

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 12-0182

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EMILY BLODGETT

Petitioner,

-vs-

JUSTICE COURT, MISSOULA  
COUNTY, TOWNSHIP NO. 2,  
JUDGE KAREN A. ORZECH,  
PRESIDING,

Respondent.

FILED

MAY 29 2012

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

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JUDGE KAREN A. ORZECH'S RESPONSE TO PETITION FOR WRIT  
OF SUPERVISORY CONTROL

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In Compliance with this Court's Order of March 21, 2012, Respondent, Judge Karen A. Orzech, by and through her counsel, Shawn Thomas, Deputy Missoula County Attorney, and submits this response to Petitioner's Petition For Writ of Supervisory Control directed to the Justice Court, Missoula County, Township No. 2, Judge Karen A. Orzech, Presiding.

### **FACTS**

On August 11, 2011, Petitioner Emily Francis Blodgett was issued a Notice to Appear for a charge of Minor in Possession of Alcohol, a third or subsequent offense, in violation of Mont. Code Ann. § 45-5-624 (2011). The Notice to Appear was filed in the Justice Court of Missoula County, and was assigned to Department number two - Judge Orzech. Petitioner made her initial appearance and pled not guilty on September 2, 2011. After rejecting a plea agreement in Petitioner's case on December 22, 2011, Judge Orzech set the case for trial on February 27, 2012 in order to protect Petitioner's right to a speedy trial. Coincidentally, another case of Judge Orzech's had a speedy trial deadline close to Petitioner's, and as such, the judge set both cases for trial on the same date in order to insure that at least one

of the cases would go to trial in the event the other one was resolved prior to trial. As it turned out, neither case was resolved and both went to trial as scheduled.

On February 27, 2012 Judge Orzech was present in the Missoula County Courthouse presiding over the other jury trial. The other Justice of the Peace for Missoula County, John E. Odlin (Department No. 1), was present in the courthouse, but was holding his regular court that day. By way of explanation, in Missoula County Justice Court, Department number 1 holds his regular court on odd number days, while Department number 2 holds her regular court on even numbered days. Both departments routinely start their ticket appearances at 1:30 p.m., their video appearances of defendants from jail at 2:30 p.m. and their non-custody criminal court calendar typically starts at 3:00 p.m. Judge Odlin had to be available for any potential jail court appearances at 2:30 p.m. and for his 3:00 p.m. calendar on February 27, 2012, and was not readily available to preside over one of Judge Orzech's jury trials that day.

In order to protect both Defendants' right to a speedy trial, Judge Orzech called retired district court judge Douglas Harkin to preside over Petitioner's jury trial, while Orzech presided over the other jury trial.

Before the jury was sworn in Petitioner's case, Petitioner objected to Judge Harkin's authority to proceed, asserting Judge Orzech was not absent. Judge Harkin overruled the objection and proceeded with trial. At the conclusion of the trial, the jury found Petitioner guilty. Rather than proceeding directly to sentencing, Judge Harkin asked the State to file a sentencing memorandum by March 16, 2012, detailing Petitioner's criminal history and whether or not she had followed the terms of her prior sentences. Sentencing was set for March 20, 2012. Prior to sentencing, Petitioner filed her Petition for a Writ of Supervisory Control.

Judge Orzech's affidavit is attached hereto as Exhibit 1.

### **STATEMENT OF THE ISSUES**

1. Did Judge Orzech, while in the courthouse and holding court, have the authority to call in a substitute judge to conduct additional proceedings on her behalf?
2. Is Mont. Code Ann. § 3-10-231 unconstitutional?

### **ARGUMENT**

- I. **Under Mont. Code Ann. § 3-10-231 (2011), Judge Orzech was authorized to call in retired District Court Judge Douglas Harkin to preside over Petitioner's jury trial while Orzech was presiding over another jury trial.**

Respondent concedes that under these circumstances  
Petitioner's Petition for a Writ of Supervisory Control is an appropriate  
remedy for the issue at hand.

**A. Mont. Code Ann. § 3-10-231 provided the authority for Judge Orzech to call in Judge Harkin as a substitute judge.**

Petitioner first argues that neither the Montana Constitution nor Montana law provides authority for a Justice of the Peace to call in a substitute judge while the Justice of the Peace is present and holding court. While the Montana Constitution may not explicitly provide the authority for a Justice of the Peace to call in a substitute judge, clearly the Legislature decided to provide that authority. Mont. Code Ann. § 3-10-231(3) sets forth when a substitute judge may be called in.

“Whenever a justice is sick, disabled, or absent, the justice may call in another justice, if there is one readily available, or a city judge or a person from the list provided for in subsection (2) to hold court for the absent justice until the absent justice's return. If the justice is unable to call in a substitute, the county commissioners shall call in another justice, a city judge, or a person from the list provided for in subsection (2).”

Mont. Code Ann. § 3-10-231(3) (2011).

There is little Montana case law on Mont. Code Ann. § 3-10-231, and as far as Respondent has been able to find, no case law directly addressing the interpretation of “absent”, which Respondent asserts is the crux of Petitioner's argument.

Under Mont. Code Ann. § 3-10-231(3) when a Justice of the Peace is sick, disabled, or absent, that Justice of the Peace may call in a substitute to hold court until the absent Justice returns. While not defined in the statute, Webster's online dictionary defines the adjective "absent" as: "not present or attending." "absent." *Merriam-Webster.com*. 2012. <http://www.merriam-webster.com> (29 May 2012). Petitioner implies that "absent" as used in Mont. Code Ann. § 3-10-231 requires the Justice of the Peace to physically be outside the courthouse, largely due to the language "...to hold court for the absent justice until the absent justice's return." "Return" supposedly implying the justice must have had to physically leave the building in the first place. However, under Petitioner's argument, if a Justice of the Peace slips and falls inside the courthouse at 2:00 p.m., is unable to walk, and has court starting at 2:30 p.m., Mont. Code Ann. § 3-10-231(3) would require that the Justice be carried out of the courthouse and remain outside the courthouse while the substitute judge is acting on his or her behalf. To read that sort of requirement into the statute simply because of the phrase "until the absent justice's return", does not make sense, and would in fact be creating a requirement that is not plainly in the statute.



Perhaps the above example is extreme, but Petitioner's implication that a justice has to physically be out of the courthouse is simply not a stated requirement in Mont. Code Ann. § 3-10-231. Judge Orzech literally could not be in two places at the same time. She was unavailable or unable to act as if she had been ill or otherwise physically removed from the courthouse.

**B. Mont. Code Ann. § 1-2-103 (2011) requires "absent" be liberally construed.**

**"1-2-103. Statutes in derogation of the common law -- liberal construction.** The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of the state of Montana. **The statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect their objects and to promote justice."** (Emphasis added)

Mont. Code Ann § 1-2-103 (2011).

In the case of *Baird v. Norwest Bank*, 255 Mont. 317, 843 P.2d 327 (1992), this Court examined the meaning of the word "services" as it was used in two different statutes. This Court stated:

"The approach to defining what is meant by the word "services" in the statute should be broad in scope. See *In re Smith*, supra. This statute being in derogation of the common law, should be liberally construed with a view to effect its object and to promote justice. See Section 1-2-103, MCA 1991."

*Baird v. Norwest Bank*, 255 Mont. 317 at 327.

Mont. Code Ann. § 3-10-231 exists to provide justices of the peace the necessary flexibility to keep their caseload moving in situations where a justice cannot be in two places at once. Otherwise, the work load would become unfeasible, particularly in more populated counties with higher case volumes, like Missoula County. In this particular situation, two cases needed to be tried by a certain date in order to protect two defendant's right to a speedy trial. A liberal construction of "absent" would promote justice under these circumstances.

The inflexible construction of "absent" proposed by Petitioner defeats the object and purpose of the statute. Petitioner's construction also fails to promote a system of justice which encourages the efficient operation of an overloaded criminal justice system required to provide criminal defendants and the public at large with speedy justice.

**C. Petitioner has not shown Mont. Code Ann. § 3-10-231 was not complied with.**

Next, Petitioner argues that the provisions of Mont. Code Ann. § 3-10-231 were not complied with in this case, citing *State v. Vickers*, 1998 MT 201, 290 Mont. 356, 964 P.2d 756, and *Potter v. District Court of Sixteenth Judicial District*, 266 Mont. 384, 880 P.2d 1319 (1994). However, Petitioner makes no specific allegations as to how

Mont. Code Ann. § 3-10-231(2) was not complied with, and merely rehashes her argument that Mont. Code Ann. § 3-10-231(3) provides no authority for a substitute judge to act while the Justice of the Peace is present and holding court.

In *State v. Vickers*, the Defendant argued that the fruits of a search warrant issued by a substitute justice of the peace should have been suppressed, because the substitute judge was not duly authorized to act as a substitute judge. This Court held that the authorization criteria of Mont. Code Ann. § 3-10-231(2) were not satisfied and determined that written requests for waivers of judicial training did not constitute a list of qualified substitutes as contemplated by Mont. Code Ann. § 3-10-231(2), and the constitutional oath of office was not properly administered. Therefore the search warrants the substitute judge authorized were void ab initio. *State v. Vickers*, 1998 MT 201 at ¶ 29.

Similarly, in *Potter v. District Court of Sixteenth Judicial District*, this Court held that the procedures set forth in Mont. Code Ann. § 3-10-231(2) were not followed and therefore a substitute judge, Steven Rice, issued search warrants that were also void ab initio. In *Potter*, there was only one Justice of the Peace in Custer County, however, this

Court found that the city court judge was available and should have been asked to serve as the substitute before Mr. Rice. The case at bar is distinguishable from *State v. Vickers* and *Potter v. District Court of Sixteenth Judicial District* because Petitioner here makes no specific allegation that the authorization criteria of Mont. Code Ann. § 3-10-231(2) was not followed. Furthermore, the other Missoula County Justice of the Peace, John Odlin, was not readily available to serve as Judge Orzech's substitute on February 27, 2012.

Petitioner goes on to cite two non-controlling cases from other jurisdictions – *Koo v. State*, 640 N.E.2d 95 (Ind. App. 1994) and *State v. Preslar*, 751 S.W.2d 477 (Tex. 1988). In *Koo v. State*, the court's opinion references a prior Indiana decision, *Survance v. State* (1984), Ind., 465 N.E.2d 1076. In *Survance*, the Indiana Supreme Court held that a judge pro tempore may not act as a judge of the court in one room while the regular judge exercises jurisdiction in another room. *Koo v. State*, 640 N.E.2d 95, (Ind. App. 1994) at 98; citing *Survance* (1984), Ind., 465 N.E.2d 1076. However, Koo's claim was that the judge pro tempore was not properly appointed by the regular judge, which the Indiana appellate court disagreed with. Koo also made a claim that the regular judge returned during his two week trial, thereby

revoking the pro tempore's authority to act. However, due to insufficient evidence in the record in support of Koo's claim, the court found no error. *Koo*, 640 N.E.2d at 97-99. As in the *Koo* case, Petitioner here submits no evidence in support of her claim that Mont. Code Ann. § 3-10-231 was not complied with. In fact, Respondent believes that prior to the jury being sworn, Petitioner did not object that the authorization criteria of Mont. Code Ann. § 3-10-231(2) had not followed, but rather maintained that Orzech could not call in a substitute judge because she was not absent. Petitioner's argument hinges on her interpretation of "absent", not that any specific provision of Mont. Code Ann. § 3-10-231(2) was violated.

*State v. Preslar*, 751 S.W.2d 477 (Tex. 1988) is also distinguishable from the case at bar. In *Preslar*, the statute at issue allowed the Chief Justice to assign a visiting judge when the presiding judge was "incapacitated, dies, resigns, or disqualifies himself in the matter." *Preslar*, 751 S.W.2d at 479. The presiding judge requested a visiting judge be assigned to preside over a trial due to his crowded docket. The court held that none of the statutory circumstances existed; therefore the assignment of the visiting judge was invalid. *Preslar*, 751 S.W.2d at 479. *Preslar* is distinguishable in that the Texas

statute was very narrow and specific, only allowing for a visiting judge when the presiding judge was incapacitated, dies, resigns or was disqualified. Mont. Code Ann. § 3-10-231 is much broader, allowing a substitute judge to be called in when the Justice of the Peace is disqualified, sick, disabled, on vacation, attending a training session, or absent, which is what the State asserts was the situation here.

In the case at bar, Petitioner has no support for her allegation that Mont. Code Ann. § 3-10-231(2) was not complied with.

Petitioner's central argument is that Orzech was not "absent" and therefore Harkin was precluded from acting as a substitute judge.

Respondent has shown that Petitioner's interpretation of "absent" is flawed.

**D. Judge Harkin is a highly competent and experienced substitute judge.**

Furthermore, Petitioner has failed to show that Judge Harkin was not a competent substitute Justice of the Peace. Judge Harkin is a retired District Court Judge of Missoula County. He was elected to his position in 1981 and retired at the end of 2011 and therefore has approximately thirty years of experience as a district court judge. To find a more qualified substitute judge would be extremely difficult. Unable to try two criminal cases at the same time, Judge Orzech

obtained the temporary services of the most qualified substitute available.

**E. Petitioner has not shown she was prejudiced.**

Finally, Petitioner has not directly asserted that she was somehow prejudiced by Judge Harkin presiding over her jury trial. Petitioner makes no assertion that she would not have been found guilty had Judge Orzech presided over her jury trial. To imply Petitioner was somehow prejudiced by having Judge Harkin preside over her Minor in Possession of Alcohol jury trial is without merit. Moreover, once the jury found Petitioner guilty, Judge Harkin requested a sentencing memorandum from the State and scheduled sentencing for approximately three weeks later. Clearly, that shows Judge Harkin wanted to make an informed decision before he sentenced Petitioner. Petitioner is unable to show she was prejudiced by Judge Harkin presiding over her jury trial.

**II. Mont. Code Ann. § 3-10-231 is not unconstitutional.**

Petitioner includes in her petition an argument that, essentially, it is never constitutional to have a substitute judge preside over a trial in Justice Court in Montana because there is no express authorization in the Montana Constitution. However, Petitioner ignores the fact that

section 5 of Article VII of Montana's 1972 Constitution provides that the legislature may provide for additional justices of the peace in each county. Art. VII section 5 (3) Mont. Const. (1972).

This Court fleshed this out in *Potter v. Dist. Ct. of 16<sup>th</sup> Jud. Dist.* (1994), 266 Mont. 384, 880 P.2d 1319, and stated the following:

"It follows that Article VII, Section 5 of the Constitution also empowers the legislature to establish, by law, the qualifications of and procedures for appointing substitute justices of the peace in the various counties. The statute authorizing the appointment of substitute justices of the peace is found at § 3-10-231, MCA."

*Potter v. Dist. Ct. of 16<sup>th</sup> Jud. Dist.* (1994), 266 Mont. at 389-391.

Petitioner's argument that it is unconstitutional for a substitute judge to act on behalf of a Justice of the Peace is meritless.

### **CONCLUSION**

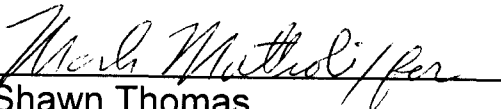
Under this set of facts, Judge Orzech was authorized to call in a substitute judge pursuant to Mont. Code Ann. § 3-10-231 (2011).

"Absent" should be liberally construed pursuant to Mont. Code Ann. § 1-2-103. Judge Orzech called in retired District Court Judge Douglas Harkin, an obviously qualified substitute. Petitioner has not shown that the procedures of Mont. Code Ann. § 3-10-231(2) were not followed in this case, and is unable to show that she was prejudiced by Judge Harkin presiding over her jury trial. Accordingly, this Court should deny



her Petition for Writ of Supervisory Control.

Respectfully submitted this 29<sup>th</sup> day of May, 2012.

  
Shawn Thomas  
Deputy Missoula County Attorney

### CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Judge Karen A. Orzech's Response to Petition for Writ of Supervisory Control to be mailed to:

Jeffrey T. Renz  
School of Law  
The University of Montana  
Missoula, Montana 59812

DATED: 5/29/12

 S.T.

## CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14 of the Montana Rules of Appellate Procedure, I certify that this response to the writ is printed with a proportionately spaced Arial text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,116 words and thus not more than 4,000 words, excluding certificate of service and certificate of compliance.

  
Shawn Thomas