

IN THE  
SUPREME COURT OF MISSOURI

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STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	Cause No. SC 100170
ROBERT WOOLERY,	)	
	)	
Appellant.	)	

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STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	Cause No. SC 100247
LORANDIS PHILLIPS,	)	
	)	
Appellant.	)	

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STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	Cause No. SC 100303
TIFFANY MILLS,	)	
	)	
Appellant.	)	

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STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	Cause No. SC 100265
JAMES LOGAN,	)	
	)	
Appellant.	)	

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STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
	)	
vs.	)	Cause No. SC 100325
JAMES LOGAN,	)	
	)	
Appellant.	)	

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APPEALS TO THE SUPREME COURT OF MISSOURI  
FROM THE CIRCUIT COURTS OF PETTIS, SCOTT, JACKSON,  
AND BOONE COUNTIES, MISSOURI  
18<sup>TH</sup>, 33<sup>RD</sup>, 16<sup>TH</sup>, and 13<sup>TH</sup> JUDICIAL CIRCUITS  
HON. ROBERT KOFFMAN, HON. DAVID A DOLAN, HON. KENNETH  
GARRETT, AND HON. STEPHANIE MORRELL, JUDGES

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AMICUS BRIEF OF MISSOURI STATE PUBLIC DEFENDER  
  
FOR THE INFORMATION OF THE COURT  
  
FILED WITH CONSENT OF ALL PARTIES

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## **INDEX**

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT .....	4
IDENTITY AND INTEREST OF AMICUS CURIAE .....	4
STATEMENT OF FACTS .....	5
STATEMENT OF CONSENT .....	5
ARGUMENT AND AUTHORITIES .....	6
CONCLUSION .....	16
CERTIFICATE OF COMPLIANCE .....	17
APPENDIX	

## TABLE OF AUTHORITIES

### Page

### CASES:

<i>State ex rel. Missouri Pub. Def. Comm'n v. Pratte</i> , 298 S.W.3d 870 (Mo. banc 2009) .	16
<i>State ex rel. Shaw v. Provaznik</i> , 708 S.W.2d 337 (Mo. App. E.D. 1986).....	7, 9, 10, 16
<i>State v. Albright</i> , 843 S.W.2d 400 (Mo. App. W.D. 1992) .....	7, 9
<i>State v. Bilyeu</i> , 867 S.W.2d 646 (Mo. App. S.D. 1993) .....	9
<i>State v. Dowdell</i> , 583 S.W.2d 253 (Mo. App. W.D. 1979).....	7
<i>State v. Logan</i> (SC100265) .....	9
<i>State v. Mills</i> (SC100303) .....	9-10

### STATUTES:

<i>Sec. 600.015, RSMo 2016</i> .....	4
<i>Sec. 600.017, RSMo 2016</i> .....	5
<i>Sec. 600.019, RSMo 2016</i> .....	4
<i>Sec. 600.021, RSMo 2016</i> .....	16
<i>Sec. 600.042, RSMo Cum. Supp. 2019</i> .....	4, 5, 11, 12, 13
<i>Sec. 600.086, RSMo 1978</i> .....	7
<i>Sec. 600.086, RSMo Cum. Supp. 1982</i> .....	7, 15
<i>Sec. 600.086, RSMo 1993</i> .....	7
<i>Sec. 600.086, RSMo 2016</i> .....	6, 7, 8, 9, 10, 11, 13, 15, 16

**RULES:**

<b>Rule 4-1.7</b> .....	14, 16
<b>Rule 4-1.9</b> .....	14, 16
<b>Rule 31.02</b> .....	15, 16

**OTHER:**

<b>18 CSR 10-2.010 (Definition of Eligible Cases)</b> .....	12
<b>18 CSR 10-3.010 (Guidelines for the Determination of Indigence)</b> .....	7, 10, 11, 13
<b>Missouri State Public Defender Annual Report 2023</b> .....	5, 11, 13, 14
<b>Missouri State Public Defender Audit, October 2012, Report No. 2012-129</b> .....	12

## **JURISDICTIONAL STATEMENT**

Amicus adopts the jurisdictional statement set forth in Appellant's brief.

## **IDENTITY AND INTEREST OF AMICUS CURIAE**

Missouri State Public Defender (MSPD) is an independent department of the judiciary that is tasked with the provision of legal representation in eligible cases to applicants determined to be indigent. *Secs. 600.019 RSMo 2016<sup>1</sup> and 600.042 RSMo Cum. Supp. 2019* (App. A-3, A-5). The department is administered by a Public Defender Commission composed of seven members appointed by the Governor and is led by a Director chosen by that Commission. *Secs. 600.015 and 600.019* (App. A-1, A-3). MSPD is governed by Chapter 600 of the Missouri Revised Statutes. MSPD made indigence determinations and provided legal services to three of the four appellants before the Court: Robert Woolery, James Logan, and Tiffany Mills. Robert Woolery and Tiffany Mills were represented by attorneys employed by MSPD as public defenders at the trial level, and by a contract counsel special public defender on appeal (Woolery Legal File D25 p. 1; Mills Legal File D1 p. 7). James Logan was represented by a contract counsel special public defender at the trial level (Logan Legal File [SC100325] D4 p. 1; Logan Legal File [SC100265] D14 p. 1). The fourth appellant, Lorandis Phillips, did not receive services from MSPD (Phillips Legal File D8 p. 1).

The issue of how an indigent person applies for and receives legal representation in Missouri is at issue in these cases. Missouri State Public Defender's Trial Division

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<sup>1</sup> Unless otherwise indicated, all further statutory references are to RSMo 2016. Copies of all cited statutes, rules and regulations are in the Appendix (App.) to this brief.

provided representation in over 86,000 felony, misdemeanor, and probation violation cases in fiscal year 2023: July 1, 2022, to June 30, 2023. *See MSPD Annual Report 2023*, p. 8, available at [publicdefender\\_mo\\_gov/wp-content/uploads/2023/10/FY2023-MSPD-Annual-Report\\_pdf](https://publicdefender.mo.gov/wp-content/uploads/2023/10/FY2023-MSPD-Annual-Report.pdf) (last accessed Dec. 28, 2023). Because MSPD is the provider of indigent defense legal services funded by the State and is the main provider of those services, MSPD provides this Amicus Brief for informational purposes to assist the Court in these five cases.<sup>2</sup>

Neither the Public Defender Commission nor the Public Defender Director take any position on the underlying legal issues. Pursuant to *Sec. 600.042.1(4) RSMo Cum. Supp. 2019*, “the director shall have no authority to direct or control the legal defense provided by a defender to any person served by the state public defender system” (App. A-5). Pursuant to *Sec. 600.017*, the Commission’s powers and duties do not extend to directing or controlling the legal defense in any case (App. A-2).

### **STATEMENT OF FACTS**

Amicus adopts the statement of facts in Appellant’s brief.

### **STATEMENT OF CONSENT**

This brief is being filed with the consent of all parties.

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<sup>2</sup> MSPD is tendering this brief in each of the five cases. However, the content of the brief is identical in each case.

## ARGUMENT AND AUTHORITIES

### I.

**MISSOURI STATE PUBLIC DEFENDER CANNOT BE APPOINTED BY THE COURT TO REPRESENT INDIGENT PERSONS BUT MUST INSTEAD MAKE AN INDIGENCE AND ELIGIBILITY DETERMINATION BASED UPON A WRITTEN APPLICATION, AND COMPLETE A CONFLICT ANALYSIS, BEFORE AN ATTORNEY CAN PROVIDE LEGAL SERVICES.**

(Related to Points 1 & 2 in *Woolery* Brief; Point 3 in *Mills* Brief; Points 1, 2, 3 & 4 in *Logan* Brief [SC100265]; Points 1 & 2 in *Logan* Brief [SC100325/WD85830] and Points 1 & 2 in *Phillips* Brief).

#### **A. MSPD IS NOT APPOINTED BY THE COURT, BUT IS THE INITIAL DETERMINER OF INDIGENCE.**

Pursuant to *Sec. 600.086*, Missouri State Public Defender does not and cannot provide legal representation until it has completed the process to determine if an applicant qualifies for public defender representation. MSPD has a statutory duty to determine whether an applicant for legal services is indigent and eligible for representation. *Sec. 600.086* (App. A-8). The law has been established since the amendment of Chapter 600 in 1982 that the initial determination of indigence qualifying



a person for legal services from Missouri State Public Defender rests solely with Missouri State Public Defender:

The determination of indigency by the court through suitable inquiry under Section 600.086 RSMo 1978, and recognized in *State v. Dowdell*, 583 S.W.2d 253, 257 (Mo. App. 1979) was withdrawn by an amendment to Section 600.086.3 which was effective on April 1, 1982. Prior to the amendment, either the public defender, Section 600.086.2 RSMo 1978, or the court were authorized to determine indigency. Section 600.086.3 RSMo 1978. *However, the 1982 amendment charges the public defender with that duty subject to appeal to the court.*<sup>3</sup>

*State ex rel. Shaw v. Provaznik*, 708 S.W.2d 337, 341 (Mo. App. E.D. 1986) (emphasis added).

The public defender, under section 600.086.3, determines indigency based on factual information contained in the affidavit completed by the defendant. *See State ex rel. Shaw v. Provaznik*, 708 S.W.2d 337 (Mo. App. 1986) (holding that determination of ‘eligible’ person under Chapter 600 shall be made by public defender, subject to appeal, and not by court in first instance).

*State v. Albright*, 843 S.W.2d 400, 402 (Mo. App. W.D. 1992).<sup>4</sup>

**Sec. 600.086** provides:

1. A person shall be considered eligible for representation under sections 600.011 to 600.048 and 600.086 to 600.096 when it appears from

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<sup>3</sup> The 1982 version of **Sec. 600.086.3 RSMo 1982** (App. 10) was amended again in 1993 to delete the language “and shall be subject to appeal to the court before which the case is pending” and to add the language “[u]pon motion by either party, the court in which the case is pending shall have authority to determine whether the services of the public defender may be utilized by the defendant. Upon the courts finding that the defendant is not indigent, the public defender shall no longer represent the defendant.” **Sec. 600.086.3 RSMo Cum. Supp. 1993** (App. 11).

<sup>4</sup> **18 CSR 10-3.010.6(C)** (Guidelines for the Determination of Indigence) no longer requires an applicant submit an affidavit to MSPD (App. 16). Instead, an applicant completes an application. *Id.* (App. 16). An affidavit is only required upon appeal to the court after a finding of non-eligibility by MSPD. *See Sec. 600.086.3* (App. 8).

all the circumstances of the case including his ability to make bond, his income and the number of persons dependent on him for support that the person does not have the means at his disposal or available to him to obtain counsel in his behalf and is indigent as hereafter determined.

2. Within the parameters set by subsection 1 of this section, the commission may establish and enforce such further rules for courts and defenders in determining indigency as may be necessary.

3. The determination of indigency of any person seeking the services of the state public defender system shall be made by the defender or anyone serving under him at any stage of the proceedings. Upon motion by either party, the court in which the case is pending shall have authority to determine whether the services of the public defender may be utilized by the defendant. Upon the courts finding that the defendant is not indigent, the public defender shall no longer represent the defendant. Any such person claiming indigency shall file with the court an affidavit which shall contain the factual information required by the commission under rules which may be established by the commission in determining indigency.

4. Any person who intentionally falsifies such affidavit in order to obtain state public defender system services shall be guilty of a class A misdemeanor.

5. The director or anyone serving under him may institute an investigation into the financial status of any person seeking the services of the state public defender system at such times as the circumstances shall warrant. In connection therewith he shall have the authority to require any person seeking the services of the state public defender system or the parents, guardians or other persons responsible for the support of a person seeking the services of the state public defender system who is a minor or those persons holding property in trust or otherwise for such person to execute and deliver such written authorization as may be necessary to provide the director or anyone serving under him with access to records of public or private sources, otherwise confidential, or any other information which may be relevant to the making of a decision as to eligibility under this chapter. The director, chief deputy director, each public defender and each assistant and deputy public defender or designee are authorized to obtain information from any office of the state or any subdivision, or agency thereof or political subdivision on request and without payment of any fees. Any office of the state or any subdivision, or agency thereof or political subdivision from which the director, chief deputy director, public defender and each assistant and deputy public defender or designee requests

information pursuant to this section shall supply such information, without payment of any fees.

6. The burden shall lie on the accused or the defendant to convince the defender or the court of his eligibility to receive legal services, in any conference, hearing or question thereon.

*Sec. 600.086* (App. A-8 – A-9).

Pursuant to *Sec. 600.086*, MSPD is the initial determiner of whether an attorney from MSPD will provide legal representation. *Provaznik*, 708 S.W.2d at 341; *Albright*, 843 S.W.2d at 402. A court’s involvement in the determination of whether MSPD shall provide legal representation to an indigent person is only begun if there is an appeal of an adverse decision and a motion is filed to contest MSPD’s indigence determination as set out in *Sec. 600.086.3*:

Section 600.086 makes it clear that it is the initial responsibility of the public defender to determine eligibility under Chapter 600. *State ex rel. Shaw v. Provaznik*, 708 S.W.2d 337, 341 (Mo. App. 1986). ‘The judiciary is to intervene only upon appeal of the public defender's adverse decision.’ *Id.*

*State v. Bilyeu*, 867 S.W.2d 646, 649 (Mo. App. S.D. 1993) (citation omitted).

Because MSPD provides services in all one hundred and fourteen counties and the City of St. Louis, MSPD is not present at every criminal court initial appearance at which a person may inform the court that they are unable to retain private counsel. Many of the courts provide communications to MSPD that a person may wish to apply for public defender services.

In *State v. Logan* reference is made to an order “appointing” the public defender for an indigence determination (Logan Legal File [SC100265] D1 p. 8), and in *State v.*

*Mills* reference is made to an order “referring” the case to the public defender for indigence determination (Mills Legal File D1 p. 28). These communications are examples of collaborations that exist between the local courts and MSPD to provide notification to MSPD when a person may wish to apply for MSPD representation. These docket entries are not true attorney appointments, but notifications only. *See Provaznik*, 708 S.W.2d at 341 (holding that public defender determines eligibility in first instance, not the court).

**B. MSPD MUST HAVE AN APPLICATION FOR SERVICES FROM THE DEFENDANT BEFORE IT CAN DETERMINE INDIGENCE.**

An application for services is the required initial step that must be completed before MSPD can determine if it can provide legal representation. *See Sec. 600.086.3* and **18 CSR 10-3.010.6(C)** (App. A-8, A-16). A person is eligible for representation by Missouri State Public Defender in an eligible case if it appears that the person does not have the means at his disposal or available to him to obtain counsel in his behalf. *Sec. 600.086.1* (App. A-8). The parameters for making the decision whether an applicant is eligible for representation by MSPD are made by the Public Defender Commission, *see Sec. 600.086.2* (App. A-8), and are set forth in Missouri’s Code of State Regulations at **18 CSR 10-3.010, Guidelines for the Determination of Indigence** (App. A-16).

Those parameters are evaluated based upon information received by MSPD on the Application for Services. The indigence determination process may only be initiated by the applicant who is seeking services by completing a public defender application. *Sec.*

**600.086.3** and **18 CSR 10-3.010.6(C)** (App. A-8, A-16). The public defender application is available to any person online at [www\\_mspd\\_mo\\_gov](http://www_mspd_mo_gov). The application is also available in paper format in all public defender offices, in all circuit courthouses, and in many county jails. The application is also available on kiosks accessible to detainees in seventeen county jails, and by QR Code at the Columbia Trial Office. The Director may designate any person as a representative of the Director for the purpose of making indigency determinations and assigning counsel. *Sec. 600.042.5(2) RSMo Cum. Supp. 2019* (App. A-7). The Director has designated members of MSPD staff to make those decisions, but has not designated any member of the bench or any court staff.

Missouri State Public Defender's Trial Division is responsible for handling the felony, misdemeanor and probation violation cases that are eligible for representation in the 114 counties and the City of St. Louis. The Trial Division is divided into thirty-three separate districts with offices located in thirty-three cities across the state; each Trial Division district office is managed by a District Defender. *See MSPD Annual Report 2023*, pp. 9-14, available at [publicdefender\\_mo\\_gov/wp-content/uploads/2023/10/FY2023-MSPD-Annual-Report\\_pdf](http://publicdefender_mo_gov/wp-content/uploads/2023/10/FY2023-MSPD-Annual-Report_pdf). (last accessed Dec. 28, 2023). As noted above, Missouri State Public Defender's Trial Division provided representation in over 86,000 felony, misdemeanor, and probation violation cases in fiscal year 2023: July 1, 2022, to June 30, 2023. *See MSPD Annual Report 2023*, p. 8, available at [publicdefender\\_mo\\_gov/wp-content/uploads/2023/10/FY2023-MSPD-Annual-Report\\_pdf](http://publicdefender_mo_gov/wp-content/uploads/2023/10/FY2023-MSPD-Annual-Report_pdf) (last accessed Dec. 28, 2023). In addition to the approved

applications in those 86,000 cases, MSPD received thousands of applications for services where the applicant was deemed not indigent.

Applications for services are received either in those individual trial offices or in a central portal maintained by MSPD. An Eligibility Coordinator supervises the review of all applications received both through the central portal and in individual trial offices. The Eligibility Coordinator provides training and supervision to all MSPD staff who make indigence determinations on eligibility policies and procedures as recommended by the 2012 audit of Missouri State Public Defender. **See Missouri State Public Defender Audit, October 2012, Report No. 2012-129**, pp. 21-29, available at [auditor\\_mo\\_gov/Press/2012-129\\_pdf](http://auditor.mo.gov/Press/2012-129_pdf) (last accessed Dec. 28, 2023).

**C. MSPD MUST DETERMINE IF AN APPLICANT IS REQUESTING SERVICES IN AN ELIGIBLE CASE AND IF THE APPLICANT IS INDIGENT AS SET OUT IN CHAPTER 600 AND TITLE 18 OF THE CODE OF STATE REGULATIONS.**

The determination of whether a person is eligible for public defender services is a two-pronged process. First, a decision is made whether the applicant's case is eligible for public defender services under *Sec. 600.042.4 RSMo Cum. Supp. 2019* and **18 CSR 10-2.010 (Definition of Eligible Cases)** (App. A-6 – A-7, A-15). A felony case would qualify for MSPD representation. *Sec. 600.042.4(1) RSMo Cum. Supp. 2019* (App. A-6). A misdemeanor would only qualify for MSPD representation if the person “is detained or charged with a misdemeanor which will probably result in confinement in the

county jail upon conviction, including appeals from a conviction in such a case, unless the prosecuting or circuit attorney has waived a jail sentence.” *Sec. 600.042.4(2) RSMo Cum. Supp. 2019* (App. A-6). A probation violation case would only qualify for MSPD representation if “it has been determined by a judge that the appointment of counsel is necessary to protect the person's due process rights under section 559.036.” *Sec. 600.042.4(3) RSMo Cum. Supp. 2019* (App. A-6).

Second, a decision is made whether the applicant is indigent. *Sec. 600.086.1* and **18 CSR 10-3.010, (Guidelines for the Determination of Indigence)** (App. A-8, A-16). That determination requires the completion of an application, signed by the applicant, that sets out in detail the information contained in **18 CSR 10-3.010**; an analysis of that information to determine if it is complete and accurate; a review of pending and resolved cases to determine if there has been previous public defender representation; and a review of pending cases to determine if the applicant has retained private counsel in other cases. *See 18 CSR 10-3.010* (App. A-16). MSPD cannot provide legal representation prior to the completion of this analysis and process. No MSPD attorney is authorized to enter an appearance until a case is deemed eligible and the applicant indigent. *See Sec. 600.086.1 - 3* and **18 CSR 10-3.010** (App. A-8, A-16).

**D. MSPD MUST DETERMINE IF THERE IS A CONFLICT OF INTEREST AND MUST FIND AVAILABLE COUNSEL BEFORE PROVIDING LEGAL REPRESENTATION.**

If the two prongs of eligibility and indigence have been satisfied, the District Office must then determine whether that office is able to provide representation to the

applicant. If a conflict of interest exists under **Rule 4-1.7** (Conflict of Interest: Current Clients)(App. A-17) or **Rule 4-1.9** (Duties to Former Clients)(App. A-27), or if the office is unable to provide counsel for the applicant because of staffing shortages, the case is referred to the Case Contracting Division of MSPD. *See MSPD Annual Report 2023*, pp. 31-32, available at [publicdefender\\_mo\\_gov/wp-content/uploads/2023/10/FY2023-MSPD-Annual-Report\\_pdf](https://publicdefender.mo.gov/wp-content/uploads/2023/10/FY2023-MSPD-Annual-Report_pdf) (last accessed Dec. 28, 2023). The Case Contracting Division recruits, screens, trains and compensates private attorneys to provide indigent defense on a contract basis as Special Public Defenders throughout all Trial Division District Offices, as well as in cases from other MSPD Divisions.

If no conflict exists and if there are sufficient staff in the District Office, an attorney from that District Office is assigned to represent the applicant; the applicant is notified of representation by that office; and an entry of appearance is filed with the Court and served upon the State. If a conflict of interest exists or if there are insufficient staff in the District Office available to provide reasonably effective assistance of counsel, the case is referred to the Case Contracting Office for assignment to a contract counsel as a Special Public Defender. Contract counsel is notified of the assignment; applicant is notified of the assignment to contract counsel; and an entry of appearance is filed with the Court and served upon the State by contract counsel notifying both that the entry is as a Special Public Defender.

Regardless of whether representation is ultimately provided by a District Office or a Special Public Defender, the assignment of counsel and appearance of counsel in court is predicated on -- and must be preceded by -- the determination of case eligibility, the



determination of indigence, and a conflict analysis to ensure assignment of conflict-free counsel.

**E. RULE 31.02 ALLOWS THE COURT TO APPOINT AN ATTORNEY FOR AN INDIGENT DEFENDANT, BUT NOT AN ATTORNEY FROM MSPD.**

The reference to indigence determination and appointment of counsel in *Rule 31.02* allows the court to exercise its authority to appoint an attorney other than a MSPD public defender to provide representation to an indigent person. *Rule 31.02(a)* provides:

(a) In all criminal cases the defendant shall have the right to appear and defend in person and by counsel. If any person charged with an offense, the conviction of which would probably result in confinement, shall be without counsel upon his first appearance before a judge, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. Upon a showing of indigency, it shall be the duty of the court to appoint counsel to represent him. If after being informed as to his rights, the defendant requests to proceed without the benefit of counsel, and the court finds that he has intelligently waived his right to have counsel, the court shall have no duty to appoint counsel. If at any stage of the proceedings it appears to the court in which the matter is then pending that because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in injustice to the defendant, the court shall then appoint counsel. Appointed counsel shall be allowed a reasonable time in which to prepare the defense.

***Rule 31.02(a)*** (App. A-12 – A-13).

This rule was adopted June 13, 1979, and became effective on January 1, 1980, prior to the amendment of *Sec. 600.086.3*. See *Rule 31.02* (adoption date) (App. A-13). The 1982 amendment to *Sec. 600.086.3* charges MSPD with the sole responsibility to initially determine indigence as it relates to MSPD representation. *Provaznik*, 708 S.W.2d at 341. MSPD’s indigence determination can be appealed by an adversely

affected litigant by the filing of a motion with the court in which the case is pending.

*Id.*; **Sec. 600.086.3. Rule 31.02** still stands, however, to allow courts to appoint any member of the bar other than an attorney employed by MSPD:

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.

*State ex rel. Missouri Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 886 (Mo. banc 2009); **Sec. 600.021.2** (App. A-4).

### **CONCLUSION**

Missouri State Public Defender cannot enter as an attorney for a defendant until MSPD completes all the above requirements. MSPD provides legal representation to indigent persons in eligible cases only after the case is deemed eligible, the applicant is deemed indigent, and a conflict-free counsel has been assigned. Those determinations are governed by Chapter 600, Title 18 of the Code of State Regulations, and **Rules 4-1.7** and **4-1.9** regarding conflict of interest. The eligibility determination process is a multi-step process that must be conducted in a thorough manner to ensure that the eligible applicant receives counsel that is conflict-free and able to provide effective assistance of counsel. Missouri State Public Defender attorneys do not assume representation of an indigent defendant after appointment by the Court, but instead are assigned to provide representation by the MSPD Director and her designees only after all the above requirements are met.

Respectfully submitted,

*/s/ Mary Fox*

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**Certificate of Compliance and Service**

I hereby certify the foregoing complies with the limitations contained in Rule 84.05(f). It was completed using Microsoft Word in double-spaced Times New Roman size 13-point font, other than headings, blockquotes, and footnotes, which are single spaced. Relying on Microsoft Word's word count feature, this brief, excluding caption, signature block and this Certificate, contains 3,868 words.

I further certify that on January 3, 2024, an electronic copy of the foregoing was sent through the Missouri e-Filing system to all counsel of record.

*/s/ Mary Fox*

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Mary Fox, MOBar #28858