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Rules Committee on Criminal Practice
and Procedure
c/o Miss. Supreme Court Clerk
P. O. Box 249
Jackson MS 39205-0249

October 24, 2016

RE: Comments to Proposed Criminal Rules

Dear Committee:

This letter comments on the proposed Rules of Criminal Procedure, specifically the proposed rules addressing indigent representation and death penalty cases. I have been a licensed attorney in Mississippi for over twenty-five years practicing exclusively criminal law on behalf of indigent defendants. I currently serve as the State Public Defender; I founded the Office of Capital Defense Counsel in 2001 and have served as its only director; and I served as an assistant public defender in Hinds County for over five years. My comments are as follows:

The Rules should explicitly require the appointment of counsel at initial appearance to every unrepresented indigent defendant desiring counsel. Proposed Rule 7.1(a) requires counsel be appointed sufficiently in advance of a proceeding to allow adequate preparation. Under proposed Rule 6.1 the defendant must demand the preliminary hearing which must occur within fourteen (14) days of demand. Without counsel a defendant cannot knowingly assert or waive the right to preliminary hearing which includes the first opportunity to assert the constitutional right to release. To make these rules meaningful and protect these fundamental rights appointment must come at initial appearance. Proposed Rule 7.1(b) recognizes this and explicitly requires the “determination of the right to appointed counsel, and the appointment of such counsel, is to be made no later than at the indigent defendant’s first appearance before a judge.”

Proposed Rule 5.2(a) should be amended to add to the responsibilities of the judge at Initial Appearance the responsibility to determine indigency and if that determination is made to appoint counsel pursuant to the procedure required in proposed Rule 7.2(1).

Proposed Rule 7.2(c) regarding the duty of continuing representation should be amended to strike “following indictment” and the last sentence of the comment should be struck. This state’s highest court should not condone or even tolerate a local practice that inevitably leaves indigent defendants without their constitutionally mandated counsel during critical stages of their case.

In many of our rural counties grand juries meet only twice a year. The practice that this rule seeks to protect could leave a defendant without counsel for the entire period between

preliminary hearing and arraignment, often six months or more. Trial counsel would be placed in a position of meeting a client who has not seen a lawyer in six months, six months that he was sitting in jail because there was no attorney to advocate for release during this extensive delay, six months with no investigation or even knowledge of information the client may have provided his temporary lawyer.

The lawyer and brand new client would either have to go to trial within a week or two or wait another six months. This lack of continuity presents a greater risk of loss of fundamental rights than the later continuity that is protected by the rule – the transition from trial to appeal.

The proposed change would not mandate continuous representation in every case. As drafted the rule recognizes that under some circumstances counsel will be allowed to withdraw. The proposed change simply prevents the Supreme Court from condoning practices that fail to ensure full constitutional protections.

This proposed change is consistent with the *ABA Ten Principles of a Public Defense Delivery System*:

7 The same attorney continuously represents the client until completion of the case. Often referred to as “vertical representation,” the same attorney should continuously represent the client from initial assignment through the trial and sentence.

http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

Further, this change is consistent with Mississippi Law. Miss. Code § 25-32-9; *In Re: Office of the Hinds County Public Defender*, 2015-M-00397, En Banc Order, May 21, 2015.

Proposed Rule 7.4(c) regarding qualifications for appellate counsel in death penalty direct appeal cases must be changed. Handling “post-conviction proceedings” has nothing to do with being qualified to handle a direct appeal. Requiring experience in that area serves no purpose and might result in no qualified attorneys for direct appeal representation.

Thank you for providing the opportunity to comment on these proposed rules. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

André de Gruy

APPENDIX

Rule 5.2 Initial Appearance.

(a) Generally. Every person in custody and not under indictment shall be taken, without unnecessary delay and in accordance with Rule 5.1, before a judge for an initial appearance. At the defendant's initial appearance, the judge shall:

- (1) ascertain the defendant's true name and address, and amend the formal charge if necessary to reflect this information, instructing the defendant to notify the court promptly of any change of address;
- (2) inform the defendant of the charges and provide the defendant with a copy of the charging affidavit; ~~and~~
- (3) if the arrest has been made without a warrant, determine whether probable cause exists to believe that the defendant committed the charged offense, in accordance with the procedures for making a probable cause determination provided in Rule 2.2(a). If the judge finds there is probable cause, a charging affidavit shall promptly be prepared, filed, and served on the defendant. If the judge finds no probable cause for the warrantless arrest, or if the judge fails to make a probable cause determination, the defendant shall be released; and
- (4) if the defendant is unrepresented and desires representation, appoint counsel pursuant to Rule 7.2, Rule 7.3 and local rule promulgated pursuant to Rule 1.9.

Rule 7.2 Procedure for Appointment of Counsel for Indigent Defendants; Appearance; Withdrawal.

(a) Procedure for Appointment of Counsel for Indigent Defendants.

- (1) *Generally.* A procedure shall be established in each circuit, county, municipal, and justice court for the appointment of counsel for each indigent defendant entitled thereto.
- (2) *Appointment of Multiple Attorneys.* In all death penalty trial proceedings, the court shall appoint two (2) attorneys pursuant to the standards in Rule 7.4. At the time of the appointment, and subject to court approval, the appointed attorney may recommend co-counsel so long as co-counsel is willing to accept the appointment and meets all of the requirements of Rule 7.4. If the appointed attorney does not recommend co-counsel upon accepting an appointment, the court shall select co-counsel. In non-death penalty cases, the appointment of multiple attorneys is within the discretion of the court.

(b) Entry of Appearance. At or before a first appearance in any court on behalf of a defendant, an attorney, whether privately retained or court-appointed, shall file an entry of appearance or, in lieu thereof, the court shall note the attorney's appearance on the record.

(c) Duty of Continuing Representation. Counsel representing a defendant at any stage ~~following indictment~~ shall continue to represent that defendant in all further proceedings in the trial court, including filing a notice of appeal, unless counsel withdraws for good cause as approved by the court.

(d) Withdrawal. When an attorney makes an appearance for any party in a case, that attorney will not be allowed to withdraw as attorney for the party without the permission of the court. The attorney making the request shall give notice to his/her client and to all attorneys in the cause and certify the same to the court in writing. The court shall not permit withdrawal without prior notice to his/her client and all attorneys of record.

Comment

Rule 7.2(a) requires that each circuit shall establish governing local procedures for the appointment of counsel for indigent defendants. Local court rules are promulgated pursuant to Rule 1.9.

Rule 7.2(c) contemplates that the usual procedure will be that, following indictment, counsel will continue to represent the defendant through all stages of the trial proceedings, including filing a notice of appeal. *See* M.R.A.P. 6(b). In addition to being familiar with the case, continued representation guarantees that a defendant's right of appeal is not lost in the period between termination of trial counsel's responsibilities and retention or appointment of appellate counsel.

Rule 7.2(d) is consistent with former Rule 1.13 of the Uniform Rules of Circuit and County Court Practice. Normally, appointed counsel will not be permitted to withdraw prior to filing a notice of appeal. If the court allows counsel to withdraw, the court shall see that new counsel is retained or appointed, unless the right to counsel has been properly waived pursuant to Rule 7.1(c). In this way, subsection (d) maintains the integrity of the trial date, while also protecting the interests of the defendant and aiding the trial court in providing continuity in legal representation.

~~Nothing in Rules 7.2(c) or (d) limits the ability of a court to employ a local procedure whereby an attorney is appointed to represent a defendant for a limited purpose or time, after which another attorney is appointed or retained to represent the defendant for subsequent proceedings.~~

Rule 7.4 Standards for Appointment of Trial and Appellate Counsel in Death Penalty Cases.

(a) In General. To be eligible for appointment in a death penalty case, an attorney:

(1) shall have been a member in good standing of the State Bar of Mississippi for at least five (5) years immediately preceding the appointment, or admitted *pro hac vice* pursuant to an order entered under Rule 46 of the Mississippi Rules of Appellate Procedure and be a member in good standing of that attorney's

home jurisdiction for a like period immediately preceding the appointment;

(2) shall have practiced in the area of state criminal litigation for three (3) years immediately preceding the appointment;

(3) shall have in the three (3) years before appointment completed twelve (12) hours of training or educational programs in the area of death penalty defense through a program accredited by the Mississippi Commission on Continuing Legal Education or the American Bar Association; and

(4) shall have demonstrated the necessary proficiency and commitment to zealous advocacy which exemplify the quality of representation appropriate to death penalty cases.

(b) Additional Qualification Requirements.

At least one (1) appointed attorney must meet the qualifications set forth in section (a) and the following:

(1) shall have practiced in the area of state criminal litigation for five (5) years immediately preceding the appointment; and

(2) shall have been counsel in at least five (5) felony jury trials that were tried to completion, including at least one (1) death penalty murder jury trial that was tried to completion in which the attorney participated.

(c) Appellate Counsel. To be eligible for appointment as appellate counsel on behalf of a defendant sentenced to death, an attorney must meet the qualifications set forth in section (a) and, within five (5) years immediately preceding the appointment, have been counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as have experience as counsel in the appeal of at least three (3) felony convictions ~~and at least one (1) post-conviction proceeding~~. Alternatively, an attorney must have been counsel in the appeal of at least six (6) felony convictions, at least two (2) of which were appeals from murder convictions, ~~and counsel in at least two (2) post-conviction proceedings~~.

(d) Exceptional Circumstances. In exceptional circumstances enumerated by the trial judge on the record, an attorney may be appointed who does not meet the qualifications set forth in sections (a)(1)-(3), (b) and/or (c), provided that the attorney's experience, stature and record in a different type of practice (e.g., civil litigation, academic work, or work for a court or prosecutor) enable the court to conclude that the attorney's ability meets or exceeds the standards set forth in this Rule.