw.com
laura.fernandez@hklaw.com

Stacey H. Wang (admitted *pro hac vice*)
Holland & Knight, LLP
400 S. Hope St., 8th Fl.
Los Angeles, CA 90071
Telephone: (213) 896-2400
Facsimile: (213) 896-2450
Email: stacey.wang@hklaw.com

Michael P. Gunn, Mo. Bar #20654
John R. Gunn, Mo. Bar #50341
The Gunn Law Firm, P.C.
1714 Deer Tracks Trail, Ste. 240
St. Louis, Missouri 63131
Telephone: (314) 965-1200
Facsimile: (314) 965-1054
Email: mgunn@thegunnlawfirm.com
jgunn@thegunnlawfirm.com

J. Gregory Mermelstein, Mo. Bar #33836
Division Director
Attorney for Relators
Woodrail Centre
1000 West Nifong
Building 7, Ste. 100
Telephone: (573) 882-9855 x314
Facsimile: (573) 882-9468
Email: greg.mermelstein@mspd.mo.gov

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 2007, in Times New Roman size 14 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 13,975 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 Symantec Endpoint Protection program, which was updated in May, 2011. According to that program, the disks provided to this Court and to the parties listed below are virus-free.

A true and correct copy of the attached brief with brief appendix and a floppy disk containing a copy of this brief were mailed postage prepaid this 16th day of May, 2011, to:

Special Master J. Miles Sweeney
2523 South Marlan
Springfield Missouri 65804

Amy Fite, Donovan D. Dobbs, Benjamin J. Miller
Office of the Prosecuting Attorney
110 West Elm Street; Room 109
Ozark, MO 65721

Hon. Mark Orr, Circuit Judge
Hon. John S. Waters, Associate Circuit Judge
Christian County Courthouse
110 West Elm Street
Ozark, MO 65721

Richard Lamb
Christian County Circuit Clerk
P.O. Box 278
Ozark, MO 65721

Jared Blacksher
318 Dusty Road
Sparta, MO 65753

_____
J. Gregory Mermelstein