IN THE SUPREME COURT OF MISSOURI

CASE NO. SC95932

STATE EX REL. JEFFREY MERRELL
Relator,

V.

THE HONORABLE R. CRAIG CARTER
Respondent.

ORIGINAL WRIT PROCEEDING
FROM THE CIRCUIT COURT OF CHRISTIAN COUNTY, MISSOURI
THE HON. R. CRAIG CARTER CIRCUIT JUDGE

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

POINTS RELIED ON

RELATOR IS NOT ENTITLED TO A WRIT OF PROHIBITION/MANDAMUS BECAUSE THE TRIAL COURT DID NOT ERR IN ORDERING RELATOR TO PAY THE COSTS OF THE SPECIAL MASTER IN THAT RESPONDENT AS CIRCUIT JUDGE HAS INHERENT AND CONSTITUTIONAL AUTHORITY TO EMPLOY NECESSARY PERSONNEL WITH WHICH TO PERFORM ITS INHERENT AND CONSTITUTIONAL FUNCTIONS AND TO FIX THE SALARY OF SUCH PERSONNEL, WITHIN REASONABLE STANDARDS, AND TO REQUIRE APPROPRIATION AND PAYMENT THEREFOR.

ARGUMENT

RELATOR IS NOT ENTITLED TO A WRIT OF PROHIBITION/MANDAMUS BECAUSE THE TRIAL COURT DID NOT ERR IN ORDERING RELATOR TO PAY THE COSTS OF THE SPECIAL MASTER IN THAT RESPONDENT AS CIRCUIT JUDGE HAS INHERENT AND CONSTITUTIONAL AUTHORITY TO EMPLOY NECESSARY PERSONNEL WITH WHICH TO PERFORM ITS INHERENT AND CONSTITUTIONAL FUNCTIONS AND TO FIX THE SALARY OF SUCH PERSONNEL, WITHIN REASONABLE STANDARDS, AND TO REQUIRE APPROPRIATION AND PAYMENT THEREFOR.

A. STANDARD OF REVIEW.

Writs of mandamus and prohibition are extraordinary remedies and are not appropriate to correct every alleged trial court error. *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576–77 (Mo. banc 1994).

Mandamus is a discretionary writ, not a writ of right. *Id.* citing, *Norval v. Whitesell*, 605 S.W.2d 789, 791 (Mo. banc 1980). Mandamus will lie only when there is a clear, unequivocal, and specific right. *Id.* citing, *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo. banc 1982). The right sought to be enforced must be clearly established and presently existing. *Id.* citing, *State ex rel. Commissioners of the State Tax Comm'n v. Schneider*, 609 S.W.2d 149, 151 (Mo. banc 1980). A writ of mandamus is not appropriate to establish a legal right, but only to compel performance of a right that already exists. *Id.* citing, *State*

ex rel. Brentwood School Dist. v. State Tax Comm'n, 589 S.W.2d 613, 614 (Mo. banc 1979).

There are generally three situations in which writs of prohibition will issue. First, prohibition will lie where there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction. *State ex rel. Noranda Aluminum, Inc. v. Rains,* 706 S.W.2d 861, 862–63 (Mo. banc 1986). A writ of prohibition will be issued to remedy a clear excess of jurisdiction or abuse of discretion such that the lower court lacks the power to act as contemplated. *Id.* Finally, departing from jurisdictional grounds, a writ of prohibition will be issued if the party can satisfy a number of conditions, often falling under the rubric of no adequate remedy by appeal. *Id.*

The third category is used in limited situations where some "absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available to respond to a trial court's order." *State ex rel. Richardson v. Randall,* 660 S.W.2d 699, 701 (Mo. banc 1983). Prohibition will lie when there is an important question of law decided erroneously that would otherwise escape review by the Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision. *Noranda,* 706 S.W.2d at 862–63. *State ex rel. Chassaing v. Mummert,* 887 S.W.2d 573, 577 (Mo. 1994).

Respondent through counsel respectfully suggests to this Honorable Court none of the examples of reasons for prohibition listed above exist in the case at bar.

B. ANALYSIS.

a. Introduction.

The Honorable R. Craig Carter used the court's inherent power to appoint a special master to review the communications between Malcolm Brian Pearce and his counsel while he is incarcerated pending trial in the Christian County, Missouri jail. These telephone calls exceeded over 6,000 communications between Mr. Pearce and his family and friends. Furthermore, more than 600 of these telephone calls included communications made by Mr. Pearce to his attorneys at their office and cell phones. Moreover, one communication included a face-to-face contact with an attorney which was required to be placed on a telephone located in the jail and which was also recorded.

Respondent's Order appointing the Hon. Judge Mark Fitzsimmons (Ret.) required Judge Fitzsimmons to sequester the communications between Mr. Pearce and his attorneys and leave available to the prosecutors all other telephone calls placed by Mr. Pearce out of the jail. The Circuit Court obviously weighed the competing interests: Mr. Pearce's interest in the effective representation of his charges by his attorneys and the jail's legitimate penological interests in assuring the safe operation of the jail.

A review of the 6,000 phone calls by Respondent would have been both time-consuming and potentially prejudicial to Mr. Pearce. The Circuit Court's Order recognizes that it was appropriate to have the phone calls reviewed by and independent person and to remove those communications between Mr. Pearce and his attorneys; but the Circuit Court also recognized that a third-party reviewer would be necessary as a matter of fairness to Mr. Pearce. If Respondent was the reviewer of the telephone calls, Respondent could have

learned of some issue between attorney and client which could have resulted in an unfair trial; either to Mr. Pearce or the state. Respondent's Order suggests Respondent believed it necessary for a fair trial that the state not have access to the communications between Mr. Pearce and his counsel. Respondent must have believed the review of the phone calls by either the court or the prosecutor's office would be prejudicial to Mr. Pearce. Accordingly, appointing a special master to aid the court in effectuating its Order was appropriate and necessary and within the inherent power of the court. Moreover, it was Relator who disclosed this discovery and placed this issue before the court by obtaining these telephone recordings. Accordingly, it was appropriate and fair for Respondent to place the expense of the special master upon Relator.

The state also suggests, even if Respondent was entitled to appoint a special master, it was not necessary because Mr. Pearce was not entitled to privileged communications with his attorney by way of telephone while he was incarcerated in the Christian County jail. The state's argument is premised upon the proposition that communication between inmate/detainee and the confidential nature thereof gives way to the public policy proposition that a correctional facility has a penological interest in monitoring the communications of the inmate/detainee with his/her attorney.

Such a proposition begs the question: if telephone communications between attorney and client in a correctional facility is not privileged, then what other communications between attorney and client are also not privileged.

The state suggests because a recording announces that the phone call is being recorded and may be monitored at any time has the effect of waiving any privilege

communication between attorney and client. But what if a correctional facility announced to inmates and attorneys that written communications between attorney and client would also be monitored? Moreover, some jails and correctional facilities are allowing inmates computer access as well as tablets for electronic communications between attorney and client. Even in-person conferences would seem to be non-privileged under Relator's proposition that jail communications on a telephone are not privileged. The state's proposition that the monitoring of jail telephone calls for a legitimate penological interest would apply to those types of communications as well.

Mr. Pearce respectfully suggests to this Honorable Court that an inmate/detainee in a correctional facility cannot properly prepare for trial if he/she cannot appropriately communicate with counsel. Because of the complex nature of the underlying charge in *State v. Malcolm Brian Pearce*, it is impractical if not impossible to communicate with Mr. Pearce and prepare for trial without the use of telephone communications. An attorney spending the requisite time to prepare for trial in a jail setting is extremely difficult and sometimes counsel and client need to communicate by mechanisms other than a face-to-face contact.

The state's proposition that Mr. Pearce is not entitled to privileged communications with his attorney by way of telephone is patently unfair and is a denial of Mr. Pearce's right to a fair trial.

b. Respondent has inherent authority to appoint a special master to review and sequester the telephone calls between attorney and client and to order a party for the payment of the special master.

It is a well settled principal that "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for the performance of their duties." *In re Peterson,* 253 U.S. 300, 312, 40 S. Ct. 543, 547 (1920). "This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." *Id.* "From the commencement of our government [this power] has been exercised by the federal courts, when sitting in equity, by appointing, either with or without the consent of the parties, special masters, auditors, examiners, and commissioners." *Id.* Whether such aid is sought is ordinarily within the discretion of the trial judge. Where the documents and other evidence are voluminous, "it is the better practice to refer the matter to a special master or commissioner than for the judge to undertake to perform the task himself." *Id.* at 313. Internal quotations omitted.

This Honorable Court has unanimously held that the Circuit Court of St. Louis County had the inherent power to appoint and fix the compensation of personnel deemed essential to the proper functioning of the Juvenile Division of that court, provided such personnel and facilities were not supplied to the court by conventional methods. *See, State ex rel. Weinstein v. St. Louis County,* 451 S.W.2d 99, 102 (Mo. 1970). And in *State v. Green*, 470 S.W.2d 571 (Mo. 1971), Chief Justice Finch noted in dissent:

> this court quoted with approval from *Noble County Council v. State ex rel. Fifer*, 234 Ind. 172, 125 N.E.2d 709, 713, as follows:
>
> 'However, the authority of the court to appoint a probation officer, fix his salary and require payment thereof, does not rest upon mere legislative fiat.

> The court has inherent and constitutional authority to employ necessary personnel with which to perform its inherent and constitutional functions and to fix the salary of such personnel, within reasonable standards, and to require appropriation and payment therefor. The necessity of such authority in the courts is grounded upon the most fundamental and far reaching considerations.
>
> …
>
> 'These mandates necessarily carry with them the right to quarters appropriate to the office and personnel adequate to perform the functions thereof. The right to appoint a necessary staff of personnel necessarily carries with it the right to have such appointees paid a salary commensurate with their responsibilities. The right cannot be made amenable to and/or denied by a county council or the legislature itself. Our courts are the bulwark, the final authority which guarantees to every individual his right to breathe free, to prosper and be secure within the framework of a constitutional government. The arm which holds the scales of justice cannot be shackled or made impotent by either restraint, circumvention or denial by another branch of that government.'

State v. Green, 470 S.W.2d 571, 578 (Mo. 1971), Finch, CJ dissenting.

In the case at bar, Respondent was presented with more than 6,000 phone calls made by defendant Pearce; over 600 of which were placed to his attorney. Respondent ordered the Honorable Mark Fitzsimmons (Ret.) to examine the phone calls and sequester those

calls placed to defense counsel. Respondent properly utilized the inherent power of the court to engage personnel to aid the Court with the examination of voluminous records. There was nothing improper and certainly nothing criminal in the Court appointing a special master and requiring the state to pay the expense of the special master.

c. Mr. Pearce is entitled to privileged communications with his attorney while incarcerated in the Christian County jail.

Relator further alleges there was no legal basis or reason for Respondent to appoint a Special Master to examine Mr. Pearce's phone calls because such phone calls were voluntarily placed after Mr. Pearce was notified that the phone calls were being recorded and were subject to monitoring at any time.

Respondent was presented evidence Relator had access to the telephone calls made by defendant from the Christian County jail to all persons including defendant's attorneys. Furthermore, if attorneys meet at the Christian County jail with defendant in a non-contact related visit, the client must communicate with the attorney via telephone through a glass window and such communication is also recorded. Mr. Pearce only complained about those phone communications occurring with his attorneys.

Respondent was also aware Defendant Pearce is being held without bond in the Christian County jail and is currently charged in four pending matters: 13AF-CR02061-02; 13AF-CR02065-02; 13AF-CR02449-02; and 14AF-CR00050-02. It is essential to Mr. Pearce's defense in these cases that he can communicate with his attorneys. The amount of evidence disclosed in these cases requires defendant and his counsel be able to communicate through means other than only face-to-face communications. To properly

prepare for his trial, defendant needs the ability to communicate unfettered with his counsel via telephonic communications.

A defendant's unfettered and private ability to consult with counsel is essential to secure the fundamental right to due process and the protections of the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984). The privacy of these communications is "crucial to this relationship." *Al Odah v. United States*, 346 F.Supp.2d 1, 10 (D.D.C. 2004).

The attorney-client privilege is to be construed broadly to encourage its fundamental policy of encouraging uninhibited communication between the client and his attorney. *State ex rel. Great American Insurance Co. v. Smith*, 574 S.W.2d 379, 383 (Mo. banc 1978). The attorney-client privilege attaches to: 1) Information transmitted by voluntary act of disclosure; 2) between a client and his lawyer; 3) in confidence; and 4) by a means which, so far as a client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purpose for which it is to be transmitted. *Id.* at 384. All four of the above elements must be present for the privilege to apply. In addition, surrounding circumstances should be considered as they indicate the existence, or nonexistence, of any one of the elements. *State v. Longo*, 789 S.W.2d 812, 815 (Mo.App. E.D. 1990).

It is too general and inaccurate to say that all communications between counsel and client are privileged. *State v. Fingers*, 564 S.W.2d 579, 582 (Mo. App 1978). To be privileged, the communication must relate to attorney-client business and not to extraneous matters. *Id. citing In re Busse's Estate*, 332 Ill.App. 258, 75 N.E.2d 36, 40(5) (1947). It is

likewise overly broad to declare that the attorney-client privilege is destroyed because the attorney-client communications were made in the presence and hearing of third persons. *Id.* There is no destruction of the privilege because of the presence of a third person if the circumstances surrounding or necessitating the presence may be such that the communication still retains its confidential character and the attending privilege. *Id. citing Jayne v. Bateman*, 191 Okl. 272, 129 P.2d 188, 191(2) (1942).

This appears to be a matter of first impression in the state of Missouri. However, the Honorable Stephen R. Bough recently addressed a similar issue in the United States District Court for the Western District of Missouri and issued an Order directing all detention facilities in the Western District to cease and desist from recording telephone calls between detainees and defense counsel unless said detention facility explicitly, has specifically and advanced permission to record such phone calls. (Respondent's Exhibit 1).

The state suggests because Mr. Pearce was notified by a recording that his phone call was being recorded and subject to monitoring vitiated the attorney-client privilege. Such a result forces Mr. Pearce to choose between not communicating with his attorney or only communicating in a face-to-face meeting with his attorney. But the state's belief that the correctional facility needs to merely notify a detainee/inmate that their communications are being recorded and subject to monitoring could apply to any type of communication between attorney and client when the client is incarcerated in a correctional facility. There are many ways for attorneys and clients to communicate which would include: in person communications, electronic communications by way of computers or tablets, or even written correspondence through the Postal Service.

The foundation of effective representation for any client is appropriate communication between attorney and client. Mr. Pearce is being held without bond in the Christian County jail and the only way to effectively prepare for trial is to have all forms of communication available without the threat of the state being able to review those communications. If counsel is unable to communicate with client, the effect would naturally be the extension of the life of cases so that the case can be properly prepared. The discovery in the cases affecting Mr. Pearce is voluminous. Relator's suggestion that Mr. Pearce must choose not communicate so the state is unable to discern his strategies with his attorney ensures that Mr. Pearce will not receive effective representation by his attorney thereby depriving him of a fair trial.

CONCLUSION

For the foregoing reasons, this Honorable Court should quash its preliminary writ, and allow the Circuit Court's Order directing relator to pay the special master's fees to stand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 84.06(c)

The undersigned hereby certifies that Brief of Respondent contains the information required by Missouri Supreme Court Rule 55.03 and that it complies with Rule 84.06(b) in that it contains 2,882 words as indicated by the word processing program used to prepare such Brief.

/s/ Jason Coatney
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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing Respondent's Brief was electronically filed with the Supreme Court this 29th day of December, 2016 for electronic transmission to all interested parties to:

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