

No. SC90222

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IN THE MISSOURI SUPREME COURT

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STATE OF MISSOURI *ex. rel.* SKYLAR M. MANION,

Relator,

v.

THE HONORABLE R. BRENT ELLIOTT,

Respondent.

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ORIGINAL PROCEEDING IN PROHIBITION

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ON PRELIMINARY ORDER IN PROHIBITION FROM THE SUPREME  
COURT OF MISSOURI TO THE HONORABLE R. BRENT ELLIOTT,  
CIRCUIT JUDGE OF THE CIRCUIT COURT OF DAVIESS COUNTY,  
MISSOURI

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BRIEF OF RELATOR SKYLAR M. MANION

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## TABLE OF CONTENTS

|                                    |    |
|------------------------------------|----|
| TABLE OF CONTENTS .....            | i  |
| TABLE OF AUTHORITIES .....         | ii |
| JURISDICTIONAL STATEMENT .....     | 1  |
| STATEMENT OF FACTS .....           | 2  |
| POINT RELIED ON .....              | 4  |
| ARGUMENT .....                     | 5  |
| CONCLUSION .....                   | 11 |
| CERTIFICATE OF SERVICE .....       | 13 |
| CERTIFICATE OF COMPLIANCE .....    | 14 |
| APPENDIX - TABLE OF CONTENTS ..... | 15 |

## TABLE OF AUTHORITIES

### CASES

|  |          |
|--|----------|
| <u>State ex rel. Delgado v. Merrell</u> , 86 S.W.3d 468, 470 (Mo.App.SD 2002)    | 5        |
| <u>State ex rel. Stickelber v. Nixon</u> , 54 S.W.3d 219, 221 (Mo.App.WD 2001)   | 5        |
| <u>Elrod v. Stewart</u> , 163 S.W.3d 587, 589 (Mo.App.WD 2005)                   | 5        |
| <u>State ex rel. Cohen v. Riley</u> , 994 S.W.2d 546, 547 (Mo.Banc. 1999)        | 5        |
| <u>Breazeale v. Kemna</u> , 854 S.W.2d 631, 632 (Mo.App.WD 1993)                 | 6        |
| <u>State ex rel. Mountjoy v. Bonacker</u> , 831 S.W.2d 241, 244 (Mo.App.SD 1992) | 6        |
| <u>State ex rel. Raack v. Kohn</u> , 720 S.W.2d 941, 943 (Mo.Banc. 1986)         | 6        |
| <u>State ex rel. Horton v. House</u> , 646 S.W.2d 91, 93 (Mo.banc. 1983)         | 6        |
| <u>State ex rel. B C C v. Conley</u> , 568 S.W.2d 605, 608                       | 7,10     |
| (Mo.App.WD 1978)   |          |
| <u>State ex rel. Cochran v. Andrews</u> , 799 S.W.2d 919 (Mo.App.WD 1990)        | 7,8,9,10 |
| <u>Atteberry v. Hannibal Reg. Hosp.</u> , 926 S.W.2d 58 (Mo.App.ED 1996)         | 7        |
| <u>State v. Sapp</u> , 55 S.W.3d 382, 383 (Mo.App.WD 2001)                       | 8        |
| <u>State v. Murphy</u> , 787 S.W.2d 794, 797 (Mo.App.ED 1990)                    | 8        |
| <u>Moore v. Stamps</u> , 507 S.W.2d 939 (Mo.App.ED 1974)                         | 8        |

### STATUTES & CONSTITUTIONAL PROVISIONS

|   |   |
|---|---|
| Section 555.036(4), RSMo.                   | 9 |
| Missouri Constitution, Article V, Section 4 | 1 |

### SUPREME COURT RULES

|                                   |            |
|-----------------------------------|------------|
| Missouri Supreme Court Rule 84.24 | 1          |
| Missouri Supreme Court Rule 32.07 | 8          |
| Missouri Supreme Court Rule 97    | 1          |
| Missouri Supreme Court Rule 51.05 | 4,5,8,9,10 |

## JURISDICTIONAL STATEMENT

Relator Skylar M. Manion has brought this original proceeding seeking a Writ of Prohibition pursuant to Missouri Supreme Court Rule 84.24 and Rule 97. Prohibition is sought to prohibit the Respondent from taking any action in Relator's probation violation case except to grant Relator's request for a change of judge.

Relator filed a Petition for Writ of Prohibition on June 19, 2009. On July 14, 2009, this Court issued its Preliminary Writ of Prohibition commanding Respondent to take no further action until further order of this Court. Respondent's Return to Relator's Petition for Writ of Prohibition was filed August 13, 2009.

This Court has jurisdiction because this proceeding is brought seeking a remedial writ and pursuant to Article V, Section 4, of the Missouri Constitution, the Missouri Supreme Court is authorized to hear and issue Writs of Prohibition.

## STATEMENT OF FACTS

Skylar M. Manion plead guilty to three counts of arson and one count of second degree attempted arson on April 4, 2006. (Appendix A4) He was 17 years old at the time. A sentencing hearing was conducted October 3, 2006, and the then presiding Circuit Judge of Daviess County, the Honorable Stephen K. Griffin, suspended the imposition of any sentence and placed Skylar M. Manion on probation for five years. (Appendix A5) The Honorable Stephen K. Griffin subsequently retired and his vacancy was ultimately filled by the Respondent, the Honorable R. Brent Elliott. (Admitted in Paragraph 4 of Respondent's Return to Relator's Petition).

On March 18, 2008, Skylar M. Manion was found to have violated the terms of his probation and lost the benefit of the suspended imposition of sentence. The Honorable Warren McElwain, who was presiding at the time, sentenced Relator to 7 years on each arson count and 5 years on the attempted arson count, all to run consecutive for a total prison sentence of 25 years. That sentence was suspended with Judge McElwain placing Skylar M. Manion on a new five-year term of probation. (Appendix A7)

On March 31, 2009, Relator was arrested and no bond was allowed. (Appendix A8) On April 6, 2009, the Prosecuting Attorney for Daviess County filed another Motion to Revoke the Probation of the Relator. (Appendix A11) At this time, the

Honorable Judge R. Brent Elliott was presiding over Relator's case, having filled the vacancy created upon the retirement of Judge Griffin.

Twenty-two days after the Motion to Revoke Probation was filed, the Relator filed his Motion for Change of Judge and Notice of Hearing. The Respondent subsequently denied the Relator's request for a change of judge by docket entry and set the matter for hearing. (Appendix A9)

At no time during the entire course of the original criminal prosecution nor subsequent probation proceedings had Skylar M. Manion previously requested a change of judge. (Appendix A1-A10)<sup>1</sup>

Relator thereafter filed his Petition in Prohibition in the Missouri Court of Appeals, Western District. The Western District denied Relator's Petition without opinion on June 3, 2009. (Admitted in Paragraph 10 of Respondent's Return).

Relator filed his Petition for Writ of Prohibition, with Suggestions in support thereof, with this Court on June 19, 2009. Respondent's Suggestions in opposition were filed July 7, 2009. On July 14, 2009, this Court entered its Preliminary Writ of Prohibition directed to the Respondent. (Appendix A18)

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<sup>1</sup>All of the foregoing facts have been admitted by Respondent in Respondent's Return to Relator's Petition for Writ of Prohibition filed with this Court on August 13, 2009.

### **POINT RELIED ON**

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION IN THE UNDERLYING PROBATION CASE, BECAUSE THE RESPONDENT IS WITHOUT JURISDICTION TO TAKE ANY ACTION EXCEPT TO GRANT A CHANGE OF JUDGE, IN THAT THE RELATOR TIMELY REQUESTED A CHANGE OF JUDGE WHICH THE RESPONDENT SHOULD HAVE SUSTAINED AS A MATTER OF RIGHT PURSUANT TO MISSOURI SUPREME COURT 51.05.**

*State ex rel. Cochran v. Andrews*, 799 S.W.2d 919 (Mo.App.WD 1990)

*State ex rel. Horton v. House*, 646 S.W.2d 91 (Mo.banc 1983)

*State ex rel. B\_\_\_ C\_\_\_ C\_\_\_ v. Conley*, 568 S.W.2d 605 (Mo.App.WD 1978)

Missouri Supreme Court Rule 51.05

## ARGUMENT

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY ACTION IN THE UNDERLYING PROBATION CASE, BECAUSE THE RESPONDENT IS WITHOUT JURISDICTION TO TAKE ANY ACTION EXCEPT TO GRANT A CHANGE OF JUDGE, IN THAT THE RELATOR TIMELY REQUESTED A CHANGE OF JUDGE WHICH THE RESPONDENT SHOULD HAVE SUSTAINED AS A MATTER OF RIGHT PURSUANT TO MISSOURI SUPREME COURT 51.05.**

Relator seeks to have the Preliminary Writ of Prohibition previously issued by this Court made absolute. A Writ of Prohibition is appropriate when a judge has improperly denied a Request for Change of Judge. *State ex rel. Delgado v. Merrell*, 86 S.W.3d 468, 470 (Mo.App.SD 2002). On review the Relator must establish that the Respondent acted in excess of his jurisdiction. *State ex rel. Stickelber v. Nixon*, 54 S.W.3d 219, 221 (Mo.App.WD 2001). When a change of judge is proper and timely, the trial court has no discretion and should sustain the motion. A trial judge has no authority to do anything else. *Elrod v. Stewart*, 163 S.W.3d 587, 589 (Mo.App.WD 2005). In *State ex rel. Cohen v. Riley*, 994 S.W.2d 546, 547 (Mo.Banc. 1999), this Court held, that upon “*the filing of a proper, timely application under the rule, the court has no jurisdiction to do anything other than to grant the application and transfer the cause.*”



A court's denial of a change of judge motion should be carefully scrutinized bearing in mind certain fundamental legal principles. It should be recognized that in both criminal and civil cases, the right to disqualify a judge without cause, "*is a keystone to our judicial system.*" *Breazeale v. Kemna*, 854 S.W.2d 631, 632 (Mo.App.WD 1993). Missouri courts have recognized that it is important to our system of justice that litigants feel as though they have a neutral judge, and additionally it is also necessary to instill public confidence. *State ex rel. Mountjoy v. Bonacker*, 831 S.W.2d 241, 244 (Mo.App.SD 1992), *State ex rel. Raack v. Kohn*, 720 S.W.2d 941, 943 (Mo.Banc. 1986). Thus, it is not surprising that, "*our courts therefore adhere to a rule of liberal construction in favor of the right to disqualify.*" *State ex rel. Horton v. House*, 646 S.W.2d 91, 93 (Mo.banc. 1983).

Relator suggests that the Missouri concept of liberal construction in favor of disqualifying judges should be particularly applicable in cases such as this where a party's substantial rights and liberties are at stake and that there would be no prejudice or undue delay by granting the request. Put another way, it can be asked what is to be gained by the Respondent denying Relator's motion for change of judge? The only plausible benefit would be a claim ostensibly rooted in legal policy. However, this pales in comparison to the right of one who faces a loss of liberty and freedom to have his case adjudicated by a judge he feels is impartial. *State ex rel. B\_\_\_ C\_\_\_ C\_\_\_ v.*

*Conley*, 568 S.W.2d 605, 608 (Mo.App.WD 1978).

The right of a probationer to a change of judge when a new judge inherits his case has long been recognized. *Cochran v. Andrews*, 799 S.W.2d 919 (Mo.App.WD 1990), *State ex rel. Horton v. House*, 646 S.W.2d 91 (Mo.banc. 1983). In *Horton*, the Relator was on probation in a Circuit Court which thereafter split into two circuits with a new judge attempting to hear the Relator's probation revocation case. The Respondent attempted to argue that the probation revocation was mere continuation of the earlier underlying proceeding and thus no right to disqualify existed in the probation case. However, this Court recognized for the Relator, "*that means that he will never have had any opportunity to disqualify a judge who will pass upon whether relator should be imprisoned.*" At 92. This Court went on to cite the rule of liberal construction in favor of the right to disqualify, while recognizing such right to be one of the "*keystones*" of our judicial system. At 93.

Even though the right of a party to one change of judge is a highly prized right and should be liberally granted, the requesting party must still comply with the appropriate procedures set forth in the applicable rule and in a timely manner. *Atteberry v. Hannibal Reg. Hosp.*, 926 S.W.2d 58 (Mo.App.ED 1996). There has been no claim on behalf of the Respondent that Relator's motion for change of judge was not in proper form, but only that it was not filed timely. Relator acknowledges

that if Missouri Supreme Court Rule 32.07 governing criminal proceedings is applicable, then his request was not timely. Nonetheless, probation revocation hearings are not criminal proceedings. *Moore v. Stamps*, 507 S.W.2d 939, 949 (Mo. 1974), *State v. Sapp*, 55 S.W.3d 382, 383 (Mo.App.WD 2001). It has been stated, “A probation revocation hearing is civil in nature in that a defendant is not entitled to the full panoply of rights that he has in a criminal trial.” *State v. Murphy*, 787 S.W.2d 794, 797 (Mo.App.ED 1990), Judge Crandall concurring. Indeed, in *Cochran* at 923, the Western District specifically found that Missouri Supreme Court Rule 32.07 was not applicable to probation proceedings.

Missouri Supreme Court Rule 51.05 is the applicable rule. Subsection (b) provides, “*The application must be filed within 60 days from service of process or 30 days from the designation of the trial judge, whichever time is longer.*” Accordingly, Skylar M. Manion had at least 30 days to request a new judge be assigned to his case. The only plausible issue may be a question of when that time began.

Before any probation may be revoked, the process requires, at a minimum, some written notice of the alleged violations and notice of intent to conduct a hearing be provided to a probationer. *Moore v. Stamps*, 507 S.W.2d 939 (Mo.App.ED 1974). In *Cochran*, at 922, the Western District held, “*Before a court can revoke probation, a motion must be filed to invoke the court’s jurisdiction to revoke probationer’s*

*probationary status*”. Section 555.036(4), RSMo. statutorily provides the court shall not revoke probation without notice and opportunity for a hearing. Skylar M. Manion requested a change of judge within 30 days of being arrested and a motion to revoke being filed by the State. It was not until this time that any case or controversy existed with regards to Relator’s probationary status and at no time prior was he ever in jeopardy of his probationary status changing. This would not have occurred until such time as Relator was arrested or a motion to revoke his probation was filed with the court. Either way, the Relator filed his request for change of judge within 30 days pursuant to Missouri Supreme Court Rule 51.05.

The Western District Court of Appeals for the State of Missouri has previously addressed a strikingly similar situation in *State ex rel. Cochran v. Andrews*, 799 S.W.2d 919 (Mo.App.WD 1990). In *Cochran*, the respondent judge replaced a retired judge in the Fourth Judicial Circuit. Respondent shortly thereafter called in probationers for a “probation review”, but approximately ten months later Relator was alleged to have violated probation. The Relator thereafter requested a change of judge which the Respondent denied. In granting the writ of prohibition, the court specifically found, “*Rule 51.05 applied when the state filed its motion to revoke.*” The court rejected Respondent’s claim that the 30 day time frame to request a change of judge started when Respondent took office or conducted a probationary status review,

recognizing that no case or controversy existed in the court at that time. Accordingly, the time limitations of Rule 51.05 were not triggered until the motion to revoke was filed. *Cochran* remains good law and should continue to be followed in the State of Missouri.

Contrary to the specific holding of *Cochran*, Respondent now argues Missouri Supreme Court Rule 51.05 is not applicable because a probation revocation is not a “civil action” within the meaning of Rule 51.05. This Court has recognized in determining whether a case is a “civil action”, that term should not be “*miserly construed*”, but rather it should be broadly interpreted. “*The consummate test appears to be rooted in basic and fundamental concepts of right and fairness.*” *Conley* At 608. The court later went on to recognize that adopting a narrow construction of the term “civil action” as used in Rule 51.05 “*makes a mockery and a farce of the fundamental right to have matters affecting one’s liberty and freedom adjudicated by an impartial judge.*” *Conley*, At 609. It seems abundantly clear that Rule 51.05 is applicable to probation revocation proceedings which are civil actions.

## CONCLUSION

Skylar M. Manion is a young man who is facing the very real possibility of spending the next many years of his life in prison. For reasons that the Relator need not disclose, he desires another judge to determine whether he has violated probation and any subsequent consequences. Twenty-two days after the Motion to Revoke Probation was filed, the Relator filed for a change of judge. It cannot reasonably be argued that if granted any party would be prejudiced or that the case would be unduly delayed. It does seem manifestly unfair that Relator's future is to be decided by a judge who has inherited the case upon a prior judge's retirement when Relator has timely requested a different judge be appointed to his case.

The right to disqualify the judge is a fundamental right of persons involved in the Missouri judicial system. It is a right afforded to both civil and criminal litigants that assures fairness in individual cases and instills confidence in the legal system. Accordingly, the right to disqualify a judge should be liberally construed particularly when timely application is made and no prejudice would be involved.

Because the Relator timely filed his written Request for Change of Judge, such request should have been granted by the Respondent, and the Respondent should have sustained the motion and taken no further action on the Relator's case except to

sustain Relator's request to appoint a new judge. Accordingly, this Court's preliminary writ of prohibition should be made absolute and a new judge assigned to hear Relator's probation violation case.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the printed brief and one (1) copy of the disk required by Rule 84.06(g) have been mailed on the \_\_\_\_ day of September, 2009, to:

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COMPLIANCE WITH RULE 84.06(c)

The undersigned hereby certifies that Relator's Brief contains the information required by Rule 55.03, that the Brief complies with the limitations contained in Rule 84.06(b) in that Relator's Brief contains 2,642 words, as indicated by the word count of the word processing system used to prepare the Brief.

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