

Nancy L. Callahan
Idaho State Bar #4884
Rolf M. Kehne
Idaho State Bar #2180
LAW OFFICES OF NANCY L. CALLAHAN
101 Canal Street
Emmett, Idaho 83617
Tel. (208) 365-1200
Fax. (208) 365-1646

Attorney for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO,)	
)	
Plaintiff,)	Case No. CR-2011-31217*C
)	
vs.)	MOTION FOR ORDER CONTINUING
)	APPOINTMENT OF LEGAL COUNSEL
JOHN T. BUJAK,)	
Defendant,)	
_____)	

COMES NOW, NANCY CALLAHAN, attorney for the Defendant, and hereby moves this honorable Court, pursuant to the Sixth Amendment to the U.S. Constitution and Article I, Section 13 of the Constitution of the State of Idaho, for the entry of an order continuing the appointment of conflict counsel, Nancy Callahan, as the attorney for the Defendant in the above-captioned case.


This Motion is based upon the following:

1. The record in this case.
2. The Affidavit of Nancy Callahan in Support of Defendant's Motion for

Order Continuing Appointment of Legal Counsel filed contemporaneously.

3. The Memorandum of Law in Support of Defendant's Motion for Order Continuing Appointment of Legal Counsel filed contemporaneously.
4. It is in the interests of justice to grant the Defendant's request.

DATED this 20th day of December, 2011.



NANCY CALLAHAN
Attorney for Defendant

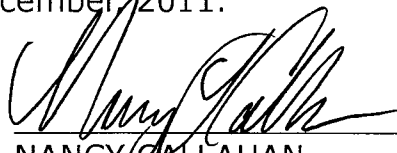
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I did cause a true and correct copy of the foregoing to be delivered to the following individuals via the method and on the date indicated below:

Via Facsimile

Bill Thompson
Special Prosecutor
Fax. (208) 883-2290

DATED this 20th day of December, 2011.



NANCY CALLAHAN
Attorney for Defendant

3. I was duly appointed by the Honorable James C. Peart, Magistrate Judge, to represent the above-named Defendant in the above-captioned case on December 13, 2011. I was previously appointed to represent the Defendant by Judge Smyser in a contempt proceeding arising in his divorce case. I had appeared in the divorce case on December 13, 2011, to resolve the contempt matter. At the conclusion of the divorce hearing, and without prior knowledge or notice to the Defendant or to me, Judge Smyser left the court room as Judge Peart took the bench. Judge Peart appointed me as conflict counsel and then proceeded to conduct an initial arraignment. The issue of bond was addressed and the Defendant was taken into custody.
4. After I was appointed to represent the Defendant in this matter, I contacted Dan Kessler, Trial Court Administrator, to discuss how to submit my conflict attorney fees in the contempt case, and I inquired if submitting attorney's fees and costs would be the same process in this case. Mr. Kessler advised me that he did not know I had been appointed to this case and he did not know the answer to my question so he would be getting back to me.
5. On December 15, Judge Peart sent an email to the attorneys in this case and Mark Mimura, the Canyon County Public Defender. The email sparked correspondence between the parties and resulted in a

telephone conference on December 16, 2011. A true and correct copy of the email correspondence between Judge Peart, the attorneys, and Mark Mimura is attached hereto as Exhibit "A" and incorporated herein by reference. In the email, Mark Mimura represented to the Court the County Commissioners had worked with the Trial Court Administrator to secure my appointment in the Defendant's divorce case. Mr. Mimura also requested permission to forward Judge Peart's email to the County Commissioners suggesting that they would be involved in the appointment of counsel in this case.

6. During the telephone conference, Judge Peart asked for comments regarding whether I should continue to be appointed to represent the Defendant in this case. At the time, I was still representing him on the contempt charge. I had met with the Defendant concerning this case. I started communication with Special Prosecutor, Bill Thompson to develop a professional relationship, and started the discovery process. I detailed my involvement in the case to the Court. I also advised the Court that this was an extraordinary case, requiring the appointment of co-counsel and a higher hourly rate of pay.

7. During the telephone conference, the Court inquired whether Mark Mimura had conflict counsel on contract who could represent the

Defendant in this case. Mr. Mimura indicated that he had spoken with all of his conflict attorneys when the Defendant requested Court-appointed counsel in his divorce case and none of his regular conflict attorneys would touch the case. He also listed his contract conflict counsel during the hearing. One of the named conflict counsel was Ryan Henson. Of primary concern to Mr. Mimura was who would be paying for the Defendant's representation.

8. At the conclusion of the telephonic hearing, and based at least in part on my concerns that there be no delay in the preparation of the Defendant's case, Judge Peart indicated that he would have a decision about the appointment of legal counsel by 5:00 p.m. that day, December 16, 2011.

9. After the telephonic hearing, Mark Mimura sent the Court and me an email indicating that one of his conflict counsels, Ryan Henson, would agree to represent the Defendant in this case. After receiving Mr. Mimura's email, Mr. Henson called me and indicated he had not been contacted by Mr. Mimura previously about representing the Defendant in his divorce case or otherwise in direct contradiction to what Mr. Mimura had represented to the Court during the telephonic hearing.

10. Concerned about Mr. Mimura's apparent misrepresentations to the Court, I contacted Bill Thompson and we agreed that I should


submit a letter detailing my concerns to the Court. I drafted a letter accordingly and sent it to the Court and counsel. A true and correct copy of my letter to the Court is attached hereto as Exhibit "B" and incorporated herein by reference.

11. December 16, 2011, came and went without receiving a decision from Judge Peart about the appointment of Defendant's counsel.

12. It is now December 20, 2011, four (4) days later and no decision regarding the appointment of counsel has been issued by the Court.

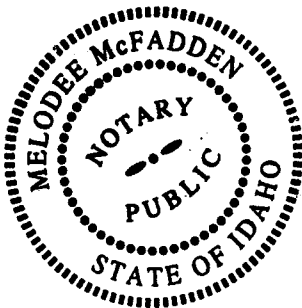
13. It is my opinion that the Defendant will suffer significant prejudice in the preparation of his defense if my appointment as his legal counsel is not continued by the Court.

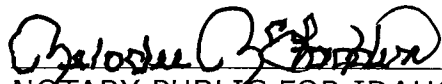
FURTHER AFFIANT SAYETH NAUGHT.



NANCY CALLAHAN
Affiant

SUBSCRIBED AND SWORN to before me this 20th day of December, 2011.





NOTARY PUBLIC FOR IDAHO
Residing at: EMMETT, IDAHO
My Commission Expires: 6/2/2012

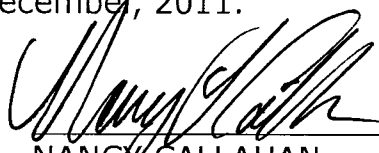
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DATED this 20th day of December, 2011.

A handwritten signature in black ink, appearing to read "Nancy Callahan", written over a horizontal line.

NANCY CALLAHAN
Attorney for Defendant

Nancy Callahan

From: James Peart [jcpeart@ctcweb.net]
Sent: Thursday, December 15, 2011 2:49 PM
To: Nancy Callahan; 'Bill Thompson'; 'Mark Mimura'; Nancy Callahan
Subject: Re: State v. Bujak

I think we will shoot for a telephone conference at 10 MST, 9PST tomorrow morning (Friday 16 December 2011).

Jim Peart

On 12/15/2011 12:21 PM, Nancy Callahan wrote:

> I am available any time this afternoon and tomorrow morning until
> noon. Nancy
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> ncallahan@nancycallahan.org
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> From: Bill Thompson [mailto:bthompson@latah.id.us]
> Sent: Thursday, December 15, 2011 11:17 AM
> To: 'James Peart'; 'Mark Mimura'; 'Nancy Callahan'
> Subject: RE: State v. Bujak
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> Sorry for my tardiness in replying. I'm just in the office after a
> series of morning meetings.
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> I am available the balance of this morning. I have a court hearing at
> 1:30 this afternoon (2:30 you all's time) and a meeting out of the
> office at 2:30 (3:30 your time). Tomorrow, I have a 7:30 am meeting
> that should be over by 8:30 and am open the balance of the morning
> until 11:15, and open again in the afternoon until a staff meeting at
> 3.
>
> Bill
>
> William W. Thompson, Jr.
> Latah County Prosecuting Attorney
> P.O. Box 8068
> Moscow, ID 83843
> 208-883-2246
> bthompson@latah.id.us
>
> This message is confidential and may be legally privileged. Unless
> you are the intended recipient, you may not use, copy, or disclose
> this message or any information herein. If you have received this
> message in error, please immediately delete it and any attachments,
> and notify us at pa@latah.id.us or by calling 208-883-2246. Thank
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> hearing. The trial court administrator is aware of the communications

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> Jim Peart
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Nancy Callahan

From: Bill Thompson [bthompson@latah.id.us]
Sent: Friday, December 16, 2011 5:42 PM
To: 'Nancy Callahan'; 'James Peart'; 'Mark Mimura'
Cc: 'Ryan Henson'; 'Stephen Bywater'
Subject: RE: State v. Bujak

Lady and Gentlemen,

Unfortunately, Latah County's email has been down this afternoon, so I wasn't able to reply earlier.

By way of clarification, it is more accurate to say that I suggested to Nancy that she author a letter to Judge Peart to express the concerns she and I discussed. As I indicated this morning, the State's interest is simply to ensure that Mr. Bujak has competent independent legal representation and I would hope to avoid any potential creation of some appellate issue in that regard.

That being said, I completely trust Judge Peart to do the correct thing and trust that this situation can be resolved quickly and appropriately.

Bill

William W. Thompson, Jr.
Latah County Prosecuting Attorney
P.O. Box 8068
Moscow, ID 83843
208-883-2246
bthompson@latah.id.us

This message is confidential and may be legally privileged. Unless you are the intended recipient, you may not use, copy, or disclose this message or any information herein. If you have received this message in error, please immediately delete it and any attachments, and notify us at pa@latah.id.us or by calling 208-883-2246. Thank you.

-----Original Message-----

From: Nancy Callahan [mailto:ncallahan@nancycallahan.org]
Sent: Friday, December 16, 2011 3:11 PM
To: 'James Peart'; 'Bill Thompson'; 'Mark Mimura'
Cc: 'Ryan Henson'
Subject: RE: State v. Bujak

Dear Judge Peart:

Attached is my written response, after consulting with Bill Thompson, to our hearing this morning. Despite Mark Mimura's comments in email communications attached to my letter, I have the highest regard for Ryan and his firm. Nancy

ncallahan@nancycallahan.org

-----Original Message-----

From: James Peart [mailto:jcpeart@ctcweb.net]
Sent: Thursday, December 15, 2011 2:49 PM
To: Nancy Callahan; 'Bill Thompson'; 'Mark Mimura'; Nancy Callahan
Subject: Re: State v. Bujak

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LAW OFFICE OF NANCY L. CALLAHAN

NANCY L. CALLAHAN
Bar #4884

101 Canal Street
Emmett, Idaho 83617

ROLF M. KEHNE
Bar #2180

December 16, 2011

Judge Peart
Via Email

Re: Public Defender Appointment

Dear Judge Peart:

At the request of Bill Thompson and my client (or former client) John Bujak, I am writing this letter to memorialize the concerns that our brief status conference has raised.

Shortly after our status conference this morning, we received a message from Mark Mimura advising that, surprisingly, Ryan Henson, his first conflict attorney, was available to take the appointment of this case. Shortly after Mr. Mimura's email, I received a telephone call from Ryan Henson asking about "What contempt did I not take?" and I advised Ryan of Mark's representations to this Court this morning that he had contacted all of his conflict attorneys and other attorneys in Canyon County and no one wanted to take John Bujak's contempt case. He further advised this Court that he had mentioned the conflict to the Commissioners and the Trial Court Administrator.

This raises serious concerns for my client concerning Mark Mimura's involvement at all in selecting his court appointed attorney. Mr. Bujak may be entitled to a hearing on this issue. It would be necessary to call Mr. Henson as a witness at that hearing particularly after Mark's representations this morning.

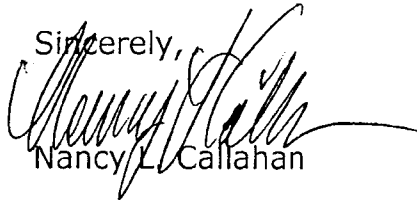
I have also been in contact with Bill Thompson. He is as baffled and concerned as we are that Mark has any involvement in this process. He is concerned that we are creating a potentially serious appeal issue out of the gate. It is his desire that John Bujak be given a clean fair trial, and this appointment process is very unusual and would not be taking place in his county.

I do not know how the Canyon County Public Defender is funded or if there is an actual contract that addresses the issues of funding for conflict counsel. I did find an indication that the Commissioners had some concerns about funding conflict

Judge Peart
December 16, 2011
Page 2

representation in Canyon County last January. I do not know if this issue has been resolved. Mark may have a personal financial interest in the outcome of this appointment. See attached minutes dated January 3, 2011.

It is Mr. Bujak's desire that my office continue with his representation. Neither Bill Thompson nor I have a grasp on the political culture of Canyon County, but what ever has been cooked up here does not seem to pass the smell test.

Sincerely,

Nancy L. Callahan

CC: Bill Thompson
Mark Mimura
Ryan Henson

The Board met today at 3:01 p.m. for a monthly meeting with the Public Defender to discuss general issues, set policy, and give direction. Present were: Commissioners David Ferdinand, Kathy Alder and Steve Rule, Public Defender Mark Mimura, Scott James and Deputy Clerk Monica Reeves. Mr. Mimura presented his December report, a copy of which is on file with this day's minute entry. With regard to providing the required monthly reports, Mr. Mimura said he does not have the database to list the dispositions of the cases. He said maybe the information could be obtained from ISTARs, the system used by the courts. Mr. Mimura has had the public defender contract since June of 2009. Commissioner Ferdinand said the Board feels confident in extending the contract for another year so that it matches Mr. Mimura's lease. Commissioner Rule wants to make sure Mr. Mimura is comfortable with the current arrangement. Mr. Mimura said he is here for the duration and he will perform the tasks to the best of his ability. Mr. James said they're hopeful this will be a career they can retire from. Commissioner Ferdinand said there is no plan to make changes to the public defender's budget, but he wants to make sure the issue of conflict counsel makes sense. Mr. Mimura said he is talking with the prosecutor's office and he has plans to talk to the district judge about his concerns with compensation for conflict counsel. Commissioner Rule said the contract spells out what will be paid from his budget and after that it is unfortunately passed on to the taxpayers. Commissioner Ferdinand said the prosecutor's office is looking into the issue and we have to continue to talk about it. Commissioner Alder said the prosecutor's office will work on the contract extension so that Mr. Mimura can go forward for another year. The Board asked Mr. Mimura to work with the prosecutor's office on providing the monthly reports that are required. The meeting concluded at 3:36 p.m. An audio recording of the meeting is on file in the Commissioners Office.

THIRD DAY OF JANUARY TERM, A.D., 2011
CALDWELL, IDAHO JANUARY 12, 2011

PRESENT: Commissioner David J. Ferdinand, II, Chairman
 Commissioner Steve Rule
 Commissioner Kathy Alder
 Deputy Clerks Monica Reeves and Claudia Amaral

APPROVED DOOR ACCESS CARD

Nancy Callahan

From: Nancy Callahan [ncallahan@nancycallahan.org]

Sent: Friday, December 16, 2011 4:01 PM

To: 'Mark Mimura'

Subject: RE: State v. Bujak

Mark: Contrary to your email below, I have no issue with the competency of Ryan or his firm. Nancy

ncallahan@nancycallahan.org

-----Original Message-----

From: Mark Mimura [mailto:mark@mimuralaw.com]

Sent: Friday, December 16, 2011 3:28 PM

To: Nancy Callahan; 'James Peart'; 'Bill Thompson'

Cc: 'Ryan Henson'; 'Gordon Petrie'

Subject: RE: State v. Bujak

Ryan did not say that he had a conflict on the Rule 75 Contempt. He indicated at that time that he did not want to take the case. I find it very interesting that you, or John, would question the competency of Ryan's firm. If you have specific reasons why the firm lacks competency, I would suggest that you, or John, make record of such concerns. As for my involvement in the appointment process, this is what I do in every conflict case. I will change the process when the Supreme Court tells me the process is not proper.

From: Nancy Callahan [ncallahan@nancycallahan.org]

Sent: Friday, December 16, 2011 12:28 PM

To: Mark Mimura; 'James Peart'; 'Bill Thompson'

Cc: 'Ryan Henson'; 'Gordon Petrie'

Subject: RE: State v. Bujak

Mark: I have been in contact with John. He believes that you are interfering in the court's duty to appoint disinterested and competent counsel primarily to control the purse strings in this case. John has serious questions about your involvement in this process in this particular case. John truly wants an answer concerning Ryan's conflict in the contempt case. You represented to the Court that you asked all of your conflict counsel concerning this appointment. If Ryan's office had a conflict in the contempt case, when did the conflict resolve or did you misrepresent your inquiry to the Court this morning. Nancy
ncallahan@nancycallahan.org

-----Original Message-----

From: Mark Mimura [mailto:mark@mimuralaw.com]

Sent: Friday, December 16, 2011 11:05 AM

To: James Peart; Bill Thompson; Nancy Callahan

Cc: Ryan Henson; Gordon Petrie

Subject: RE: State v. Bujak

Judge,

I have just returned from the Canyon County Courthouse where I spoke with my first conflict counsel on criminal cases. Surprisingly to me, Ryan Henson advised that he would be willing to take the case. If you would amend the Order to simply appoint the Public Defender, I will file my normal Notice of Conflict with a proposed Order Appointing Mr. Henson.

Mark Mimura

From: James Peart [mailto:jcpeart@ctcweb.net]
Sent: Thursday, December 15, 2011 10:35 AM
To: Mark Mimura; Bill Thompson; Nancy Callahan
Subject: Re: State v. Bujak

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12/16/2011

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LAW OFFICES OF NANCY L. CALLAHAN
101 Canal Street
Emmett, Idaho 83617
Tel. (208) 365-1200
Fax. (208) 365-1646

Attorney for Defendant

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

STATE OF IDAHO,)	
)	
Plaintiff,)	Case No. CR-2011-31217*C
)	
vs.)	MEMORANDUM OF LAW IN SUPPORT
)	OF DEFENDANT'S MOTION FOR
JOHN T. BUJAK,)	ORDER CONTINUING APPOINTMENT
Defendant,)	OF LEGAL COUNSEL
_____)	

COMES NOW, NANCY CALLAHAN, attorney for the Defendant, and hereby submits this Memorandum of Law in Support of Defendant's Motion for Order Continuing Appointment of Legal Counsel. This Memorandum will be divided into three parts. The first part will present the relevant factual history. The second part will present the Defendant's legal discussion, and the third part will present the Defendant's conclusion, to wit: the Court should enter an order continuing the appointment of Nancy Callahan as the attorney for the Defendant in the above-captioned case.

RELEVANT FACTUAL HISTORY

1. Nancy Callahan was duly appointed by the Honorable James C. Peart, Magistrate Judge, to represent the above-named Defendant in the above-captioned case on December 13, 2011. Callahan was previously appointed to represent the Defendant by Judge Smyser in a contempt proceeding arising in his divorce case. Callahan had appeared in the divorce case on December 13, 2011, to resolve the contempt. At the conclusion of the divorce hearing, and without prior knowledge or notice to the Defendant or to Callahan, law enforcement officers entered the courtroom, Judge Peart took the bench and proceeded to conduct an initial appearance in the above-captioned case. At the hearing, Callahan was appointed as conflict counsel, the issue of bond was addressed, and the Defendant was taken into custody.
2. After Callahan was appointed to represent the Defendant, Judge Peart sent an email to the attorneys in this case and Mark Mimura, the Canyon County Public Defender. The email sparked correspondence between the parties and resulted in a telephone conference on December 16, 2011. In the email, Mark Mimura represented that the **County Commissioners** had worked with the Trial Court Administrator to secure Callahan's appointment in the

Defendant's divorce case. Mr. Mimura also requested permission to forward Judge Peart's email to the **County Commissioners** suggesting that they would be involved in the appointment of counsel in this case.

3. During the telephone conference, Judge Peart asked for comments regarding whether Callahan should continue to be appointed to represent the Defendant in this case. At the time, Callahan had already met with the Defendant, communicated and started to develop a professional rapport with the Special Prosecutor, Bill Thompson, and started the discovery process. Callahan detailed her involvement in the case to the Court and also advised the Court that this was an extraordinary case, requiring the appointment of co-counsel and a higher hourly rate of pay.
4. During the telephone conference, the Court inquired whether Mark Mimura had conflict counsel on contract who could represent the Defendant in this case. Mr. Mimura indicated that he had spoken with all of his conflict attorneys when the Defendant requested Court-appointed counsel in his divorce case and none of his regular conflict attorneys would touch the case. He also listed his contract conflict counsel during the hearing. One of the named conflict counsel was Ryan Henson. Of primary concern to Mr. Mimura was

- who would be paying for the Defendant's representation.
5. At the conclusion of the telephonic hearing, and based at least in part on Callahan's concerns that there be no delay in the preparation of the Defendant's case, Judge Peart indicated that he would have a decision about the appointment of legal counsel by 5:00 p.m. that day, December 16, 2011.
 6. After the telephonic hearing, Mark Mimura sent Callahan an email indicating that one of his conflict counsel, Ryan Henson, would agree to represent the Defendant in this case. After receiving Mr. Mimura's email, Mr. Henson called Callahan and indicated he had not been contacted previously about representing the Defendant in his divorce case or otherwise. This representation was in direct contradiction to what Mr. Mimura had represented to the Court during the telephonic hearing.
 7. Concerned about Mr. Mimura's apparent misrepresentations to the Court Callahan contacted Bill Thompson and they agreed that Callahan should submit a letter detailing her concerns to the Court. Callahan drafted a letter accordingly and sent it to the Court and counsel.
 8. December 16, 2011, came and went without receiving a decision from Judge Peart about the appointment of Defendant's counsel.

9. It is now December 20, 2011, four (4) days later and no decision regarding the appointment of counsel has been issued by the Court.

LEGAL DISCUSSION

The Defendant has filed a Motion asking the Court to enter an order continuing the appointment of Nancy Callahan as legal counsel for the Defendant in this case. As the Court has indicated, a person who is entitled to the appointment of legal counsel is only entitled to the appointment of competent counsel and not the appointment of counsel of the defendant's choosing; however, there is a body of conflicting case law throughout the United States at both the state and federal levels that indicates a defendant may have the right to continuous representation by legal counsel once counsel is appointed.

At this time, the state of Alabama has petitioned the United States Supreme Court for a writ of certiorari to address the issue of continuous representation by court-appointed counsel in a criminal case. The Defendant has attached relevant portions of Alabama Attorney General Luther Strange's Petition for a Writ of Certiorari to this Memorandum. The Petition does a good job of framing the issue and identifying the relevant state and federal authority related thereto.

The Defendant brings this matter to the Court's attention because this case has not even reached preliminary hearing yet and already a colorable


appellate issue has been created by revisiting the appointment of the Defendant's legal counsel. In addition to the prejudice caused by the delay in preparing for his defense, the Defendant has to question the apparent political influence and appearance of impropriety created by involving the Canyon County Commissioners, the complaining party in the current criminal case against the Defendant, in the process of selecting the Defendant's legal counsel – especially when that influence occurs after the Court has duly and properly appointed the Defendant legal counsel pursuant to I.C. § 19-853. The Defendant is also concerned because the Canyon County Public Defender, Mark Mimura, who serves pursuant to an appointment made by the Canyon County Commissioners, has misrepresented facts to the Court in an effort to manipulate the process of appointing legal counsel to the Defendant in this case.

CONCLUSION

Revisiting the appointment of counsel in the manner the issue has been revisited in this case is not normal procedure in a criminal case. The manipulation of the appointment process and the delay in the Court's decision creates serious concerns and continues to prejudice the Defendant in the preparation of his defense. Although the issue has not been addressed in Idaho, case law from other jurisdictions as outlined in Attorney General Strange's Petition suggest that a criminal defendant may have a

constitutional right to the continuous appointment of legal counsel in a criminal case. If the Court were to change the Defendant's legal counsel at this juncture it will create an appellate issue before this case has even made it to preliminary hearing. Accordingly, the interests of justice and the integrity of the justice system are best served by the Court entering an order continuing Nancy Callahan's appointment as legal counsel for the Defendant in this case.

DATED this 20th day of December, 2011.



NANCY CALLAHAN
Attorney for Defendant

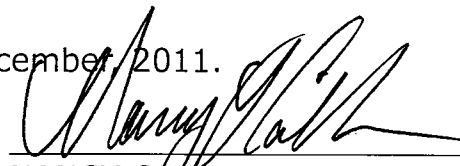
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I did cause a true and correct copy of the foregoing to be delivered to the following individuals via the method and on the date indicated below:

Via Facsimile

Bill Thompson
Special Prosecutor
Fax. (208) 883-2290

DATED this 20th day of December, 2011.



NANCY CALLAHAN
Attorney for Defendant

No. _____

In the
Supreme Court of the United States

STATE OF ALABAMA,
Petitioner,

v.

THOMAS ROBERT LANE,
Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

PETITION FOR A WRIT OF CERTIORARI

Luther Strange
Attorney General
John C. Neiman, Jr.
Solicitor General
Counsel of Record
Andrew L. Brasher
Deputy Solicitor General
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November 17, 2011

conviction and requiring a new trial, is where this case currently stands.

REASONS FOR GRANTING THE PETITION

This case possesses all the necessary qualifications for certiorari. It implicates an entrenched split involving published decisions by federal courts of appeals, state supreme courts, and state intermediate criminal courts. It implicates an important question about the federal constitution. The Alabama courts' erroneous answer to that question will have adverse consequences both in the immediate future and in the long term. And the case presents an excellent vehicle for clarifying this area of the law. This Court should grant plenary review.

I. The lower courts are split on the question presented.

This case presents a deep and entrenched split that only this Court can resolve. Although this Court's precedents make clear that the Sixth Amendment grants criminal defendants the right to effective assistance by court-appointed counsel, this Court's precedents also make clear that a defendant has no Sixth Amendment right to choose which court-appointed counsel will represent him. The lower courts are divided on what these principles mean for a trial-court order that erroneously replaces a criminal defendant's initial appointed counsel with a different, but effective, substitute counsel. As explained below, the better-reasoned view, adopted by two federal courts of appeals and two state

supreme courts, is that because a criminal defendant has no right to choice of court-appointed counsel, these circumstances do not implicate the defendant's Sixth Amendment right to counsel. But several other state courts, joined now by the Alabama court below, have held that the trial court's replacement of appointed counsel in these circumstances amounts to Sixth Amendment error.

A. Two federal courts of appeals and two state supreme courts have held that erroneous replacement of appointed counsel is not Sixth Amendment error.

Two federal courts of appeals and two state supreme courts are on the right side of this split.

Sixth Circuit. On federal habeas review, the Sixth Circuit has held that a state court did not violate a criminal defendant's Sixth Amendment rights when it removed his appointed attorney without cause because "a defendant relying on court-appointed counsel has no constitutional right to counsel of his choice." *Daniels v. Lafler*, 501 F.3d 735, 740 (6th Cir. 2007), *cert denied*, 552 U.S. 1261 (2008).

Fourth Circuit. Two years later, in a direct appeal from a federal conviction, the Fourth Circuit explicitly adopted the Sixth Circuit's rationale from *Daniels*. The court affirmed a district court's disqualification of appointed counsel on direct appeal, holding that even if the disqualification had

been erroneous, an indigent defendant has a Sixth Amendment “right to effective assistance of counsel, but not to counsel of his own choosing.” *United States v. Basham*, 561 F.3d 302, 324-25 (4th Cir. 2009). The court explained that “the only right implicated by the district court’s disqualification of [the appointed attorneys] was the right to effective assistance of counsel.” *Id.* at 324.

California. Similarly, the California Supreme Court has held that a trial court’s erroneous replacement of a criminal defendant’s appointed counsel did not violate a Sixth Amendment right to continuation of counsel. *People v. Noriega*, 229 P.3d 1, 4-5 (Cal. 2010), *cert. denied*, 131 S.Ct. 897 (Jan. 10, 2011). That court endorsed the lower state court’s rationale “that defendant had no right under the federal Constitution’s Sixth Amendment to choose which attorney would represent him at taxpayers’ expense.” *Id.*

Louisiana. The Louisiana Supreme Court has likewise held that the erroneous removal of a criminal defendant’s appointed counsel is not a structural error under the Sixth Amendment. The Court explained that, while criminal defendants with retained counsel have a Sixth Amendment right to choose their counsel that may be abridged by an erroneous removal, “there is nothing in either the federal or state constitutions which would provide [the defendant] with the right to maintain a particular attorney-client relationship in the absence of a right to counsel of choice.” *State v. Reeves*, 11 So. 3d 1031, 1067 (La. 2009), *cert. denied*, 130 S.Ct. 637

(2009). Instead, the Louisiana Supreme Court held, “[a] criminal defendant who has been appointed counsel, whether a private attorney or a public defender, only has the right under the federal constitution to effective representation.” *Id.* at 1056.

Because these courts have held that there is no Sixth Amendment right to choose continued representation by court-appointed counsel, each of these courts also has reasoned that when a trial court erroneously replaces court-appointed counsel, the defendant must prove that he has been *prejudiced* by that erroneous removal in order to obtain reversal of his conviction. *See Daniels*, 501 F.3d at 740 (“The replacement of court-appointed counsel might violate a defendant’s Sixth Amendment right to adequate representation or his Fourteenth Amendment right to due process if the replacement prejudices the defendant.”); *Basham*, 561 F.3d at 325 (“[The defendant] must point to some type of prejudice suffered because of the removal of the court-appointed attorneys.”); *Noriega*, 229 P.3d at 7 (“[A]s defendant in this case has not shown a reasonable probability that the trial court’s erroneous replacement of the public defender altered the outcome of the trial he is not entitled to reversal of his conviction.” (citation omitted)); *Reeves*, 11 So. 3d at 1064 (“We hold that the district court’s actions . . . did not result in structural error in Reeves’ retrial.”).

B. Nine jurisdictions hold that indigent defendants have a Sixth Amendment right to choose continued representation by appointed counsel.

Meanwhile, the Alabama courts have joined courts from eight other jurisdictions on the other side of the split. All those jurisdictions have held that the Sixth Amendment grants criminal defendants a right to continuous representation by their court-appointed counsel. And when those courts have considered whether a violation of that right is structural error, those courts have uniformly answered that question in the affirmative.

District of Columbia. The equivalent of the state supreme court for the District of Columbia, the D.C. Court of Appeals, has held that “once counsel has been chosen, whether by the court or the accused, the accused is entitled to the assistance of that counsel at trial.” *Harling v. United States*, 387 A.2d 1101, 1105 (D.C. App. 1978). That court held that erroneous disqualification of appointed counsel is a structural Sixth Amendment error requiring automatic reversal. *See id.* at 1106. In so doing, the court rejected the government’s argument that “even assuming the court erred in removing appellant’s court-appointed attorney, reversal is not required since appellant eventually received a competent defense through substituted counsel.” *Id.*

Alaska. Likewise, the Alaska Supreme Court has held that after a trial court appoints counsel and

the defendant “has reposed his trust and confidence” in that attorney, “the trial 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.” *McKinnon v. State*, 526 P.2d 18, 22-23 (Alaska 1974), *overruled on other grounds*, *Kvasnikoff v. State*, 535 P.2d 464 (Alaska 1975). The Alaska court also held that the erroneous replacement of appointed counsel requires reversal whether or not the defendant was prejudiced. *Id.* at 24.

Arkansas. Though it did not reach the structural-error question, the Arkansas Supreme Court agreed with the D.C. and Alaska courts that the Sixth Amendment creates a right to continued representation by appointed counsel. The Arkansas court therefore held that a trial court violates a defendant’s Sixth Amendment “right to particular counsel” when it “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.” *Clements v. State*, 817 S.W.2d 194, 200 (Ark. 1991).

Colorado. Stating the same holding in slightly different language, the Colorado Supreme Court has held that “[w]hile there is no Sixth Amendment right for an indigent defendant to choose his appointed counsel, that defendant is entitled to continued and effective representation by court-appointed counsel in the absence of a demonstrable basis in fact and

law to terminate that appointment.” *People v. Harlan*, 54 P.3d 871, 878 (Colo. 2002) (en banc).

Texas. Along the same lines, Texas’s highest criminal appeals court has held that constitutional interests protect a defendant from the erroneous removal of his court-appointed attorney. *Stearnes v. Clinton*, 780 S.W.2d 216, 223-25 (Tex. Crim. App. 1989) (en banc) (citing *Wheat v. United States*, 486 U.S. 153, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988)).

Florida. More recently, the Florida Supreme Court endorsed the holdings of the D.C., Alaska, Colorado, and Texas courts. *Weaver v. State*, 894 So. 2d 178, 189 (Fla. 2004), cert. denied 125 S.Ct. 2297 (2005). It thereby “reject[ed] the argument that because a defendant does not pay his fee, he has no ground to complain about his counsel’s removal by the court as long as the replacement attorney handles the case competently.” *Id.*

In addition to those decisions from states’ highest criminal courts, two intermediate appellate courts with statewide jurisdiction have adopted the same rule:

Michigan. The Michigan Court of Appeals has held that a trial court’s improper “removal of defendant’s appointed trial counsel during a critical stage in the proceedings, over the objection of the defendant, violates the defendant’s Sixth amendment right to counsel.” *People v. Johnson*, 547 N.W.2d 65, 69 (Mich. App. 1996). Like the Alabama courts here, the Michigan courts hold that “reversal is required”

whether or not the defendant can establish prejudice. *People v. Durfee*, 547 N.W. 2d 344, 347 (Mich. App. 1996).

Tennessee. The Tennessee Court of Criminal Appeals, without addressing the structural-error issue, has agreed that a trial court's erroneous removal of counsel "violate[s] the defendant's right to counsel and exceed[s] its discretion." *State v. Huskey*, 82 S.W.3d 297, 302 (Tenn. Crim. App. 2002).

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The split is thus real, and it is meaningful. As one commentator has recently put it, this "continued counsel split" serves as a prime example of current "disparities in state systems." Key Bosse, *Price Tag on Constitutional Rights: Georgia v. Weis and Indigent Right to Continued Counsel*, 6 MODERN AMER. 43, 43, 45 (2010). As things currently stand, if a court erroneously replaces a defendant's appointed counsel, the constitutional and practical consequences for the defendant will turn on where he or she happens to be tried. In two federal circuits and two states, no Sixth Amendment violation will have occurred, and the defendant's conviction will be upheld, so long as substitute counsel was constitutionally effective. Yet in numerous other states, the courts will deem the defendant to have suffered a Sixth Amendment violation, and they will require the conviction to be reversed, no matter how brilliantly substitute counsel may have performed. It is thus no surprise that one justice of Texas's highest criminal court has noted that "there is confusion

among some of our trial judges as to when their authority to determine who will represent an indigent defendant begins and ends.” *Stotts v. Wisser*, 894 S.W.2d 366, 368 (Tex. Crim. App. 1995) (Bard, J., concurring).

This confusion surrounds an issue that is of substantial importance. The DOJ Bureau of Justice Statistics has concluded that “[p]ublicly-financed counsel” represent between 60 percent and 80 percent of felony defendants. *See Two of Three Felony Defendants Represented by Publicly-Financed Counsel*, Nov. 29, 2000 (available at <http://bjs.ojp.usdoj.gov/content/pub/press/iddc.pr> (last visited Nov. 10, 2011)). No split should linger on an issue that conceivably affects so many criminal trials, and this Court should eliminate the split now.

II. The decision below is on the wrong side of the split.

It is particularly important for this Court to resolve the split in this particular case, for the courts that have found a violation of the Sixth Amendment in these circumstances have reached the wrong conclusion on the merits. Although this Court has not squarely addressed the question, one commentator recently observed that “the thrust of the Court’s opinions suggest that the indigent defendant has no constitutionally protected interest other than to receive effective assistance of counsel.” Anne Bowen Poulin, *Strengthening the Criminal Defendant’s Right to Counsel*, 28 CARDOZO L. REV. 1213, 1252 (2007). As explained below, that