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' REPLY BRIEF

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, Bldg. 7, Ste. 100
1000 West Nifong Blvd.
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

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JURISDICTIONAL AND FACT STATEMENTS

Relators adopt the Jurisdictional Statement and the Statement of Facts in their original brief. To avoid undue repetition, some additional facts will be discussed in the argument portion of this brief.

ARGUMENT

I.

Respondents' arguments for denying a writ of prohibition are without merit because:

(1) this case is not moot for the same reasons this Court found the writ case in *Pratte* not to be moot, especially because this case presents an important issue on which this Court should give guidance to trial courts, prosecutors and Public Defenders throughout Missouri;

(2) the command of the statute ("…shall provide legal services to an eligible person…") and Rule 31.02(a) must be interpreted in accord with the rules of ethics and the United States and Missouri constitutions, and 31.02(a) does not require appointment of only the Public Defender, but of "counsel";

(3) the orders appointing the Public Defender to represent Mr. Blacksher are among the type for which prohibition is available;

(4) this Court's directives in *Pratte* concerning "the proper remedy" in a case such as this were based on this Court's exercising its supervisory authority and superintending control of proceedings in the circuit courts, as authorized by article V, section 4 of the Missouri Constitution;

(5) the Protocol is not self serving or outdated, and is sufficient because it is based on national standards, ABA recommendations, and an internal workload study; criminal law has become more complex since the NAC standards were established; and the Director exercises her professional judgment when deciding to limit an office's availability;

(6) The "ethical rules" encompass the Public Defender's obligation to decline initial appointment since representation must not be accepted if the appointment would result in violation of the rules of professional conduct;

(7) *Luckey v. Harris* standards, not *Strickland v. Washington* standards, apply to the issues raised in this case to prospectively prevent irreparable harm;

(8) The Public Defender has evidence of bar complaints or sanctions resulting from its caseload;

(9) Relators do not have "unclean hands" since they complied with all court orders and have represented Mr. Blacksher before the preliminary writ and after the writ was modified; and,

(10) the relief requested will not "stymie the criminal justice system".

Each of Respondents' arguments for denying a writ, as discussed below, are without merit.

(1) **Mootness**

On January 28, 2011, Respondents filed a Motion to Modify Preliminary Writ, requesting that this Court's preliminary writ be modified to allow Mr. Blacksher to plead guilty, if he so chose, and be sentenced. On February 3, 2011, the Public Defender filed a reply to that motion, taking no position on whether Mr. Blacksher should be allowed to plead guilty as long as a guilty plea by him would not cause the Court to deem this writ case moot, citing ***State ex rel. Public Defender Comm'n v. Pratte***, 298 S.W.3d 870, 885 n.33 (Mo. banc 2009). On February 8, 2011, this Court granted Respondents' Motion to Modify Preliminary Writ. Mr. Blacksher's cases were resolved by guilty plea on February 10, 2011.

This case is not moot for precisely the reasons articulated by this Court in ***Pratte***, 298 S.W.3d at 885 n.33, a case which is virtually on all fours with this case on this issue. Respondents do not even attempt to distinguish this case from the holding of footnote 33 in ***Pratte***, in which the Court chose not to find the case moot because "[t]his issue is one of general public interest and importance, is capable of repetition and may evade review if not decided in this proceeding"; "'there is some legal principle at stake . . . as to which a judicial

declaration can and should be made for future guidance'" (citation omitted); and "[t]he trial courts, the state and the public defender have an interest in this Court determining [the issue]." 298 S.W.3d at 885 n.33.

For the same reasons articulated in ***Pratte***, this Court should choose not to find this case moot because the issue in this case is one of general public interest and importance; is capable of repetition and may evade appellate review if not decided in this proceeding; and is an issue on which this Court can and should rule in order to give future guidance to trial courts, prosecutors and Public Defenders throughout Missouri.

(2) **The Command of the Statute and Supreme Court Rule 31.02(a)**

Respondents' attempt to bootstrap ***Pratte****'s* analysis of the word "shall" in Section 600.086.1 in the context of "[a] person shall be considered eligible for representation . . ." to bolster their argument about the use of the word "shall" in Section 600.042.4(1) in the context of ". . . shall provide legal services . . . " should be rejected. *See* Respondents' Brief at 14-15 (citing ***Pratte***, 298 S.W.3d at 882). The rule at issue in ***Pratte*** -- 18 CSR 10-2.010 (July 30, 2008 version; repealed February 28, 2011) -- prohibited Public Defender representation of any person who retained private counsel during the pendency of the case.

After noting that "[t]he word 'shall' generally prescribes a mandatory duty," the Court in ***Pratte*** held that because 18 CSR 10-2.010 denies representation to otherwise eligible defendants simply because they had previously retained private counsel, its promulgation exceeded the statutory authority provided to the Public Defender Commission and Director and was therefore invalid. ***Id***. at 882-884. The Public Defender takes no issue with this holding in ***Pratte***.

But the ***Pratte*** Court also implicitly recognized that the mandatory nature of the command of Section 600.042.4(1) -- "shall provide legal services" -- must give way to the commands of the United States and Missouri constitutions and the Rules of Professional Conduct when the Public Defender has so many cases that she cannot provide effective and competent representation to her clients, or must choose which among her clients will receive effective and competent representation and which will not. *See* ***Pratte***, 298 S.W.3d at 880. That is the jurisprudential predicate for ***Pratte***'s directive that "the proper remedy" in such a situation is to proceed under 18 CSR 10-4.010 and ultimately make the Public Defender office in question "unavailable for any appointments until the caseload falls below the commission's standards." ***Id***. at 887.

If Section 600.042.4(1) were interpreted as Respondents insist it must, *i.e.*, to command the appointment of a Public Defender who has so many cases

that she cannot effectively and competently represent a defendant, the statute would run afoul of the United States and Missouri constitutions and the Missouri Rules of Professional Conduct. Accordingly, the statute should be interpreted to preserve its constitutionality, *i.e.*, by permitting the Public Defender to limit the number of cases she will accept so that she can represent her clients competently and effectively. (*See* Relators' Initial Brief at 41-47).

Supreme Court Rule 31.02(a) provides in pertinent part that upon a showing of indigency, "it shall be the duty of the court to appoint counsel…" Significantly, Rule 31.02(a) does not require the appointment of the "Public Defender," but of "counsel." Court rules are interpreted according to their plain and ordinary meaning, and if the intent of the rule is clear and unambiguous when giving the language its plain and ordinary meaning, courts carry out that intent and do not engage in further construction. *See* ***Jones v. Jackson County Circuit Court***, 162 S.W.3d 53, 61 (Mo. App. W.D. 2005). Under the plain and ordinary meaning, Respondents can appoint private counsel for Mr. Blacksher and satisfy Rule 31.02(a). In fact, ***Pratte*** held that Rule 31.02(a) does not apply to Public Defenders – at least in a private capacity: "Trial judges have the ability under Rule 31.02(a) to appoint almost any lawyer from The Missouri Bar to represent indigent defendants and ensure their

constitutional right to counsel is met but not someone who also happens to be a public defender." 298 S.W.3d at 886.[1]

To the extent that Respondents contend that Rule 31.02(a) requires appointment of *only* the Public Defender as counsel (with which Relators do not agree), the rule would have obvious constitutional infirmities in requiring the Public Defender to undertake representation that is inconsistent with the commands of the United States and Missouri constitutions and the Missouri Rules of Professional Conduct. Relators urge this Court to construe the command of this rule to preserve its constitutionality first, by construing it not to require appointment of *only* the Public Defender, but of "counsel," and second, if the rule applies to the Public Defender, by construing it to permit a limit on the number of cases the Public Defender must accept in the midst of an unmitigated caseload crisis.

(3) **Prohibition Is The Proper Remedy**

This Court and the Court of Appeals have repeatedly and expressly held that prohibition is the proper remedy for the Public Defender to challenge its unlawful appointment. As this Court stated in ***Pratte***, "[w]hen a trial court

[1] The ethical rules also require private lawyers to "avoid appointment" when "representing the client is likely to result in violation of the Rules of Professional Conduct." Rule 4-6.2(a)(public service – accepting appointments).

exceeds its authority in appointing the public defender, a writ of prohibition should issue to prohibit or rescind the trial court's order." 298 S.W.3d at 881 (citing ***State ex rel. Tanzey v. Richter***, 762 S.W.2d 857, 858 (Mo. App. E.D. 1989)(granting writ of prohibition to prohibit trial judge from appointing the Public Defender to represent a non-indigent defendant) and ***State ex rel. Shaw v. Provaznik***, 708 S.W.2d 337, 341 (Mo. App. E.D. 1986)(granting writ of prohibition to prohibit trial judge from appointing the Public Defender to represent a defendant in a civil contempt proceeding)). ***Pratte***, ***Tanzey*** and ***Provaznik*** clearly hold that prohibition is the proper and only remedy available to the Public Defender here.

Respondents' argument that the issues in this case are more appropriately left to proceedings in a civil case, a motion under Rule 24.035, or a complaint filed with the disciplinary counsel simply ignores this long line of authority.

(4) ***Pratte* Is Not Dicta**

Respondents' argument that Relators rely upon mere dicta in ***Pratte*** ignores this Court's clear statement in ***Pratte*** that it was exercising its "supervisory authority" and "superintending control" of proceedings in the circuit courts, as authorized by article V, section 4 of the Missouri Constitution. ***Pratte***, 298 S.W.3d at 873 n.1. Moreover, this argument ignores this Court's powerful observation in ***State ex rel Wolff v. Ruddy***, 617 S.W.2d 64, 67 (Mo.

banc 1981), that it is this Court's "first obligation to secure to the indigent accused all of his constitutional rights and guarantees."

The rule in ***Pratte*** could not be more explicit: The "proper remedy" is 18 CSR 10-4.010's authorization to the Public Defender, in the absence of any agreement by prosecutors and judge to a resolution of excessive caseloads, "to make the office unavailable for any appointments until the caseload falls below the commission's standard." ***Id***. at 887. Therefore, Respondents' argument that the rule in ***Pratte*** was mere dicta should be rejected.

(5) **The Protocol Is Not Self Serving or Outdated**

In the trial court, before the Special Master and in this Court, the Respondents have argued that the Protocol is self serving in that it was not reviewed by an outside agency and therefore "it alone is not sufficient" (Respondents' Brief at 21-22) for its intended purpose.

As Relators have explained at great length in their Initial Brief, the Protocol does nothing acting alone. Rather, it plays an important, but not exclusive or automatic, role in the Director's decision to limit an office's availability when, and 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. Initial Brief at 62-65.

Moreover, the Protocol is built on national standards, modified and improved by an internal work study to conform to the findings from that workload study, and recommendations by the American Bar Association on additional factors to take into consideration. The Protocol was developed 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-E179M.) The Rule establishing the procedure for utilizing the Protocol 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.

Respondents take issue with the National Advisory Council (NAC) standards and offer a solution that throws the proverbial baby out with the bathwater. Relators recognize that the NAC standards are not perfect. Initial Brief at 4-5, 34. But criminal defense has become substantially more complex[2] since 1972, a fact Respondents do not take into account. It was precisely because of the flaws of the NAC standards -- as examined by the American Bar Association and commentators such as Dean Norman Lefstein -- that the Public

[2] *See* ***Simmons v. State Public Defender***, 791 N.W.2d 69, 86 (Iowa 2010) (recognizing that "criminal law has increased in complexity") (citing ***Makemson v. Martin County***, 491 So.2d 1109, 1114 (Fla. 1989)).

Defender conducted an eight-week workload study. The workload study captured the time it now takes to represent clients under modern conditions, including the use of technology available to the Public Defender and accounting for the current complexity of criminal laws and procedures. *See* Initial Brief at 34.

As Dean Lefstein explained, whatever refinements might be made to the standards and the study, the Protocol is "most certainly sufficiently reliable at this time as a basis to allow the MSPD to reject additional cases." (A77-78.) That is because the Protocol "errs on the side of permitting MSPD [Missouri State Public Defender] lawyers to handle too many cases, not too few." (A78.)

Furthermore, Respondents ignore the fact that the Public Defender does not immediately limit the availability of defenders when the caseload limit is crossed -- there is a period during which judges and prosecutors may work with the Public Defender to alleviate the Public Defender's caseload. *See* Initial Brief at 5-6, 27-28; *see also* ***Pratte***, 298 S.W.3d at 887. Public Defender General Counsel Peter Sterling testified that the Public Defender does not mechanically initiate certification procedures under the Protocol; the Public Defender waits and monitors the situation while engaging the prosecutor and judges in an attempt to alleviate the caseload. Initial Brief at 54-55. But if caseloads are not alleviated and continue to substantially exceed caseload limits

and the Public Defender determines that there is a significant risk of ineffective representation, then the limited availability process is instituted. Initial Brief at 54-55, 63. Here, the cooperative efforts failed to decrease the caseload and the caseloads continued to exceed the Protocol limits. Initial Brief at 6-9. By the time the Public Defender began limiting the availability of its defenders, the caseload problem was in an untenable crisis.

(6) **The "Ethical Rules" Do Apply to Initial Appointments of the Public Defender**

According to the Respondents, "the ethical rules themselves present no bar to the initial appointment of the Public Defender in any given case." (Respondents' Brief at 23). Respondents then claim that under "the ethical rules," once the appointment is made to an already hopelessly overburdened Public Defender, she can subsequently inform the court that she "could not reasonably provide effective assistance of counsel (*e.g.*, in light of obligations owed to other clients)," and if the court were convinced that was true, "the circuit court could permit the public defender to withdraw at that point." (Respondents' Brief at 23).

This statement of the law under the Missouri Rules of Professional Conduct is wrong. On the contrary, the Missouri Rules of Professional Conduct affirmatively require a lawyer to decline representation: "[A] lawyer ***shall not***

represent a client … if the representation will result in violation of the rules of professional conduct or other law[.]" Mo. Rule of Prof. Conduct, Rule 4-1.16(a)(emphasis added); *see also* Scope [1] to the Rules (distinguishing between mandatory and permissive language used in the Rules -- terms such as "shall" are "imperatives"). There is a distinct corresponding duty to "withdraw from the representation" where the "representation has [already] commenced." Mo. Rule of Prof. Conduct Rule 4-1.16(a). The rule against accepting an appointment is consistent with the mandate that a lawyer's "work load *must* be controlled so that each matter can be handled competently." Mo. Rule of Prof. Conduct, Comment 2 to Rule 4-1.3 (emphasis added).

Rule 4-1.7(a) requires that "a lawyer *shall not represent a client* if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if … (2) 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 . . . . " *See* Mo. Rule of Prof. Conduct, Rule 4-1.7(a)(emphasis added); *see also* Initial Brief at 35. (E227-28; A111-112.)

Indeed, attorney managers and supervisors are responsible for ensuring that subordinate lawyers are able to render competent and diligent services to their clients; if managers and supervisors fail to ensure that subordinate lawyers

comply with Missouri's Rules of Professional Conduct, they themselves violate their ethical duties. *See* Mo. Rule of Prof. Conduct, Rule 4-5.1.

(7) ***Luckey*, not *Strickland*, Applies to this Case**

Respondents acknowledge - and do not challenge - the holding in ***Luckey v. Harris***, 860 F.2d 1012, 1017 (11th Cir. 1988), but argue instead that the ***Strickland*** "standard is inappropriate for a civil suit seeking prospective relief." (Respondents' Brief at 24-25 n.2 (quoting ***Luckey***, 860 F.2d at 1017.)) Respondents thus attempt to distinguish this case from ***Luckey*** on the grounds that this is not a civil suit.

This argument is the triumph of form over substance. The critical words in ***Luckey*** are "prospective relief," not "civil suit." The distinction that the ***Luckey*** court made was between a convicted defendant's post-conviction Sixth Amendment claims of ineffective assistance of counsel, which look back at a completed trial and conviction and attempt to retroactively set aside that conviction, and pre-trial public defender claims which seek prospective relief to prevent irreparable harm -- that is, appointment of counsel who cannot act competently or effectively because of her excessive caseload -- before that harm occurs.

Whether that occurs in the form of a civil suit under 42 USC § 1983 or in the form of a motion to set aside an appointment that was made by the

Respondents over the Public Defender's objection, as in this case, is irrelevant to the analysis.

Moreover, as Relators noted in their initial brief, the United States Supreme Court has recently emphasized in ***Padilla v. Kentucky***, ___ U.S. ___, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010), that it is the constitutional duty of the courts "to ensure that no criminal defendant … is left to the 'mercies of incompetent counsel.'" The ***Luckey*** standard, which sets forth an analysis to ensure that indigent criminal defendants receive competent counsel, applies to this case.

(8) **Evidence of Bar Complaints Resulting From Caseload**

Respondents' contend that the Public Defender did not produce any documentation to show that it has had any bar complaints or sanctions resulting from its caseload (Respondents' Brief at 6-8). Although Relators' witnesses testified that they knew of some bar complaints (E296, E338), Relators did not produce documents at the hearing because the Public Defender System did not track such complaints (E296-97, E340) and, more importantly, because the issue is not relevant to the instant proceeding: Neither the Public Defender – nor any attorney – must wait until they are overwhelmed with bar complaints before seeking to control their caseload to provide competent, effective and ethical representation.

Moreover, bar complaints are by no means the careful barometer of effectiveness that Respondents suggest. Much like in an Eighth Amendment prison case, cruel and unusual punishment is not accurately measured by the number of grievances filed, or even by the number of inmates who suffer or die as a result of abuse or neglect. As the Supreme Court recently found in ***Brown v. Plata***, ___ U.S. ___, 131 S.Ct. 1910, 1925 n.3 (2011): Plaintiffs "do not base their case on deficiencies in care provided on any one occasion," but rather, "[p]laintiffs rely on systemwide deficiencies in the provision of medical and mental health care that, taken as a whole, subject [prisoners] to 'substantial risk of serious harm.'" Relators in the instant case make an analogous argument regarding the substantial risks posed by the systemwide deficiencies caused by the caseload crisis.

Nevertheless, in recent weeks, Division Director Gregory Mermelstein has become aware of two bar complaints – one resulting in discipline – stemming from the Public Defender's excessive caseload. These matters are on file with the Office of Chief Disciplinary Counsel, which is an agency of this Court. *See* OCDC webpage at <http://www.mochiefcounsel.org> (last visited June 11, 2011). Thus, OCDC's records are part of this Court, and this Court may take judicial notice of them. *See* ***State ex rel. Callahan v. Collins***, 978 S.W.2d 471, 474 (Mo. App. W.D. 1998)(courts may take judicial notice of their

own records in other prior proceedings). Relators request that this Court take judicial notice of OCDC case nos. 10-1066-IV, and 10-939.

In case no. 10-1066-IV, a Public Defender client had written in early 2010 to Division Director Mermelstein to complain about a Public Defender attorney's alleged inaction in his case. Mermelstein wrote to the client on February 2, 2010, to inform him that "[f]rankly, due to the large number of cases which are assigned to the Public Defender, we are not able to push our cases to completion as quickly as we would like" (Reply Brief Appendix A2). [3] On May 16, 2011, OCDC wrote to Mermelstein[4] to inform him of its concerns about the case, stating:

> . . . Rule 4.1.3 (Diligence) might require that the Public Defender System provide replacement counsel in a case where a specific public defender's case load is so great that the attorney is unable to provide diligent and prompt representation to a client.

(Reply Brief Appendix A1).

[3] Relators have blacked out client and attorney names in the Appendix documents.

[4] Mermelstein was previously unaware of this bar complaint until he received this letter from OCDC.

The problem with OCDC's directive, however, is that the Public Defender does not have any *non*-overloaded attorneys to whom to assign its cases. The Public Defender simply cannot provide "diligent and prompt" representation to all of its clients when it has far too many clients to represent. Case no. 10-1066-IV was ultimately resolved in the attorney's favor, but that has not been true of case no. 10-939.

In case no. 10-939, OCDC issued a written admonishment to a Public Defender on May 24, 2011, for "violation of Rule 4-1.3 diligence" in not promptly prosecuting a postconviction case after having filed an amended postconviction motion (Reply Brief Appendix A3-A5).[5] Although the attorney is currently contesting this admonishment, the case illustrates that bar complaints are being made against Public Defender attorneys, and that OCDC is imposing discipline for alleged ethical violations stemming from the Public Defender's excessive caseload. The whole point of this current writ litigation is to allow the Public Defender to control and reduce its caseload so that its attorneys can provide the competent, ethical and effective representation –

[5] The Public Defender Directors were unaware of this bar complaint until the attorney at issue brought it to Division Director Mermelstein's attention on or about May 25, 2011.

including promptness and diligence – to which clients are entitled, but which excessive caseloads preclude.

(9) **Relators Have Clean Hands**

Respondents argue that prohibition is not proper because Relators have "unclean hands" (Respondents Brief at 26-31). Respondents contend that "[i]nstead of putting Mr. Blacksher's interest first and foremost, the Relators have put their own interests above all others." Respondents' Brief at 27. Respondents' suggest that Relators only ethical option was to represent Mr. Blacksher. *See* Respondents' Brief at 28. Under Respondents' logic, however, the Public Defender could never challenge a trial judge's appointment of the Public Defender to any case – no matter how legally unauthorized the court's action may be – since that would not be putting the client's interest "first and foremost."

Pratte, ***Tanzey*** and ***Provaznik***, *supra*, teach, however, that it is proper for the Public Defender to challenge its appointment to a client's case through a writ of prohibition. Indeed, the Public Defender has no other legal means of doing so. Here, the Public Defender has followed the procedures it did in ***Pratte***, ***Tanzey*** and ***Provaznik*** to challenge Respondents' appointment.

From the outset, the Public Defender objected to the appointment to Jared Blacksher's cases on the grounds that because of the case overload, Public

Defenders were in essence being asked to make an impossible choice between representing their existing clients and representing newly appointed defendants. The writ regarding the appointment of Mr. Blacksher was not done to neglect or harm Mr. Blacksher; to the contrary, it was part of the Public Defender's longstanding effort to ensure that every criminal defendant represented by the office receive meaningful representation.

Relators have complied with every court order regarding representation of Mr. Blacksher. Relators assigned an Assistant Public Defender to represent Mr. Blacksher in court up to the date that this Court issued its preliminary writ, even as Relators were challenging their appointment. This Court's preliminary writ issued on September 3, 2010, directed Respondent judges "to take no further action in said causes, *other than rescinding said appointment* [of the Office of Public Defender], until the further order of this Court." *See* Preliminary Writ of Prohibition, Sept. 3, 2010 (emphasis added). Relators did not wish any harm to Mr. Blacksher, and indeed, chose to take no position on whether this Court should modify its preliminary writ in February (provided that this did not moot the case) precisely because Relators wished to move Mr. Blacksher's case along while still allowing the Public Defender to pursue the important legal issues concerning its appointment in this case. After this Court modified the preliminary writ, Relators provided an Assistant Public Defender

to represent Mr. Blacksher in his guilty plea proceeding. Most recently, on June 10, 2011, Relators provided Mr. Blacksher with an Assistant Public Defender to represent him in a probation violation case. [6] *See* Case.net docket entry dated June 10, 2011, in ***State v. Blacksher***, No. 10CT-CR00470-01. In short, Relators have sought to challenge their appointment to Mr. Blacksher's cases in an entirely appropriate fashion, and have complied with all court orders to represent Mr. Blacksher at various proceedings.

While it is true that Mr. Blacksher's guilty plea was delayed by Relators' seeking the writ of prohibition, when an appellate court issues a preliminary writ, there is almost always a delay in the trial court proceeding while the writ case is litigated. Respondents appear to contend that Relators should have done something to allow Mr. Blacksher to plead guilty so that he would not have to remain in jail. *See* Respondents' Brief at 29. But, undoubtedly, if Relators had done so, Respondents would then contend that the case was moot, just as they contend now (Respondents' Brief at 10-13), even though Respondents were the party that sought to modify the writ.

[6] District 31 represented Mr. Blacksher in his probation violation case because at the time that case was assigned to District 31 in early June 2011, District 31 had not yet reached its monthly capacity under its caseload protocol, and was still accepting cases for June 2011.

Therefore, Relators do not have unclean hands in seeking to avail the Public Defender of proper legal remedies to challenge its appointment.

(10) **"Stymieing The Criminal Justice System"**

This argument is essentially a restatement of the Special Master's observation about the "negative consequences on the rest of the criminal justice system" (A24, *see* A31) if the Public Defender's professional judgment to refuse additional appointments, based in part on the application of the Protocol, were upheld by this Court. More colloquially stated, this is the familiar state defense that were the state to conform its conduct to the mandate of the Constitution, "the sky would fall." That defense suffered a serious and hopefully fatal blow on May 23, 2011 when the United States Supreme Court held that the State of California, which had asserted its own version of this defense, must take meaningful and serious measures to reduce its prison population. ***Brown v. Plata***, 131 S.Ct. at 1941-1947. After finding that California's actions had created "a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners," the Court stated bluntly: "The Constitution does not permit this wrong." ***Id***. at 1941. Accordingly, the Court held: "The relief ordered by the three-judge court is required by the Constitution[.]" ***Id***. at 1947.

This Court should do no less.

CONCLUSION

For the reasons stated in Relators' Initial Brief and this Reply, 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 represented 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, Bldg. 7, Ste. 100
1000 West Nifong Blvd.
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, 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 5,145words, which does not exceed the 7,750 words allowed for a relators' reply 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 June, 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 June, 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

Barbie Barnett-Stillings
Christian County Circuit Clerk
P.O. Box 278
Ozark, MO 65721

Jared Blacksher
Christian County Jail
110 West Elm, Room 70
Ozark, MO 65721

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J. Gregory Mermelstein

APPENDIX

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