

**STATE OF MINNESOTA**  
**IN COURT OF APPEALS**

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In re State of Minnesota,  
Petitioner.

**ORDER**  
#A09-2331

State of Minnesota,  
Petitioner,  
vs.

Clifford Michael Hipps,  
Respondent,

Alan Vawn Johns,  
Respondent.

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Considered and decided by Toussaint, Chief Judge; Worke, Judge; and Larkin, Judge.

**BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:**

The state has filed a petition for prohibition to prevent the judge assigned to these two criminal prosecutions from presiding over further proceedings. The assigned judge denied the state's notices to remove seeking automatic removal, citing *State v. Erickson*, 589 N.W.2d 481, 485 (Minn. 1999). Respondent Hipps has filed a motion to dismiss the petition, and the state has filed a response to that motion. Respondent Johns has not filed a response to the petition.

Hipps is charged with domestic assault, and Johns is charged in two separate complaints with violating an order for protection. After the cases were assigned, the prosecutor filed notices to remove him the assigned judge. The assigned judge denied the notices, citing *Erickson*, which involved prosecutorial abuse of the automatic-removal rule. The county attorney wrote to the assigned judge, denying there was a blanket removal policy within the office. The assigned judge responded with a letter conceding that “there have not been blanket removals of [me] by your office in all cases and by all attorneys,” but asserting that the prosecutor involved had been routinely filing notices to remove him.

Respondent Hipps has moved to dismiss the petition, arguing that because the state did not initially serve the State Public Defender and the Attorney General’s Office with the petition, the petition must be dismissed. The rule governing the filing of petitions for prohibition has been amended to state that, in addition to service on all parties, “[i]n criminal cases, the State Public Defender and the Attorney General . . . shall also be served.” Minn. R. Civ. App. 120.02. The comment to the amended rule notes that this additional requirement of service on the State Public Defender is patterned after a similar requirement in the rule governing pretrial appeals. *Id.*, adv. comm. cmt. (citing *State v. Barrett*, 694 N.W.2d 783 (Minn. 2005)).

The state has corrected its initial failure to serve the petition for prohibition on the State Public Defender and the Attorney General. And there is no time limit for filing a petition for prohibition. *State v. Pflepsen*, 590 N.W.2d 759, 764 (Minn. 1999); *see*

Minn. R. Civ. App. P. 120.01, .02. Therefore, the state's belated service on the State Public Defender is sufficient to comply with the rule, as well as with *Barrett*.

In *Erickson*, the supreme court granted relief to two criminal defendants who were denied discretionary review by this court in a case in which it was shown that the county attorney was removing the assigned judge from a substantial majority of the criminal cases assigned to him. *See id.* at 482-83 (noting removals in 188 out of 254 felonies and gross misdemeanors, and 240 of 334 misdemeanors). *Erickson* describes a practice in a county attorney's office of "routinely removing" a judge from criminal cases. *Id.* Here, a single prosecutor in the county attorney's office has apparently made it a practice of removing the assigned judge from her cases. The state has submitted statistics showing the assigned judge was assigned to more criminal cases than the other judges in the county. We conclude that this personal removal policy of a single prosecutor does not present the "rare use of [the removal] rule" criticized in *Erickson*, nor does it present the threat to judicial independence described in that case. *See id.* at 482, 485.

Prohibition is the appropriate remedy when a notice to remove a judge has been improperly denied. *State v. Cermak*, 350 N.W.2d 328, 331 (Minn. 1984).

**IT IS HEREBY ORDERED:**

1. The motion to dismiss the petition for prohibition is denied.
2. The petition for a writ of prohibition is granted.

