FILED
2008 SEP -3 PM 3:01
KNOX COUNTY CRIMINAL COURT
KNOXVILLE TN

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION II

IN RE: PETITION OF
KNOX COUNTY PUBLIC DEFENDER

Docket No. 89620

KNOX COUNTY PUBLIC DEFENDER'S RESPONSE TO THE ADMINISTRATIVE OFFICE OF THE COURTS' MOTION TO INTERVENE

The Office of the Knox County Public Defender ("Public Defender") responds herewith to the Motion to Intervene filed by the Administrative Office of the Courts ("AOC"):

The AOC has moved to intervene in the action initiated by the Public Defender's filing of a petition for caseload relief in each of the three divisions of Knox County Criminal Court. In support of its Motion, the AOC has cited only budgetary concerns.

Supreme Court Rule 13 ("Rule 13"), however, on which the Public Defender has based the petition for relief in the Criminal Court divisions, does not contemplate that the Court may consider the financial strain on the AOC in deciding whether it may appoint the Public Defender.

Rule 13 provides in pertinent part:

> When appointing counsel for an indigent defendant pursuant to [Rule 13, § 1(e)(3)], the court shall appoint the district public defender's office, the state post-conviction defender's office, or other attorneys employed by the state for indigent defense (herein "public defender") if qualified pursuant to this rule and no conflict of interest exists, unless in the sound discretion of the trial judge appointment of other counsel is necessary. . . .
>
> . . . .
>
> The court shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent

> counsel from rendering effective representation in accordance with constitutional and professional standards.

Sup. Ct. Rule 13, § 1(e)(4)(A), (D). Under this rule, if the Public Defender makes the requisite clear-and-convincing showing, the Court has no choice but to appoint private counsel. Rule 13 simply does not allow the Court to take into account the financial impact that appointing private counsel would have on the AOC. Because financial considerations have no bearing on the Court's decision on the Public Defender's petition, there is no legal basis for allowing the AOC to intervene.

The AOC has argued that it must be allowed to intervene because if it is denied party status in this action, it will not be able to appeal an adverse decision from this Court. The Attorney General made a similar argument on behalf of the AOC at the June 10, 2008, hearing on the Sworn Petition filed by the Public Defender in Knox County General Sessions Court:

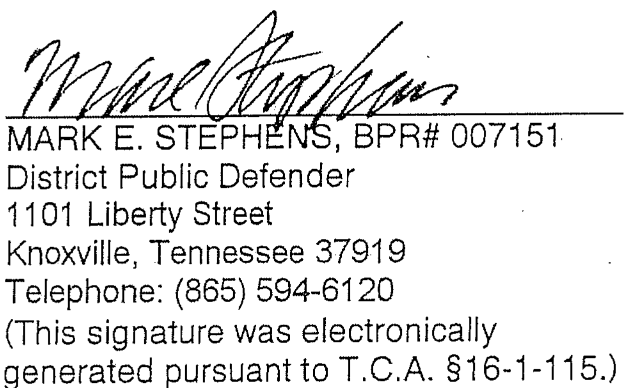
> If [the AOC] is not pleased with the result in this case, we would be foreclosed from any review if we were not a party. So we are very clearly asking some sort of party status. I'm not saying we're going to appeal, but we just want to be able to have that right, because it's not much of a right to exercise to simply be able to talk without any party rights of review - -

Transcript of June 10, 2008, Hearing on Sworn Petition, at p. 153 (relevant pages attached as **Exhibit A**). The denial of a motion to intervene is an immediately appealable order, however. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987) (applying Federal Rule of Civil Procedure 24). If the AOC wishes to seek review of what it perceives to be an adverse result, it may do so regardless of whether it is a party. If its Motion to Intervene is denied, it may appeal from that order. If, however, its Motion is granted, it may appeal the Court's decision as a party.

CONCLUSION

This Court should deny the AOC's Motion to Intervene. The AOC has only cited budgetary concerns as the basis for its Motion. Because Rule 13 does not provide that a Court may take the AOC's finances into account when deciding whether it must appoint private counsel rather than the Public Defender, there is no basis for allowing the AOC to intervene. Moreover, the AOC need not be made a party because it may immediately appeal the denial of its Motion to Intervene.

Respectfully submitted,



MARK E. STEPHENS, BPR# 007151
District Public Defender
1101 Liberty Street
Knoxville, Tennessee 37919
Telephone: (865) 594-6120
(This signature was electronically generated pursuant to T.C.A. §16-1-115.)

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing pleading upon the following individual(s) via hand-delivery or United States Mail, postage prepaid, and correctly addressed as follows:

Douglas Earl Dimond
State of Tennessee
Office of the Attorney General
P.O. Box 20207
Nashville, Tennessee 37202

This 3rd day of September, 2008.

MARK E. STEPHENS

IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE

MISDEMEANOR DIVISION

June 10, 2008

TRANSCRIPT OF THE PROCEEDINGS

IN RE:	)	
	)	
PETITION OF	)	No. (None Assigned)
KNOX COUNTY PUBLIC DEFENDER	)	
	)	

APPEARANCES:

COPY

HONORABLE GEOFFREY P. EMERY
HONORABLE BOBBY RAY MCGEE
HONORABLE TONY W. STANSBERRY
HONORABLE CHARLES A. CERNY, JR.
HONORABLE ANDREW JACKSON, VI

MR. T. MAXFIELD BAHNER
MR. HUGH J. MOORE, JR.
MR. D. AARON LOVE
Attorneys at Law
1000 Tallan Building
Two Union Square
Chattanooga, Tennessee 37402

MR. DOUGLAS EARL DIMOND
Assistant Attorney General
State of Tennessee
Post Office Box 20207
Nashville, Tennessee 37202-0207

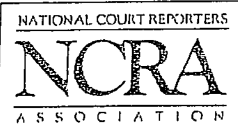


Exhibit A

1 I N D E X

2 OPENING STATEMENTS
By The Court 4
3 By Mr. Bahner 10

4 WITNESS:

5 MARK STEPHENS
6 By Mr. Bahner 15
By The Court 63

7 ISAAC MERKLE
8 By Mr. Moore 69
By The Court 74

9 JAMIE POSTON
10 By Mr. Love 81

11 CHRISTY MURRAY
By Mr. Love 88

12 NORMAN LEFSTEIN
13 By Mr. Bahner
Qualifying testimony 93
14 Expert testimony 100
By The Court 118

15 TOM DILLARD
16 By Mr. Moore 121
By The Court 129

17 DON BOSCH
18 By Mr. Moore 131
By The Court 139

19 JERRY BLACK
20 By Mr. Bahner 142

21 ARGUMENT
By Mr. Dimond 151
22 By Mr. Bahner 159

23 THE COURT 161

24 ******

25

1 JUDGE MCGEE: When we set up this
2 hearing, I think it was our general understanding that, yes,
3 we do recognize it to be a judicial proceeding but not an
4 adversarial one, so this business of being called a party or
5 intervening or so forth doesn't really matter that much to
6 us. We simply want to know what your position is, what your
7 argument would be with relation to what's been presented to
8 the Court.
9 MR. DIMOND: Well, particularly, I
10 understand that, and I think it is to some extent an
11 adversarial proceeding by the fact that we've got a
12 significant interest at stake that absent our participation
13 could be jeopardized.
14 JUDGE MCGEE: We're allowing you to
15 participate. We're inviting you to participate.
16 MR. DIMOND: I understand, and really, if
17 that were all there was I wouldn't care what you called me,
18 but that's not all there is. If my client is not pleased
19 with the result in this case, we would be foreclosed from
20 any review if we were not a party. So we are very clearly
21 asking some sort of party status. I'm not saying we're
22 going to appeal, but we just want to be able to have that
23 right, because it's not much of a right to exercise to
24 simply be able to talk without any party rights of review--
25 (Interruption in the proceedings.)

1 MR. DIMOND: This is an important public
2 question and, especially in this day and age of limited tax
3 dollars, a significant amount of money for the State to ante
4 up. So I do, respectfully, want party status. I can review
5 quickly for the record my arguments on that. And I
6 apologize, but a little more repetition today probably won't
7 hurt matters too much.
8 I've cited the Rules of Civil Procedure.
9 Your Honor's correct that they don't apply here, but I
10 argued earlier that the Rules of Civil Procedure provide
11 good guidance, and the root of the Constitution has a
12 fundamental right of notice and opportunity to be heard that
13 even a state agency should have, and with 2.5 million
14 dollars at stake AOC ought to have that right to be heard
15 and to participate in this proceeding. (Indicates.) Pardon
16 me, Your Honor. I have a cold and I may be interrupting
17 from time to time.
18 This petition, we argue, should be
19 dismissed for two reasons. One is lack of subject matter
20 jurisdiction. This Court is a court of limited jurisdiction
21 and can only rule upon such matters that are expressly
22 authorized by statute. The case I cited to Your Honors,
23 Caldwell versus Woods, involved an interpretation of the
24 statute that said General Sessions Court correct its
25 judgment, and the court in that case used that statute to

1 set aside the judgment. And this is how straight and narrow
2 the Court of Appeals viewed this and strictly it took that
3 express statutory authorization.
4 The Court of Appeals said, No, you're not
5 authorized--you're only authorized to correct the judgment,
6 that doesn't include voiding it altogether, setting it
7 aside. People might think it does. There's no such express
8 statutory authorization. Similarly, there's no such express
9 statutory authorization in this case, and if you look at
10 Rule 13--I noted that the other side has done a really good
11 job in talking about how they apply a class of cases or a
12 class of the court, but if you look at the explicit language
13 of Rule 13 it says when appointed counsel for an indigent
14 defendant, the trial judge, one judge, should make the
15 ruling.
16 The rule goes on to say the court shall
17 not make an appointment unless counsel makes a very
18 convincing case that "having the appointment," in the
19 singular. They're talking case by case. I don't think
20 there's any (inaudible) reading that rule. The word
21 "unreasonable" might--well, I can't argue that there's some
22 efficiency to doing it the way they're doing it here, I just
23 don't think there's any authority to do it. So I highly
24 doubt we have subject matter here, that you all have subject
25 matter jurisdiction, with all respect to the Court, to

1 entertain this action as it's phrased in the petition and
2 to excuse the Public Defender from a class of court.
3 I also think there's a problem with the
4 evidence. I know you've heard a lot of it today, and I know
5 you saw a lot of it in the petition. It is the burden upon
6 the Public Defender to make a case - assuming you can hear
7 this case - to make a case by clear and convincing evidence.
8 Clear and convincing evidence is evidence that leaves no
9 serious doubt, and I think there is some serious doubts that
10 were raised in the petition in the facts alleged by the
11 Defender himself.
12 First of all - and this is sort of
13 related to the jurisdictional argument - the petition states
14 that the problem really isn't in this Court. It's certainly
15 not in the Misdemeanor Division of this Court. It's
16 elsewhere. The six attorneys--and for better or worse we're
17 stuck with that horizontal representation of six attorneys
18 assigned to that court. They're not the ones in crisis, at
19 least according to the petition. It's the DUI and Felony
20 Divisions of this court, and more importantly, the Criminal
21 Courts that are in trouble. Therefore, I don't think it
22 makes sense for you to excuse people who aren't providing
23 effective assistance of counsel so that the Public Defender
24 can shift resources. That's really his decision but not the
25 courts.

1 I think maybe even more importantly, some
2 of the figures in the petition--we want to question the
3 argument in the petition. The petition talks in terms of,
4 We won't be able to continue to comply with effective
5 assistance of counsel. I take it as a tacit admission
6 up-to-date that they pretty much have been.
7 What we did is took a look at the figures
8 from the last several years, 2006. That's on page eight.
9 You have the response that we filed on Friday, and I will
10 tell you what was filed. I'm pretty sure that the response
11 is only, what, ten pages, and our motion to intervene is two
12 or three. So it's, I hope, not unduly burdensome.
13 Look at that chart, Table 1 and Table 2
14 on page 8. Look at cases. They're down. From 2006 to 2007
15 new cases went from sixty-three fifty to fifty-seven sixty.
16 That's a drop of almost 10 percent. We've gotten some
17 updates from the Public Defenders Office that show projected
18 caseload - if I understand it, and folks testified to today
19 - of about forty-three oh three cases. These are the
20 misdemeanor cases. So we're down again. From fifty-seven
21 sixty to forty-three oh three is considerable. That's,
22 what, 20 percent, right, if my math is right? Overall cases
23 are down.
24 New cases in 2006 were 12,028; 2007 - 10,791.
25 That's a 10 percent decrease. And they continue to go down.

1 Total cases, excuse me, fifteen two forty; thirteen
2 twenty-two forty-four to 11,511 from '06 to '07 to '08.
3 Again we're seeing constant decreases in caseloads here, and
4 they've been obtaining great results thus far and they're
5 effectively assisting their clients. I can't see how, when
6 a caseload dropped, they should be excused from attending
7 court.
8 There's a few more points I'd like to
9 make. I think those are the two--the ones I hit upon in the
10 response. But even as I was looking at some of the
11 statistics we were seeing up there about the caseloads--I'm
12 not a trial lawyer. I don't do criminal work, at all. I
13 did a little bit as a clerk in the Attorney General's
14 Office. I am an appellate attorney. I do a lot of appeals,
15 and I look--I've got 25 appeals. Twenty-five appeals is not
16 much to do. If I had a caseload that just consisted each
17 year of 25 appeals I'd be in heaven, because that would be
18 too easy. I routinely do them in a matter of days.
19 As we look on, do you trust your own
20 eyeballs? You're the ones that are presiding in these
21 cases. Is the court chaos? If your court's not chaos--I
22 don't know about Criminal Court, but I will say the figures
23 in Criminal Court would be more than that than they are in
24 Misdemeanor. There's no--there's just about 20 to 30
25 percent caseloads. If you're not seeing chaos in your

1 courts and clearly ineffective assistance of counsel, and
2 you're seeing worse results from the Public Defenders--
3 you've got the best sense of anybody. If the Public
4 Defenders are obtaining worse results, not showing up, not
5 doing their job, you've got--I would assume you have a
6 pretty good sense of that. If you are seeing adequate
7 representation - I'll put it to you, with these figures -
8 don't make a case for excusing the Public Defender from your
9 courts. So, again, trust yourselves. I have no further
10 argument.
11 JUDGE EMERY: Any questions of Mr.
12 Dimond?
13 (No response.)
14 MR. DIMOND: Thank you, Your Honors.
15 JUDGE MCGEE: Thank you.
16 JUDGE EMERY: All right. Is there any
17 other...
18 MR. BAHNER: May I respond briefly?
19 JUDGE EMERY: Yes, sir.
20 MR. BAHNER: I don't want to unduly
21 prolong this.
22 Mr. Moore's been out and I've been out.
23 I didn't see the petition--or the motion to intervene until
24 yesterday morning. I didn't see the brief which was filed
25 until this morning at 8:15 or 8:30. Through some snafu we