C8-85-1433

STATE OF MINNESOTA

IN SUPREME COURT

In the Matter of the Petition of the Board of Public Defense and the State Public Defender for an Emergency Order Addressing the Crisis in Public Defense

Supplemental Memorandum

In an Order dated September 12, 2003, the Court requested that petitioners provide a supplemental memorandum addressing several questions posed in the order and stating in detail the specific relief requested in its petition to this Court, and how such relief may be implemented. The Order also requests that petitioners estimate the savings that would be achieved in public defender resources were the petition granted.

Introduction.

Public Defenders have presented to this Court a petition that is founded upon two overarching principles. The first of these is the framework crafted by this Court within which the public defense system does its work. The elements of that framework are that public defense services are vital to the criminal justice system, the services provided by public defenders must be of good quality, and the public defense system is

unable to control the number of cases it must handle. The Court has also acknowledged that the fiscal resources of the public defense system are not commensurate with its responsibilities. The second principle is that, due to the combination of factors set forth in the petition, the ability of the public defense system to provide its vital services at the appropriate level of quality has been compromised.

It is within the context of this Court's stewardship over the criminal justice system and, in effect, over the provision of public defense services, that petitioners have attempted to address the crisis. Petitioners have done so by proposing measures that fit within the framework of the public defense system's obligations. If adopted, these measures will ease the crisis by reducing the caseload pressures on public defenders. They will not "save" time for public defenders, in the sense that they will permit them to work fewer hours. But these measures will allow them to use that time to provide representation of appropriate quality to each individual client.

Presumptive Continuances.

- **Does the proposal apply to all criminal and juvenile cases?**

The proposal applies to all criminal and juvenile cases, at any stage of the proceedings, where the client is not in the physical custody of the state. A broad, bright-line presumption is requested for two reasons. First, there

are too many variables to make it practical to segregate out particular situations where the presumption would not apply. Instead, the presumption can be rebutted based upon the circumstances in a given case.

Second, experience has taught that some district judges place an inappropriate level of emphasis upon their docket concerns, and too little emphasis upon the ability of the public defender to provide appropriate representation in a given case. The concern that the criminal justice system has placed undue emphasis on pushing cases through the system, rather than upon the quality of the process, is not limited to that expressed by public defenders. In the context of discussing the advent of problem-solving courts, such as drug court and mental health court, Chief Justice Blatz noted:

> I think the innovation that we're seeing now is a result of judges processing cases like a vegetable factory. Instead of cans of peas, you've got cases. You just move 'em, move 'em, move 'em. One of my colleagues on the bench said: "You know, I feel like I work for McJustice: we sure aren't good for you, but we are fast."[1]

The pressure to push cases through the justice system can only be addressed through a presumption of the nature requested, backed by an order of the Supreme Court.

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[1] Symposium, *"What is a Traditional Judge Anyway?" Problem Solving in the state courts*, 84 Judicature 80 (Sept-Oct. 2000).

- **Would the presumption apply to all requests for continuances, or would there be limitations based on timing of the request (e.g., day or eve-of-trial requests), length of continuance requested or multiple continuances requested in the same case?**

Yes, for the reasons noted above. The district court would consider case relevant factors, including those articulated in the question, in determining whether the presumption had been rebutted.

- **Would continuance requests require a motion, the opportunity to respond, and a determination by the district court judge?**

Yes. The procedure by which continuances are requested would not change from current practice. In considering the request, the district court would apply the presumption. The motion, any response by the state, and the court's order should be made either in writing or orally on the record.

- **Would continuance requests subject to the presumption be screened by the Chief Public Defender or in some other fashion to prevent abuse?**

A decision by an individual lawyer to request a continuance would not be screened by the Chief Public Defender. The public defense system has hundreds of lawyers, tens of thousands of cases, and enormous geographic scope. These conditions do not make it practical for Chief Public Defenders,

who have their own, often substantial, caseloads, to provide case-by-case review and consultation each time a lawyer thinks a continuance is necessary.

Petitioners recognize that the Court has an institutional concern that all elements of the criminal justice system – prosecutors, district judges, and public defenders – work to their fullest capacity to fulfill their separate responsibilities. The State Public Defender and the Chief Public Defenders will provide guidelines for requesting continuances and will supervise their lawyers to assure that these are complied with.

- **What standard should apply to overcome the presumption?**

Petitioners propose the following standard for determining whether the continuance presumption has been overcome: Are the circumstances such that a continuance will cause undue prejudice to the administration of justice in that case?[2] If the district court concludes that, based upon the totality of the circumstances, the answer is yes, the presumption is rebutted and the court can deny the continuance. The district court's findings and its legal analysis should be stated in a written order or orally on the record.

- **Is it fair to assume that the proposed continuance presumption will generate the intended savings only if it results in the delay of a**

[2] This standard has been applied in at least one other situation. The prosecutor must establish "undue prejudice" due to delay in order to bar an otherwise justified retrial. *Hoagland v. State,* 518 N.W.2d 531 (Minn. 1994).

significant number of cases, and if so, how do you see the resulting case backlog being cleared?

If this presumption is put into place, and if all other factors remain the same, a backlog of cases will develop. Petitioners suggest, however, that if this presumption is implemented, all other factors would not inevitably remain the same. A case backlog could be addressed by the increased use of diversion programs and/or the creation or expansion of payables lists. These tools would address many of the low-level misdemeanor cases that would constitute the bulk of backlogged cases. On a policy level, the type of reforms contemplated in HF1229 during the last legislative session would, if enacted, meaningfully reduce any case backlog.[3]

Petitioners share a concern about backlogged cases. They believe, however, that the greatest threat to the criminal justice system is not increased delay. Instead, it is the diluting of resources needed to provide an adequate and appropriate level of attention to each individual case by public defenders, prosecutors, judges and probation officers. Having an efficient criminal justice system is important for everyone. But if efficiency reduces effectiveness to the point that defendants face a "McJustice" system where

[3] HF1229 reduced some driving related offenses, such as careless driving, failure to provide proof of insurance, and driving after revocation, to petty misdemeanors. It did the same for a variety of low-level property offenses.

"we sure aren't good for you, but we are fast," then concerns about due process must come ahead of concerns about efficiency. What is ultimately at issue in the petition is whether defendants receive representation of a quality that is required by the constitution and desired by this Court, or "McJustice."

• **Savings if implemented.**

The circumstances faced by public defenders vary from lawyer to lawyer, and each lawyer's personal circumstances vary from week to week, depending on the number of cases they are assigned and the nature of those cases. Because of this, it is particularly difficult to quantify savings in regard to the continuance presumption. As noted, time savings would permit existing public defender staff to spend more time on the cases of their individual clients.

Limitation on Public Defender Appointments in CHIPS Cases.

• **Does the district court have the authority to appoint, at public expense, a non-public defender to represent individuals who have the statutory right to court-appointed counsel, and if so, what governmental entity would be responsible for payment?**

Yes. The district court is empowered in child protection cases to appoint counsel at the expense of the county. Minn. Stat. § 260C.331, subd.

3(d). In addition, the Supreme Court has used its supervisory powers to require that district courts appoint counsel to indigents in child support contempt cases where a real possibility of incarceration exists, *Cox v. Slama*, 355 N.W.2d 401 (Minn. 1984), and in paternity actions. *Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn. 1979). In both of these case types, the cost of appointed counsel was generally borne by the county.

• **In what percentage of cases, and at what point in the proceedings, does the appointment of a single public defender to represent multiple parties create an actual conflict of interest?**

The percentage of cases in which the appointment limitation would apply is difficult to gauge. At this point, public defenders provide 1.7 lawyers for each CHIPS filing in district court.[4] In light of this, petitioners believe that limiting public defender appointments in CHIPS cases would have meaningful benefit. An estimate of this benefit is discussed below.

If the question is whether there can be a broadly applicable rule or policy that joint representation in CHIPS cases is permissible until the CHIPS litigation reaches a particular point, the answer is no. There is no practical boundary line between what is appropriate representation and what

[4] It should be noted that more than 40 percent of CHIPS cases arise in Hennepin County. Because that county supplements the cost of public defense services, this limitation would not apply in Hennepin County cases.

is conflicted representation that can be broadly applied to CHIPS cases because circumstances case-to-case are too variable. For example, if domestic abuse is a family problem, or if the individuals entitled to counsel immediately disagree about an issue relevant to the case, a conflict will assumedly be evident at the point that counsel is normally appointed. There are also cases where the individuals entitled to counsel are in agreement initially but disagree as the process moves forward – about measures appropriate to address the concerns of the state, for example.

In considering this problem, it is important to recognize that joint representation is not a good practice. Indeed, in criminal cases this Court has stated: "We must express again our disapproval of joint representation and again stress the attendant dangers it adds to effective representation by counsel." *State v. Olsen*, 258 N.W.2d 898, 905 (Minn. 1977). In light of this, joint representation in criminal cases is permitted only after a litany of warnings and waivers. Minn. R. Crim. P. 17.03, subd. 5; *see also Mercer v. State*, 290 N.W.2d 623, 625 (Minn. 1980) (discussing waiver of conflict). In effect, what the criminal cases and rule reflect is that joint representation is a mistake that properly advised individuals are permitted to make. Importing the ability to make that mistake into CHIPS cases, which are often longer-lived than criminal cases, is not a good idea.

• **Savings if implemented.**

Plaintiffs estimate that adopting a one-public defender per CHIPS case policy would result in a reduction of 11,925 units annually.

Pre-Petition Screening in CHIPS Cases.

• **What does pre-petition screening entail, and to what extent are county child protection agencies involved?**

Pre-petition screening is an alternative response to CHIPS matters that uses the court system as the last resort, except when substantial child endangerment is asserted. The child protection agency must be intimately involved in this process.

The use of alternative responses is authorized by Minn. Stat. § 626.5551. That provision permits counties to establish a program that uses alternative responses to reports of child maltreatment, except in cases involving substantial child endangerment.[5] An alternative response program is defined as:

> a voluntary program on the part of the family, which may include a family assessment and services approach under which the local welfare agency assesses the risk of abuse and neglect and the service needs of the family and arranges for appropriate

[5] Substantial child endangerment is a term of art defined in § 626.5551, subd. 2(b).

services, diversions, referral for services or other responses identified in the plan under subdivision 4.[6]

Minn. Stat. § 626.5551, subd. 1(b).

A successful example of a pre-petition screening/alternative response program is in place in Olmsted County. Reports from Olmsted County Child and Family Services reflect that when the agency receives a child maltreatment report it applies a screening protocol and makes both a safety assessment and an assessment of family needs and strengths.[7] It limits the "traditional approach" to cases involving children at the highest level of risk. For children at lesser risk levels, it takes a "best practices" approach emphasizing family group decision making, strength based practice, specialized services, and outcomes.[8] Family decision making is a process "that asks a family to weigh the risk factors and participate in the development of a plan that builds safety for a child."[9]

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[6] Subdivision 4 refers to the county community service plan required by Minn. Stat. § 256E.09.

[7] Report entitled: Responding to Reports of Child Maltreatment & Domestic Violence, Olmsted County Children's Justice Initiative, Feb. 12, 2002, p. 4-5, 8.

[8] *Id.* at 6.

[9] *Id.* at 18.

The evidence that a properly implemented plan works to reduce court cases is powerful. Olmsted County Child and Family Services reported that in 2001 the agency received 1450 child maltreatment reports. Through the combination of responses noted, only 62 CHIPS and 17 TPR were filed.[10]

- **How many counties have implemented pre-petition screening for CHIPS cases?**

Petitioners are aware of pre-petition screening programs in Dakota, Scott, Carver and Goodhue Counties in the First District; Olmsted in the Third District; the Fourth District; Nicollet County in the Fifth District; Carlton County in the Sixth District; Chippewa, Kandiyohi and Yellow Medicine Counties in the Eighth District; and Kanabec in the Tenth District.

- **Would a judicial requirement of pre-petition screening violate the constitutional separation of powers?**

If implemented, the order would require that district court administrators review non-emergency CHIPS petitions and not accept for filing a petition that did not contain an assertion that the case had been subject to pre-petition screening.[11] Pre-petition screening is the use of an

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[10] *Id.* at 13.

[11] An alternative would be to have the petition reviewed by the court, as already required in cases filed by some petitioners. *See* Minn. R. Juv. P. 70.02, subd. 2(b)(4).

alternative response program as defined by Minn. Stat. § 626.5551, subd. 1(b). An emergency filing would be a case where substantial child endangerment existed, as that term is defined by Minn. Stat. § 626.5551, subd. 2(b).

Petitioners respectfully submit that such an order would not violate the constitutional separation of powers. This conclusion is based upon several reasons. The relief requested is procedural, not substantive, in nature. The Court has the inherent power to address procedural matters and, in addition, has been empowered by the legislature to do so in juvenile cases. The relief requested is comparable to CHIPS petition screening practices already in place in the juvenile rules and in the statutes. Finally, this Court has fostered innovative alternatives to the litigation model of dispute resolution.

It is clear that determination of procedural matters is a judicial function.[12] The Court "has the primary responsibility under the separation of powers doctrine to regulate matters of trial and appellate procedure."[13] Complementing the Court's broad inherent powers to regulate judicial

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[12] *State v. Johnson.* 514 N.W.2d 551, 554 (Minn. 1994).

[13] *Welfare of J.R., Jr.*, 655 N.W.2d 1, 3 (Minn. 2003); *State v. Lindsey*, 632 N.W.2d 652, 658 (Minn.2001); *State v. Olson*, 482 N.W.2d 212, 215 (Minn.1992).

procedure, Minn. Stat. § 480.0595 explicitly empowers the court to "promulgate rules to regulate the pleadings, practice, procedure and the forms thereof in juvenile proceedings in all juvenile courts of the state."[14]

In determining whether an issue is substantive or procedural, this Court recognizes substantive law as that which creates, defines, and regulates rights, whereas "adjective or remedial" (procedural) law prescribes methods of enforcing the rights or obtaining redress for their invasion.[15] The proposed requirement would not affect the ability of child protection agencies to act in child maltreatment cases. The order would limit judicial enforcement in non-emergency CHIPS filings to those cases where the petitioner asserts that pre-petition screening – in other words an "alternative response" process of a type the legislature has explicitly approved of – has been attempted first.

This limitation of the use of the Court's enforcement powers is functionally similar to requirements it already imposes on some CHIPS petitioners. The juvenile rules require district courts to review CHIPS petitions within three days of filing when the petitioner is someone other

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[14] This authorization is both broader, and far less conditional, than the legislative authorization to the Court to create rules of criminal procedure. Minn. Stat. § 480.059.

[15] *Meagher v. Kavli*, 251 Minn. 477, 488, 88 N.W.2d 871, 879-80 (1958).

than a county attorney or an agent of the Commissioner of Human Services.[16] The court must determine whether the facts asserted fail to constitute a prima facie CHIPS case, whether the petition's purpose is to modify custody between parents, and whether other information required by the rules is missing.[17] In any of these circumstances, the court "shall not allow a petition to proceed."[18]

Interestingly, the legislature has imposed a comparable responsibility on district court administrators. The administrator must also screen CHIPS petitions when the petitioner is someone other than a county attorney or an agent of the Commissioner of Human Services.[19] The court administrator can reject the petition if the petitioner has not asserted that he/she has first contacted the responsible social services agency.[20]

The innovation in addressing CHIPS cases fostered by the legislature, and embraced by Olmsted and other Counties, is not unlike the innovation

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[16] Minn. R. Juv. P. 70.02, subd. 2(b)(4).

[17] *Id.*

[18] *Id.*

[19] Minn. Stat. § 260C.141, subd. 1(b).

[20] *Id.*

this Court has fostered in other areas of the law. This Court has used its rule-making powers to press the development of alternatives to the traditional litigation model in civil and family law cases.[21]

In sum, the Court's inherent and express authority to make rules of juvenile procedure permits it to issue the requested order without violating separation of powers. Such an order would preserve prosecutorial and judicial resources, as well as public defender resources, for use in cases where an emergency exists, or where pre-screening has been unsuccessful.

- **Savings if implemented.**

The reduction in cases is difficult to estimate in regard to CHIPS pre-petition screening. The Olmsted County experience reflects a substantial reduction in the number of CHIPS court filings based upon the adoption of a pre-petition screening protocol. Because the resources required for CHIPS cases are comparatively great, petitioners believe that there would be a meaningful reduction in case units where pre-petition screening of non-emergency cases was required before litigation would be permitted.

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[21] Minn. R. Gen. Pract. 114.01 (all civil cases are subject to Alternative Dispute Resolution (ADR) processes, with some enumerated exceptions); Family Court Rule 310.01 (all family court cases, with enumerated exceptions, subject to ADR).

Respectfully Submitted by:

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