Shelby County Government

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May 22, 2017

VIA EMAIL & U.S. MAIL
Ms. Sandra Simkins, Due Process Monitor
School of Law–Camden
Rutgers, The State University of New Jersey
217 North 5th Street
Camden, NJ 08102

Re: *Memorandum of Agreement Regarding the Juvenile Court of Memphis and Shelby County*, December 17, 2012

Dear Monitor Simkins:

Pursuant to the Memorandum of Agreement, Shelby County, Tennessee responds as follows to the issues of concern related to the Juvenile Court of Memphis and Shelby County, as discussed in Draft Due Process Compliance Report #11, dated April 20, 2018:

INDEPENDENCE ISSUES

A. Shelby County Public Defender[1]

While the Draft Report (at 3) lauds the significant "assurances of [Public Defender] independence[,]" it seems to demand much more than substantial compliance with the Memorandum of Agreement (*see* Draft Report at 4 (emphasis added)): "None of these assurances constitutes **an ideal solution** . . . ."

The Court has certainly demonstrated its commitment to the implementation of best practices within the boundaries of the controlling law, but the MOA standard is substantial compliance. In that regard, the Draft Report (at 5)

[1] The Draft Report (at 3 (emphasis added)) states that "Public Defender independence . . . has been one of the most difficult [MOA subjects] to address **given the County's interpretation** of the limitations of the County Charter and Rule 13." Thus, this Draft Report once again lays at the feet of the Court responsibility for the controlling law.

"determin[es] that the Shelby County Public Defender is presently able to act with sufficient independence."[2]

B. Conflict Counsel

The Shelby County Charter precludes the establishment of an independent commission to oversee the provision of indigent defense representation by the Public Defender. This limitation under existing law must be analyzed in tandem with the restrictions of Tennessee Supreme Court Rule 13, which provides for the appointment, qualifications, and payment of lawyers in cases not handled by the Public Defender by putting those matters squarely in control of the trial judge. The County and the Court have no control over the Tennessee Supreme Court, which has "original and exclusive jurisdiction to promulgate [its] own rules" and to govern the practice of both lawyers and the judiciary. *Petition of Tenn. Bar Ass'n*, 539 S.W.2d 805, 810 (Tenn. 1976).

The Draft Report suggests that the Public Defender create a "central administrative office" to accommodate the operation of a "single agency model," which would take control over the vast majority of conflict appointments, despite the dictates of Rule 13 against such an arrangement and the conflict-of-interest provisions of the Tennessee Rules of Professional Conduct and the Shelby County Charter. The Draft Report touts the single agency model as a purported remedy "for noncompliance" based on a presumed – although undemonstrated – lack of independence of the Conflicts Panel lawyers.[3] Thus, the Draft Report deems noncompliant a process the Juvenile Court adopted from (and which is still utilized by) the United States District Court for the Western District of Tennessee. As previously explained, the process uses software that selects, based upon current caseloads and expertise, a private lawyer for a conflict appointment. The Court's Panel Coordinator hits a button on a computer, contacts the private lawyer whose name the software generates to determine whether he/she is available to take the appointment, and, if the lawyer accepts the appointment, prepares a case package

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[2] By way of reminder, the option of attempting to change the Charter to allow the Chief Public Defender to run for office was communicated three years ago to the Department of Justice attorneys and the Chief Public Defender, all of whom declined the proposal.

[3] The Draft Report discusses extensively the State of Delaware's recent restructuring of its indigent defense delivery system, but provides no analysis of whether or not Delaware's new system could be utilized in Shelby County within the dictates of the Charter and Supreme Court Rule 13. The County and the Court therefore respectfully request that the discussion of the new Delaware system, the implication of which discussion is that the implementation of such a change in Shelby County would solve the conflict lawyers' purported lack of independence, be omitted from the final version of the Report.

for him/her. Simply put, there is no evidence that the present process for the appointment of conflict counsel has impinged on the due process rights of a single juvenile.

The Draft Report further takes the position that, under the single agency model, the Public Defender's Office, in each instance in which it determined that a conflict of interest existed (generally because of the Office's current or prior representation of a co-defendant, witness, or victim), would then choose the conflict lawyer. The Draft Report does not explain how such a mechanism would exist and operate without running afoul of Rules 1.7—1.10 of the Tennessee Rules of Professional Conduct. *See, e.g.,* Rule 1.10 Imputation of Conflicts of Interest: General Rule, "(a) While lawyers associated are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPCs 1.7, 1.9, or 2.2 . . . ." As to conflict issues that exist despite the use of a screening mechanism, *see Clinard v. Blackwood*, 46 S.W.3d 177 (Tenn. 2001), in which the law firm involved was disqualified because of the serious appearance of impropriety.

Furthermore (setting aside for a moment any ethical issue), the Draft Report provides no explanation as to how allowing the Public Defender to control conflict appointments would enhance or further the independence of conflict lawyers. Under Rule 13, the Juvenile Court Judge would still have to sign appointment (and withdrawal) orders for both Public Defenders and lawyers appointed in conflict-of-interest situations.

ATTORNEYS AT PROBATION CONFERENCES

With respect to the presence of attorneys at probation conferences, the Draft Report (at 7-8 (footnote omitted)) correctly acknowledges as follows:

> It was reported by the pilot project attorney that since March 1, 2018, 80 youth have had probation conferences scheduled under the pilot [that is, with an attorney present]. The current plan is to take this pilot to scale by July 1, 2018. I believe this pilot project, if taken to scale, would meet the requirements of the Agreement. The Department of Justice also submitted an email to Shelby County and the Settlement Coordinator on April 10, [2018] which advised, "It is our position that once implemented, the Public Defender's provision of counsel at the probation conferences will constitute substantial compliance with the Agreement, Protection against Self-Incrimination provision III.A.1([d])(ii) and (iv)."

TRANSFER ISSUES

With respect to transfers of minors by the Juvenile Court to the Criminal Court to be tried as adults, it is critical to acknowledge the historical compliance ratings on the two remaining issues: (1) children provided opportunity to present evidence on their own behalf; and (2) children provided opportunity to confront evidence and witnesses. As to the first, the Monitor found substantial compliance during the period covering the October 2015 and April 2016 reviews. As to the second, the monitor found substantial compliance during the period covering the April 2015, October 2015, and April 2016 visits.

Although nothing changed in the Court's process or procedure, the Monitor, in December 2016, lowered the ratings to partial compliance, to which the County and Court strongly objected and have continued to so object. The current Draft Report continues to assert that the ratings drop was made because of concerns "about inconsistent discovery practices and that attorney discovery was inadequate to represent youth at transfer hearings."

A. Discovery

The Monitor is well aware of the position of the County and the Court regarding discovery in transfer hearings. That position was discussed in detail in, for example, the December 7, 2017 Memorandum in response to Draft Due Process Compliance Report #10, in particular at pages 5-6, 8-9, and 13-14; there is no need to reiterate it in detail here. Suffice it to say that the two determinative components of the County and the Court's stance on discovery in transfer hearings remain completely unrefuted: (1) The MOA does not, either directly or by implication, require open discovery in transfer hearings; and (2) *State v. Willoughby*, 594 S.W.2d 388 (Tenn. 1980), is the controlling law in Tennessee.

Recently, the DOJ has in essence acknowledged the County and the Court's long-stated position. In her April 10, 2018 email, General Winsome Gayle stated that District Attorney General Amy Weirich had represented that her office provides all items subject to disclosure by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). Ms. Gayle continued (emphasis added): "It is our position that the Agreement, Transfer Hearing provision III.A.1(c)(i)(d)[4] requires **only** disclosure of *Brady* and *Giglio* materials for transfer hearings."

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[4] It appears this reference to the MOA should read "III.A.1(c)(i), (d)."

The Draft Report responds by disagreeing with the DOJ, but restoring the applicable ratings to substantial compliance:

> I completely disagree with the DOJ's opinion and maintain that full discovery is necessary to adequately represent youth at this critical stage. However, in light of the DOJ's opinion . . . I have changed my rating to substantial compliance, which must be maintained for at least a year to meet the terms of the Agreement.

We respectfully submit that the Court is not required to maintain substantial compliance for another year before those terms of the MOA may be terminated. Instead, the Court reached substantial compliance in both areas in 2016, and has been in substantial compliance continuously since that time (far longer than the year alluded to in the Draft Report). The final Report should so reflect.[5]

B. Number of Transfers

The Draft Report notes that the "numbers of youth facing transfer continued to climb to above 2013 levels," thus maintaining its long-standing criticism of the number of juveniles transferred in Shelby County and the apparent position that due process is inherently denied because of the transfer request decisions made by the District Attorney General. These matters, however, remain unrefuted: (1) The District Attorney General, an official of the State of Tennessee, is not a party to the MOA; (2) all charging decisions and transfer requests fall within the DAG's sole authority as the elected official; and (3) the law **requires** that the Court provide a transfer hearing upon the DAG's request.

The Draft Report cites 221 transfer requests made by the State in 2017. Of that number, the State withdrew 80 requests as the cases progressed (either settling the case under juvenile jurisdiction or dismissing the charges altogether), leaving 141 cases. Of that number, the Juvenile Court actually conducted only 44 transfer hearings (requests for transfer may overlap the calendar year period); the

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[5] Text omitted from the above quotation also demands a response. Although changing the ratings to substantial compliance, the Draft Report references (emphasis added) "the fact that during **this past compliance visit** [the Monitor] did not receive any reports that *Brady* materials were being withheld." The inference to be drawn is that the Monitor received prior reports of *Brady* violations. If the implication is unintended, we respectfully request that the final version of the Report be revised to remove this language. On the other hand, if such a complaint were made to the Due Process Monitor previously, why did the Monitor fail bring such critical information to the attention of the Juvenile Court (so it could ensure due process was being provided), and/or the Tennessee Board of Professional Responsibility, and/or the Tennessee Court of the Judiciary?

Court declined to transfer 25 of those 44 juveniles. Forty-eight cases were waived by the child and his/her lawyer, with 39 of those being straight waivers of transfer hearing and an additional 9 being waivers based upon "information" (bypassing Grand Jury straight to Criminal Court) offers from the State. The Court's only participation in cases in which there is a waiver by the child is to make certain the waiver is knowing and voluntary, that is, is an arm's-length decision made with proper legal advice and assistance.[6]

After declining for several years (71 transferred/waived in 2016), the number rose to 92 in 2017, unfortunately reflecting a rise in violent crime by juveniles. The County and the Court remain at a complete loss as to how the number of transfer requests made by the District Attorney General, and/or the number of waivers to adult court by children represented by counsel, reflect any issue with due process, much less an issue over which the Court has control.

C. Psychological Evaluations

The substantive text of the Draft Report concludes as follows (emphasis added):

> Finally, I want to express concerns that in 2018 there have been eight documented cases where attorneys made requests for psychological evaluations prior to the transfer hearing and the request was denied. In addition, there was a case where the Court refused to wait for the evaluation to be completed and proceeded to have the child's transfer hearing when a psychological evaluation was pending. **It is unclear why these evaluation requests are being denied,** but I encourage the Court and defense counsel to ensure decisions are not being made arbitrarily.

Thus, the Draft Report does not assert that any decision by the Court in fact was arbitrary; instead, it implies that conclusion. Further, the Draft Report's statement that "it is unclear why these evaluation requests are being denied" seems to imply that all the decisions referenced were made for the same reason. The Court of course has always made tapes of all transfer proceedings available to the Monitor for review. In this instance, the tapes would have demonstrated one or more of the following entirely appropriate reasons for denial of a psychological evaluation: (1) the parent or the lawyer for the child acknowledged that the child took no

[6] The child's waiver is generally in exchange of an immediate pre-indictment offer by the State, or because the charge is eligible for diversion in the adult system, or to link up charges pending or expected for a package offer by the State.

psychotropic drugs; (2) the child had never been diagnosed or treated for any mental illness; (3) the child had never been hospitalized for any type of mental illness; (4) the child was not mentally impaired; and/or (5) the child fully understood his counsel, his parent, and the Court. Thus, the Court made each decision on the facts of the case presented, not on any blanket (improper) ground.

Furthermore, in each instance, the "basis" provided for the proposed examination was either the mere fact that the person before the Court was a juvenile, the "seriousness of the charge" without more supporting facts, or both. The Tennessee Rules of Juvenile Procedure require that matters involving incarcerated youth be dealt with, and resolved, within 30 days (45 days for non-incarcerated youth), unless good cause is found. A psychological examination takes an additional 30 to 60 days. The Court uniformly follows its announced policy of granting such requests upon **any** reasonable basis. However, the Court cannot entertain prolonged incarceration of children upon *pro forma* requests for psychological evaluations, particularly when all the records from prior treatments under court order, the schools, the Dept. of Children's Services, or private medical providers are available to the defense. Additionally, the result of a competency test is available within one week if either the lawyer, or the Court *sua sponte*, sees such a need, and such a request is invariably granted.

Under the circumstances, the Court and the County respectfully request that this paragraph be removed from the final version of the Report.

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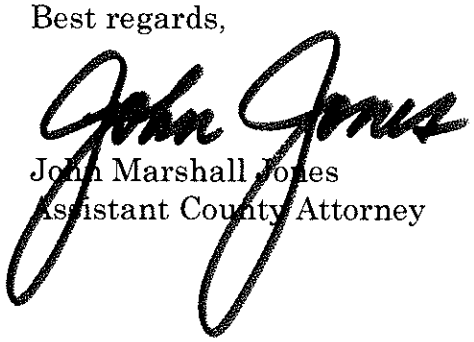
We appreciate your consideration of the above requests regarding final Due Process Compliance Report #11, and look forward to receiving the final version.

Best regards,



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/JMJ

cc: Winsome G. Gayle, Esq. (VIA EMAIL)
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