IN THE SUPREME COURT OF MISSISSIPPI

In re: Office of the Hinds County Public Defender, *et al*	)	**NO. 2015-M-00397**
Petitioners	)	

On Motion for Writ of Prohibition to the Circuit Court of Hinds County

Brief of *Amicus Curiae* National Association For Public Defense

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INTERESTS OF AMICUS CURIAE

The National Association for Public Defense (NAPD) is an association of over 9,500 professionals critical to delivering the right to counsel. NAPD members include attorneys responsible for managing public defender programs and ensuring the constitutional right to effective assistance of counsel. We are the advocates in jails, in courtrooms, and in communities and are experts in not only theoretical best practices, but also in the practical, day-to-day delivery of services. Our collective expertise represents state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, dedicated juvenile, capital, and appellate offices, and through a diversity of traditional and holistic practice models.

The NAPD submits this brief in support of the Hinds County Public Defender's Office's Motion For Writ of Prohibition. Judge Weill's interference in the management of the HCPDO violates important national standards which are designed to ensure indigent defendants receive effective assistance of counsel. The NAPD, as advocates for best practices and defenders of the constitutional right to counsel, submit that the violation of these national standards has not yet been adequately presented in the current pleadings. In order to ensure that these important interests are considered, the NAPD submits this brief as amicus curiae.

I. The Transfer of Hinds County Public Defender Cases to Private Counsel Violates the First Principle of a Public Defense Delivery System: Independence

The United States Supreme Court has stated that appointed counsel in criminal cases must be allowed to act independently. In *Ferri v. Ackerman*, 444 U.S. 193 (1979), the Court stated that the "principal responsibility" of assigned counsel "is to serve the undivided interest of his client" and that "an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation." *Id.* at 204.

The Court also noted, "the primary office performed by appointed counsel parallels the office of privately retained counsel." *Id.* In *Polk County v. Dodson*, 454 U.S. 312 (1981), the Court stated, "it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages." *Id.* at 321-22. The Court found implicit in the Sixth Amendment right to counsel "is the assumption counsel will be free of state control." *Id.* at 322.

In accord with these pronouncements the first principle of the American Bar Association's "Ten Principles of a Public Defense Delivery System" is that "the selection, funding and payment of defense counsel, is independent." Public Defender offices should be "subject to judicial supervision only in the same manner and to the same extent as retained counsel" and "[r]emoving oversight from the judiciary... is an important means of furthering the independence of public defense."[1]

The American Bar Association "Standards for Criminal Justice, Providing Defense Services" also stresses the importance of professional independence stating that a legal representation plan for a jurisdiction "should be designed to guarantee the integrity of the relationship between lawyer and client" and that "[t]he selection of lawyers for specific cases should not be made by the judiciary" but should be made by the "administrators of the defender, assigned-counsel and contract-for-services programs."[2] It is "essential" that public defenders "be fully independent, free to act on behalf of their clients as dictated by their best professional judgement" and "a system that does not guarantee the integrity of the professional relationship is

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[1] **AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002).**

[2] **AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 5-1.3 PROFESSIONAL INDEPENDENCE (1992)**

fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can afford to retain."[3]

The American Bar Association "Standards for Criminal Justice, Defense Function" make it clear that "the functions and duties of defense counsel are the same whether defense counsel is assigned, privately retained, or serving in a legal aid or defender program."[4] Therefore, a public defender has the obligation "to serve as the accused's counselor and advocate with courage and devotion and to render effective quality representation."[5] In fulfilling this obligation public defenders "may resist the wishes of the judge on some matters" and "may appear unyielding or uncooperative at times," but in so doing they are "fulfilling a necessary and important function within the adversary system."[6] The adversarial nature of their role in the criminal justice system further highlights the necessity of professional independence from the judiciary.

The actions of County Circuit Court Judge Jeff Weill are an attempt to undermine the independence of the Hinds County Public Defender Office (HCPDO). Judge Weill demanded that the cases currently assigned to a specific public defender, Alison Kelly, be transferred to other members of the HCPDO. When this was not done, he responded by transferring cases already assigned to the HCPDO to private counsel.

In addition, Judge Weill's actions amount to an attempt to manage the provision of indigent defense services. The Board of Supervisors of Hinds County chose to exercise their statutory authority over the manner in which indigent defense services are provided and created

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[3] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 5-1.3 PROFESSIONAL INDEPENDENCE, PAGE 16 (1992)
[4] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 4-1.2(H) FUNCTION OF DEFENSE COUNSEL (1993)
[5] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 4-1.2(B) FUNCTION OF DEFENSE COUNSEL (1993)
[6] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 4-1.2 FUNCTION OF DEFENSE COUNSEL, PAGE 122 (1993)

the office of public defender "as an alternative to court appointed counsel."[7] It is the responsibility of the Chief Defender to manage that system as evidenced by their statutory authority to appoint assistant public defenders.[8]

The ABA's "Ten Principles of a Public Defense Delivery System" require that "counsel's workload is controlled to permit the rendering of quality representation" and that "counsel's ability training and experience match the complexity of the case." The Ten Principles also call for the supervision and systematic review of counsel's performance by the defender office. Judicial demands regarding the assignment of specific public defenders impede the ability of a chief defender to control attorney workload, ensure that adequately experienced attorneys are assigned to specific cases, and to review attorney performance.

The American Bar Association "Standards for Criminal Justice, Providing Defense Services" specifically prohibit the selection of the chief defender and staff by judges.[9] It warns that even if judges have the best intentions "the appearance of justice is tarnished when the judiciary selects the chief defender or exercises control over the hiring of staff."[10] Judge Weill's demands regarding the transfer of cases assigned to HCPDO to specific public defenders is an attempt to micromanage the delivery of indigent defense services in Hinds County. Judge Weill's subsequent decision to transfer cases from HCPDO to private counsel amounts to a refusal to

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[7] **MISS. CODE ANN. § 25-32-1** "Should the board of supervisors of any county or the boards of supervisors of two (2) or more counties in the same circuit court district determine by order spread upon their minutes that the county or counties have a sufficient number of indigent defendant cases to establish an office of public defender, the board of supervisors or boards of supervisors are authorized and empowered, in their discretion, to establish the office, provide office space, personnel and funding for the office, and to perform any and all functions necessary for the efficient operation of such an office to the end that adequate legal defense for indigent persons accused of crime shall be provided at every critical stage of their cases as an alternative to court appointed counsel. Said order shall specify whether the public defender shall be full-time or part-time."

[8] Miss. Code Ann. § 25-32-3(2) "The public defender shall appoint all assistant public defenders."

[9] **AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 5-4.1 PROFESSIONAL INDEPENDENCE (1992)**

[10] **AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 5-4.1 PROFESSIONAL INDEPENDENCE, PAGE 54 (1992)**

participate in the indigent delivery system established in Hinds County. Once a county's Board of Supervisors has elected to establish the office of public defender, the presiding judge or justice, upon determination that a defendant charged with a crime is indigent and that representation is required, "shall appoint the public defender whose duty it shall be to provide such representation."[11]

II. The Transfer of Hinds County Public Defender Cases to Private Counsel Violates the Sixth Amendment Right to Continuous Representation

While indigent defendants do not have the right to counsel of their own choosing when adversarial proceedings are initiated against them, there is a well-established line of cases that hold that the arbitrary and unjustified removal of a defendant's appointed counsel violates the defendant's Sixth Amendment right to continuous representation.

In *Smith v. Superior Court of Los Angeles County*, 440 P.2d 65 (Cal. 1968) the California Supreme Court was asked to decide whether the "removal of counsel on the ground of the trial judge's subjective opinion that counsel is 'incompetent' because of ignorance of the law to try the particular case before him" was proper. *Id.* at 73. In concluding that the removal of counsel was improper, the Court found "the constitutional guarantee of the defendant's right to counsel requires that his advocate, whether retained or appointed, be free in all cases of the threat that he may be summarily relieved as 'incompetent' by the very trial judge he is duty-bound to attempt to convince of the rightness of his client's cause." *Id.* at 75. The Court found the "inhibition imposed on a defense attorney by such a threat constitutes a serious and unwarranted impairment of his client's right to counsel." *Id.* at 74.

The Court in *Smith* also concluded that there was no difference between appointed counsel and retained counsel when considering a defendant's right to continued representation pursuant to the Sixth Amendment.

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[11] **MISS. CODE ANN.** § 25-32-9(1)

> [W]e must consider whether a court-appointed counsel may be dismissed, over the defendant's objection, in circumstances in which a retained counsel could not be removed. A superficial response is that the defendant does not pay his fee, and hence has no ground to complain as long as the attorney currently handling his case is competent. But the attorney-client relationship is not that elementary: it involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client's life or liberty. Furthermore, the relationship is independent of the source of compensation, for an attorney's responsibility is to the person he has undertaken to represent rather than to the individual or agency which pays for the service [citation omitted]. It follows that once counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused.

Id. at 74.

In *McKinnon v. State*, 526 P.2d 18 (Alaska 1974), the Supreme Court of Alaska declared that it was in "complete agreement" with the holding in *Smith* and held "[o]nce counsel has been appointed, and the defendant has reposed his trust and confidence in the attorney assigned to represent him, the trail judge may not, consistent with the United States and Alaska constitutions, rend that relationship by dismissing the originally appointed attorney and then thrusting unfamiliar and unwelcome counsel upon the defendant." *Id.* at 22.

The District of Columbia Court of Appeals relied on both *Smith* and *McKinnon* in concluding "once an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the court may not arbitrarily remove the attorney, over the objections of both the defendant and his counsel." *Harling v. United States*, 387 A.2d 1101 (D.C. 1978). In *People v. Davies*, 449 N.E.2d 237 (Ill. App. Ct. 1983), the Appellate Court of Illinois agreed with the rationale of the decisions in *Smith*, *McKinnon*, and *Harling* and concluded "a court-appointed attorney may not be treated differently than privately retained

counsel." *Id.* at 241. Similarly, in *In re Civ. Contempt Proc. Concerning Richard,* 373 N.W.2d 429 (S.D. 1985) and *Matter of Welfare of M.R.S.,* 400 N.W.2d 147 (Minn. Ct. App. 1987), the South Dakota Supreme Court and the Minnesota Court of Appeals also rejected the idea that a trial court had some inherent power to arbitrarily discharge a criminal defendant's appointed counsel.

The Court of Criminal Appeals of Texas has also held that once an attorney is appointed, the same type of attorney-client relationship is established as would exist with retained counsel, and it should be protected. In *Stearnes v. Clinton,* 780 S.W.2d 216 (Tex. Crim. App. 1989), the Court concluded:

> Counsel should not have to serve two masters. An attorney's loyalty is to his client and he should feel free to function within the bounds of the law and ethical propriety for his client. The previously cited authorities [which include *Smith* and *Harling*] make it clear that the power of the trial court to appoint counsel to represent indigent defendants does not carry with it the concomitant power to remove counsel at his discretionary whim. As noted, to hold otherwise would be to discriminate between retained and appointed counsel without a semblance of rationality.

Id. at 222-223.

The Supreme Court of Arkansas in *Clements v. State,* 817 S.W.2d 194 (AR. 1991), also relied on the holding in *Smith* in finding that when "a trial court terminates the representation of an attorney, either private or appointed, over the defendant's objection and under circumstances which do not justify the lawyer's removal and which are not necessary for the efficient administration of justice, a violation of the accused's right to particular counsel occurs." *Id.* at 200.

The Court of Appeals of Michigan has noted in *People v. Johnson,* 547 N.W.2d 65 (Mich. 1996), "[c]ourts in other jurisdictions have not hesitated to protect an indigent defendant's right to counsel on Sixth Amendment grounds... where a trial court improperly

removed court-appointed counsel" and identified *Smith* as the leading case on the issue. *Id.*at 69. The Court in *Johnson* held that a trial court may not remove a defendant's counsel "merely over a disagreement regarding the conduct of defense counsel". *Id.* at 68. The Court also found, "the trial court's improper removal of appointed counsel before trial infected the entire trial mechanism; the removal is not subject to a harmless-error analysis" and noted there is a "well-established line of federal and state cases holding that a harmless-error analysis does not apply where a trial court violates a defendant's Sixth Amendment right to counsel by improperly removing appointed or retained trial counsel and that a defendant need not establish prejudice under these circumstances." *Id.* at 68.[12]

The Court of Criminal Appeals of Tennessee in *State v. Huskey*, 82 SW.W.3d 297 (Tenn. Crim. App. 2002), relied on the cases cited above to come to the conclusion "that any meaningful distinction between indigent and non-indigent defendant's right to representation by counsel ends once a valid appointment of counsel has been made." *Id.* at 305. In overruling the trial court's decision to remove appointed defense counsel based on its belief that appointed defense counsel's "approach to litigation" constitutes "an abuse of the legitimate functioning of the legal system" the Court found "that removal of counsel should only occur when no other option exists." *Id.* at 309. The Court recognized "the sanctity of the position of defense counsel in criminal cases." *Id.* at 310. Similarly, the Court of Criminal Appeals of Alabama in *Lane v. State*, 80 So.3d 280 (Ala. Crim. App. 2010), also found, "[w]ith respect to continued

[12] It should be noted that the *Johnson* decision came a decade before the United States Supreme Court's decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), where the Court held that when a defendant's Sixth Amendment right to counsel of his choice was violated because the disqualification of his chosen counsel was erroneous, no additional showing of prejudice was required to make the violation complete, and the trial court's erroneous deprivation of defendant's Sixth Amendment right to choice of counsel entitled him to reversal of his conviction, as error qualified as a "structural error" not subject to review for harmlessness. The reasoning in *Johnson* that rejected harmless-error analysis is clearly supported by the Supreme Court's decision in *Gonzalez-Lopez* to regard the erroneous deprivation of chosen counsel as a "structural error"

representation... there is no distinction between indigent defendants and nonindigent defendants." *Id.* at 295 (citing *Huskey,* 82 SW.W.3d *at* 305). In overturning the defendant's conviction and sentence of death, the Court in *Lane* relied on the United States Supreme Court's holding in *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006), that the denial of a defendant's Sixth Amendment right to counsel of choice is a "structural error" not subject to review for harmlessness, even though in *Lane* defense counsel was appointed and in *Gonzalez-Lopez* counsel was retained. The Court of Criminal Appeals of Alabama found, "there is no difference between retained counsel and appointed counsel when it comes to the right to continued representation by counsel of choice." *Lane,* 80 So.3d at 303.

The unjustified transfer of HCPDO cases to private counsel by County Circuit Court Judge Jeff Weill violates the Sixth Amendment right to continued representation. The HCPDO is being relieved from cases where they have already established an attorney-client relationship with the defendants. Overwhelming precedent supports an indigent defendant's Sixth Amendment right to continued representation and regards the denial of that right to be a "structural error" requiring reversal.

In addition, the duties of public defenders in Mississippi "include the investigation of charges against the defendant and all facts surrounding the same, and shall include courtroom and appellate appearances on behalf of the defendant in all cases originating in state and county courts."[13] Public Defenders are also required to provide representation "at every critical stage of the proceedings... where a substantial right may be affected."[14] This is consistent with the ABA "Ten Principles of a Public Defense Delivery System" which requires that the same attorney "continuously represents the client until completion of the case." ABA Guidelines also

[13] **MISS. CODE ANN.** § 25-32-11
[14] **MISS. CODE ANN.** § 25-32-9(2)

recommend that counsel "be provided at every stage of the proceedings" and that the attorney "initially provided should continue to represent the defendant throughout the trial court proceedings."[15] The ABA stresses the importance of continuous representation by describing the attorney-client relationship as "inviolable"[16] and by calling upon counsel to "resist efforts by the court to terminate or interfere with that relationship."[17] The removal of assigned counsel "should not occur over the objection of the attorney and the client"[18] so that attorneys need not "fear that zealous representation of clients may result in their removal."[19]

The danger in having multiple attorneys through the course of representation is that "when a single attorney is not responsible for the case, the risk substandard representation is probably increased."[20] One example of this is how the lack of continuous representation inhibits the ability of defense counsel to investigate. The ABA Standards require defense counsel to "conduct a prompt investigation of the circumstances of the case"[21] and the potential substitution of counsel discourages the currently assigned attorney from conducting a prompt investigation. Judge Weill's unjustified transfer of cases from HCPDO to private attorneys violates the

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[15] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 5-6.2 DURATION OF REPRESENTATION (1992)

[16] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 5-6.3 REMOVAL (1992)

[17] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 5-6.3 REMOVAL, PAGE 86 (1992) CITING NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, NATIONAL STUDY COMMISSION ON DEFENSE SERVICES 2.12 (1976)

[18] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 5-6.3 REMOVAL (1992)

[19] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 5-6.3 REMOVAL, PAGE 85 (1992)

[20] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES: STANDARD 5-6.2 DURATION OF REPRESENTATION, PAGE 83 (1992)

[21] AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION: STANDARD 4-4.1(A) DUTY TO INVESTIGATE (1993)

principle of continuous representation endorsed by the ABA and it has the potential to severely prejudice indigent defendants by denying them counsel during critical stages of the proceedings and by discouraging counsel from performing prompt investigations of their cases.

CONCLUSION

The NAPD respectfully requests that this Court, consistent with national standards, grant the HCPDO's Motion for Writ of Prohibition.

DATED this 24th day of March, 2015.

Respectfully submitted,

NATIONAL ASSOCIATION FOR PUBLIC DEFENSE,
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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed by means of the electronic case filing system the foregoing pursuant to Mississippi Rule of Appellate Procedure 25 by which immediate notification to all ECF participants in this cause is made. In addition, I have served a true and correct copy of it by United States Mail, postage prepaid upon the following:

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This the 24th day of March, 2015.

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