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A Price Tag on Constitutional Rights: Georgia v. Weis and Indigent Right to Continued Counsel

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A PRICE TAG ON CONSTITUTIONAL RIGHTS: GEORGIA V. WEIS AND INDIGENT RIGHT TO CONTINUED COUNSEL

By: Katy Bosse [1]

"Thou shalt not ration justice." –Judge Learned Hand[2]

On February 2, 2006, Jamie Weis was arrested and charged with the robbery and murder of a local senior citizen.[3] Nearly seven months after his initial arrest, the state notified the Griffin trial court of its intention to seek the death penalty.[4] In the Georgia Public Defender system, created by the Georgia Indigent Defense Act of 2003, all death penalty cases are assigned to the Georgia Capital Defender Division instead of the local public defender's office.[5] In Weis's case, the overseeing Georgia Public Defender Standards Council determined that the Capital Defenders Division had a tremendous caseload.[6] And instead of assigning another case to the already overtaxed Capital Defenders Division, the Council decided to assign private attorneys Robert Citronberg and Thomas West on a contractual basis.[7]

From January 24, 2007 through November 26, 2007, the defense attorneys filed over sixty motions on Weis's behalf.[8] During that time, the Georgia Capital Defenders also handled the high profile case of Brian Nichols,[9] which exhausted most of its 2007 annual budget and depleted the funds available for other cases.[10] Citronberg and West filed for four continuances between January 24 and November 26, 2007,[11] because the state could no longer afford to pay them for their time.[12] On November 26, 2007, District Attorney Scott Ballard made an oral motion to remove Citronberg and West from the case, and suggested that attorneys from the local public defender's office be placed on the case instead.[13] Judge Caldwell sustained the state's motion and removed Citronberg and West.[14] Subsequently, two public defenders, Tamara Jacobs and Joseph Saia, were assigned as counsel.[15]

This article explores the origins of an indigent defendant's right to counsel and demonstrates how the facts of the *Weis* case illustrate the need for a definitive right to continued counsel. Part I traces the procedural history of *Weis*, the history of the right to counsel in America, and the current jurisdictional split on the right to continued counsel. Part II analyzes the current Supreme Court language on indigent right to continued counsel, and suggests how *Weis* provides an opportunity for the Court to resolve the issue in favor of indigent defendants. Analyzing the procedural history and arguments described below, it is evident that denying Weis the right to retain his court appointed counsel violates his Sixth Amendment right to a fair trial, because he was without effective counsel for over a year during which the prosecution continued to mount its case.

I. How We Got to a Continued Counsel Split

a. The Georgia Decision

"I guess the Supreme Court will have to earn their money." –Judge Caldwell[16]

On December 10, 2007, the two public defenders assigned to Weis's case, Jacobs and Saia, filed a motion to withdraw as counsel due to "their inability to duplicate the familiarity with the case."[17] The motion was denied.[18] Subsequently, Weis filed another motion on December 20, which contained an affidavit from Joseph Saia that detailed the current workload of his office and his ninety-one open felony cases.[19] Additionally, Weis and his public defenders filed several other motions to withdraw, along with a motion requesting Judge Caldwell recuse himself from the case, and a petition for mandamus and prohibition against Judge Caldwell.[20]

On April 25, 2008, the Georgia Capital Defenders indicated in discussions that funding would again be available to Citronberg and West. However, when provided a contract, the Georgia Capital Defenders refused to process the bills.[21] On December 31, 2008, Weis filed a petition for a writ of mandamus against the judge and the Public Defender Standards Council, which was dropped after the judge agreed to reinstate Citronberg and West.[22]

Citronberg and West were re-assigned as counsel on February 11, 2009.[23] However, as a New York Times article describes, "[the][p]rosecutors had steadily built a case while the defense did nothing. Leads went cold, memories faded, witnesses went missing."[24] Nevertheless, the trial was set for August 3rd, 2009, with evidentiary motions scheduled for July 8, 2009.[25] On July 8, Weis filed a motion to dismiss due to the denial of his right to a speedy trial.[26] The motion was denied and counsel appealed.[27] The decision was affirmed by the Georgia Supreme Court on March 25, 2010.[28]

The Georgia Supreme Court analyzed the case under the *Barker v. Wingo* four-part balancing test for assessing a speedy trial claim.[29] Under the test, a court must balance (1) the length of the delay and (2) the reasons for the delay with (3) the defendant's assertion of a right to a speedy trial and (4) the prejudice to the defendant.[30] The court found that the length of the delay did not violate the defendant's right to a speedy trial, and that the reasons for the delay did not constitute a "systemic

breakdown of the public defender system."[31] The court concluded that the delay was due to Weis's failure to cooperate with Jacobs and Saia, the public defenders appointed after Citronberg and West were removed.[32]

Specifically, the court ruled that a defendant could not assert the right of counsel of choice to delay judicial proceedings.[33] The court acknowledged that the lack of funding contributed to the delay but decided that it was not the sole factor.[34] The court ruled that a lack of funding from the Georgia Capital Defenders was not a "systemic breakdown" of the public defender system, and thus was not the primary reason for the delay.[35] Instead, the court found that the defendant's conduct and the conduct of Citronberg and West, i.e., not being able to work without compensation, was the primary reason for the delay.[36] Rather than acknowledge that the state's public defender system had failed the very people it was designed to protect, the court chose to blame the two appointed public defenders, Jacobs and Saia, and Weis for not being able to easily replicate an attorney-client relationship.[37] The court also ruled that Weis did not assert his right to a speedy trial in a timely manner,[38] and there was no evidence of oppressive pre-trial incarceration or proof that Weis had been subjected to substandard conditions in the county jail.[39]

Conversely, the dissent examined the right of an indigent defendant to continued counsel, citing the Alabama Court of Criminal Appeals decision *Lane v. Alabama*, which quotes Smith v. Superior Court of Los Angeles County:

> [O]nce counsel is appointed to represent an indigent defendant, whether it [is] 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.[40]

The dissent concluded that a defendant should not be forced to choose between his original counsel and new counsel in order to receive a speedy trial at the hands of the state.[41] The dissent also correctly assailed the majority's argument by emphasizing that Weis could hardly be held responsible for the delay when the public defenders assigned to the case requested to be removed almost immediately.[42] The majority also erred, the dissent indicated, in finding that Weis and his attorneys were at fault, when it was the state's organization that initially hired and then could not compensate Citronberg and West.[43] The dissent reasoned that even though the state agency is focused on the defense rather than the prosecution of criminals, the state is still obligated to provide adequate funding, concluding that the state's budgetary constraints were not a valid excuse for depriving a citizen his appointed counsel.[44]

After the unfavorable Georgia Supreme Court decision, Citronberg and West filed a petition for writ of certiorari before the Supreme Court of the United States.[45] The writ called for the Court to resolve the division among state courts regarding indigent defense and the continuity of representation.[46] On October 4th, 2010, the Court denied the petition for writ without comment.[47]

b. The History of the Right to Counsel

> "[T]here [is] an absolute right to appointment of counsel in felony cases. . . . [A]ppointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused might be affected."[48]

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the [a]ssistance of [c]ounsel for his defen[s]e."[49] The Supreme Court first recognized the fundamental nature of the right to counsel in 1932 in *Powell v. Alabama*, noting that the assistance of counsel was essential to a fair trial.[50] Later, in the landmark decision, *Gideon v. Wainwright*, the Supreme Court recognized this right for indigent defendants, stating "[t]he right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."[51] The *Gideon* Court held that when a defendant is unable to obtain counsel, the state must assign counsel because "[t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[52] However, the decision in *Gideon*, while obligating the states to appoint counsel, maintained a narrow focus that did not identify to what extent the right to counsel extended.[53]

While states instituted *Gideon*'s mandate with varying success, the Supreme Court continued to attempt to define the right to counsel and its effect on the practice of criminal law. In 1970, the Court indirectly analogized that the right to counsel was the right to competent counsel. In 1983, in *Morris v. Slappy*, the assigned public defender fell ill and the client was assigned a new public defender rather than

being granted a continuance.[54] The Supreme Court in *Morris* held that the Sixth Amendment does not guarantee a meaningful relationship between a defendant and counsel.[55] However, in Justice Brennan's concurring opinion, he argued that judicial efficiency should not stand in the way of an indigent defendant's continued representation by an attorney with whom he has a relationship of trust and confidence.[56]

This point aside, viewing the Court's decisions from 1970-1983 retrospectively, had the court drafted clearer language regarding the right to counsel, the Court could have reshaped attitudes and created a much more organized and superior indigent defense system.[57] Had the Court been more willing to provide guidelines for what constitutes meaningful representation, the Court would have likely drafted a set of minimum requirements that all public defenders must meet when conducting a criminal defense. Furthermore, State legislatures could have taken such standards into account when drafting legislation and appropriating funds to the state criminal defense agencies. However, without such standards, many states are unable to effectively allocate the appropriate level of funds needed by these agencies, and as a result, those needing representation, the state agencies, and the already dwindling budgets suffered.[58] The vague standard of "effective" allowed state legislatures to both design and fund the bare minimum of criminal defense.

Finally, in 1984 in *Strickland v. Washington*, the Court attempted to address the guidelines of what should constitute "effective counsel."[59] In an opinion by Justice O'Connor, the Court adopted the standard adopted by all the Federal Courts of Appeals and held that assistance of counsel should be "reasonably effective."[60] The Court adopted a two-prong analysis that considers "(1) whether the lawyer's performance fell below acceptable levels and (2) whether that performance prejudiced the accused."[61] Although the Court refused to set rigid standards for what qualifies as reasonable, Justice O'Connor enumerated basic duties of counsel: to be loyal, to avoid conflicts of interest, to advocate the defendant's cause, and to consult with the defendant on important decisions.[62] Justice O'Connor also suggested that American Bar Association (ABA) guidelines should help to determine what is reasonable, and that strict rules on reasonableness should be avoided so as to give counsel flexibility in making strategic decisions.[63]

Justice Marshall, in his dissent in *Strickland*, laments the majority's refusal to set stricter standards for the definition of "reasonably effective."[64] He describes the many aspects of the criminal defense system, such as preparing for trial, applying for bail, making timely objections, and filing for appeals, that would all benefit from judicial oversight.[65] As Justice Marshall's dissent points out, the majority's vague language in *Strickland* left the states on their own to determine how to enforce *Gideon*'s right to counsel mandate.[66] Justice Marshall reasoned that if stricter and more specific standards for the various aspects of trial had been concretely set, states would have had a clearer idea of how to build and fund their criminal defense systems.[67] More importantly, the criminal justice system around the country could operate on a more uniform level, providing equal access and fair processing for all defendants.[68]

c. Varied State Responses

In the years since *Strickland* and *Gideon*, states have individually fashioned their own standards in defining what constitutes "reasonably effective" counsel. Unfortunately, these standards can vary greatly from state to state.[69] In 2004, forty years after *Gideon*, the ABA published a scathing report on the nation's indigent defense systems.[70] The report noted the extreme disparities in funding between the prosecution and the defense, the excessive caseload of public defense attorneys, and the inadequate assistance provided to indigent defendants as a result.[71]

No standard provides more evidence of the disparities in state systems than the right to continued counsel, also known as vertical representation.[72] While Georgia and Louisiana still do not recognize an indigent defendant's right to continued counsel, state courts have ruled that indigent defendants have a right to continued counsel as part of their Sixth Amendment right to counsel. This point is evidenced by the fact that even the states surrounding Georgia have chosen to support and uphold the right to counsel for indigent defendants.[73]

For example, in *Lane v. Alabama*, a defendant's initial attorney was removed because of the state's intention to call him as a necessary witness.[74] In assessing whether such an act violated the defendant's Sixth Amendment right to a fair trial, the court claimed that "[w]ith respect to continued representation . . . there is no distinction between indigent defendants and non-indigent defendants."[75] Essentially, once counsel has been appointed, the trial judge is required to respect the attorney-client relationship as if it were privately retained counsel.[76] Similarly, in *Weaver v. Florida*, the Florida Supreme Court held that the attorney-client relationship is not dependant on the source of compensation because the attorney should be loyal to the person he or she represents, not to the person who pays for the services.[77]

States that recognize the right to continued counsel for indigent defendants have created exceptions to this right. The *Weaver* court laid out several reasons why it may be appropriate to substitute counsel, such as incompetence, physical incapacitation,

inappropriate conduct, or the efficient administration of justice.[78] In *Tennessee v. Huskey*, a case in which the trial judge attempted to dismiss counsel for filing an abundance of motions, the court analogized that an attorney-client relationship involves "an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney."[79] The Tennessee court concluded that based on case law from other states, the removal of original counsel is only permitted when all other remedies have been exhausted.[80]

While many states have interpreted the Supreme Court's decisions in *Gideon* and *Strickland* to include an indigent right to continued counsel, Georgia and Louisiana have expressly denied the right of an indigent defendant to retain counsel.[81] In *Weis*, the Georgia Supreme court relied on the Louisiana decision, *Louisiana v. Reeves*, to support its holding that moving the case forward was a sufficient reason to justify the substitution of counsel.[82] The facts of *Reeves* are extremely similar to *Weis*, in that in *Reeves* the court removed non-local counsel who was paid by the Capital Defense Project, and replaced him with the local Chief Public Defender.[83] The court justified the removal by claiming that the right to counsel of choice does not extend to defendants who require court appointed counsel.[84] In Louisiana, an indigent defendant is entitled only to "effective representation."[85]

The Sixth Circuit of the United States Court of Appeals upheld this interpretation of the Sixth Amendment in *Daniels v. Lafler*.[86] The *Daniels* court held that an indigent defendant represented by a court appointed attorney has no right to his or her choice of counsel.[87] While serving on the Second Circuit of the United States Court of Appeals, current Supreme Court Justice Sonia Sotomayor also ruled that "there is no constitutional right to continuity of appointed counsel."[88]

II. Indigent Continued Counsel Needs More Support

a. A Meaningful Relationship

The Supreme Court needs to clarify its dicta in *Morris* and hold that the non-existence of a right to chosen counsel is not the denial of a right to continued counsel once an attorney-client relationship has been established. Determining that the Sixty Amendment guarantees a right to continued counsel does not overturn *Morris*, nor does it affect the Court's decision that an indigent defendant does not have the right to choose his initial counsel. Instead, it extends the rights of indigent defendants and grants them rights equal to defendants with paid counsel.

The language used in *Morris* makes it clear that the Court was referring only to the creation of a new Sixth Amendment right to "meaningful representation." The frequently quoted language reads:

> No court could possibly guarantee that a defendant will develop the kind of rapport with his attorney – privately retained or provided by the public – that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel. Accordingly, we reject the claim that the Sixth Amendment guarantees a "meaningful relationship" between an accused and his counsel.[89]

Rejecting the idea that the Sixth Amendment contains a guarantee of a "meaningful relationship" between the defendant and counsel is not the same as rejecting an indigent defendant's right to retain his original counsel once an attorney-client relationship has been forged. While the court has been explicit that it will not create a constitutional guarantee that the relationship will be meaningful, they have not denied a defendant's right to continuity of appointed counsel.

b. Strickland*'s Vagueness Problem*

The reasonableness standard set forth in *Strickland* is intentionally vague. While the court does not set specific standards, Justice O'Connor's opinion makes it clear that standard legal practice and ABA guidelines *should* guide both lawyers and judges to determine what constitutes a reasonably effective level of counsel.[90] Unfortunately, as Kim Taylor-Thompson, a veteran Washington, D.C. public defender, explains, "[t]he unappreciated cost of the Court's lack of specificity has been a legacy of ineffective assistance that has now shifted the onus of defining the components of the right to counsel to the indigent defense community."[91] As a result of the vague standard in *Strickland*, an indigent defendant is currently only entitled to relief if the court appoints a new attorney and does not allow for sufficient time to prepare, thus forcing the counsel's representation to be ineffective.[92]

The current ABA *Ten Principles of a Public Defender System* guide maintains that "the same attorney continuously represents the client until completion of the case."[93] Additionally, the guide further asserts that the same attorney should represent the client from the initial assignment through the trial and sentencing.[94] In *Gideon's Broken Promise*, the ABA's 2004 study of the nation's indigent criminal defense standards, the ABA reported that national standards have long recognized a right to continued counsel as an essential

component of an effective defense practice.[95] The same study also found that many states still practiced "horizontal representation," where multiple public defenders handled different aspects of a single case.[96] In contrast, the study reported that, in some states, the same prosecutor handled the prosecution of a defendant from beginning to end, largely due to the ample funding available to the state's prosecuting agency.[97]

c. Strickland*'s Guidelines*

The language used in *Strickland* demonstrates that even though the court has been vague in its rulings on what constitutes "effective representation," the duties they believe apply to all defense attorneys are more effectively performed when there is a right to continued counsel. The Court stated that "the Sixth Amendment imposes on counsel a duty to investigate,"[98] and that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."[99] Based on the author's experience observing and clerking in several public defender offices and local criminal court systems, when multiple attorneys handle a single case, investigation is often neglected or left until witnesses' memories have faded and the "trail" has gone cold. Similarly, the author has also found that each attorney might have different knowledge and defense strategies that will affect the outcome of a case. Switching between attorneys causes confusion not only for the defendant, but also for the prosecuting attorney who must adjust to different defense strategies, and the judges who must rule on differing motions filed by different attorneys or rule on the same motion several times due to the change in counsel.

The *Strickland* Court also imposed a "duty of loyalty" and "the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution."[100] Continuing to keep the client informed of important developments, seeking the client's opinion on important decisions, and guiding the client through those decisions are extremely difficult when the same attorney does not represent the client throughout the entire case.

d. The Benefits of Continued Counsel

The language in *Strickland*, though vague, makes it clear that the Supreme Court upholds certain standards for effective criminal defense, all of which are easier to adhere to when there is continued counsel. A lack of continued counsel generates the following problems: (1) it prevents the establishment of an attorney-client relationship, (2) it encourages a lack of accountability, and (3) it increases the likelihood that necessary and important work will be neglected as the case moves between attorneys.[101]

i. The Attorney-Client Relationship

The relationship between an attorney and a client is a vital component of conducting an effective defense. Ideally, a defense attorney creates a collaborative relationship with a client, instead of merely dictating to the client his decisions and legal strategy. A collaborative relationship requires open communication, which necessitates a substantial amount of interaction between the attorney and client. Through this communication, the attorney and the client will collaboratively answer many of the essential questions that are presented during a criminal trial, such as how to plead, whether to proceed to trial, and whether or not the client should testify. To answer these questions and facilitate open communication, many public defender offices view continued counsel as a fundamental requirement.[102] By being involved in a case from beginning to end, an attorney can track the case's investigation, and become better informed about the facts and key issues, allowing for more effective representation.

ii. Lack of Accountability

Similarly, when a client moves between multiple attorneys during the progression of a case, files get lost, motions are not filed, and discovery does not get examined. Because a new attorney may have been assigned to a specific portion of the case, or perhaps has taken over the case completely, a predicament is created in which the client does not know who to go to for information, or even what information is needed. This disorganization fosters a lack of accountability and usually results in inadequate defense. A client, particularly an indigent client, is generally unaware and does not understand the legal process and procedural requirements for motions for continuances, or the steps to assure that previous motions were filed correctly. When more than one attorney represents a client at different junctures throughout the case, the client does not know whom to hold accountable, and thus, is without recourse. A right to continued counsel ensures that the client knows exactly who to contact and would also hold the specific attorney accountable for all files and motions associated with the case.

iii. Neglected Work

Attorneys also differ in their trial strategy, oratory skills, and the weight they give to certain legal issues.[103] The same case in the hands of two different attorneys can look extremely different; thus, a client may suffer from an involuntary change in

counsel. Following an involuntary change in counsel, the new attorney may develop a divergent strategy or need to re-conduct investigation. But most important, a new attorney must gain the defendant's trust. The chances of discovery being overlooked or a motion not being filed in a timely manner increase exponentially when a case shifts between attorneys.

A right to continued counsel permits continued communication between the client and counsel that builds client confidence and enables the relationship to evolve over time.[104] Evidenced by the irrefutable benefits of continued counsel detailed above, to deny a defendant continued counsel undermines their Sixth Amendment right to the assistance of counsel. As Anne Poulin, a Villanova law professor and prolific writer on Criminal Procedure, argues in *Strengthening the Criminal Defendant's Right to Counsel*, "[a] defendant should not be forced to reestablish an attorney-client relationship with each of a series of attorneys, repeatedly explaining the case and her understanding of it to new counsel."[105]

e. Jamie Weis's Lasting Legacy

"Whenever possible, substitution of counsel over the defendant's objection should be avoided. Changing counsel without the defendant's consent reduces the likelihood that the defendant will receive effective assistance, and will perceive the process as fair."[106]

In *Weis*, Citronberg and West, Weis's original counsel, though court appointed, worked tirelessly for over a year to investigate and prepare Weis's capital murder defense. They developed an open communication with Weis and learned about his mental health problems, family history, and his life both before and after the alleged murder. Weis submitted an affidavit stating that he could "trust Mr. West and Mr. Citronberg with my case and . . . my life. They truly care about me and I believe they have the knowledge and skill to prepare a defense."[107] The public defenders assigned to replace Citronberg and West did not have access to investigators trained in uncovering the mitigating circumstances surrounding Weis's case, which can be pivotal in a capital murder defense. When Citronberg and West were removed from the case, more than a year lapsed in which there was no investigation. Based on the Supreme Court's language in *Strickland*, it is evident that once West and Citronberg were removed from the case, there was no longer "effective" representation.

The procedural history of this case raises a myriad of issues. Ranging from the state's burden to fund its criminal defense and prosecution agencies equally, to the attempts on the part of Citronberg and West to use Weis's case as a test case for structural litigation to improve Georgia's indigent defense system. The most obvious, however, is whether Weis has the same right to keep his original counsel, as he would if he had privately retained counsel with his own funds. When Judge Caldwell removed Citronberg and West, despite Weis's objections, and replaced them with public defenders who were unable to continue the work necessary to provide Weis with effective counsel, they effectively denied Weis's Sixth Amendment rights.

The Supreme Court of Georgia and the Supreme Court of Louisiana both cite *Morris* in their rulings. Both courts held that there is no right to "meaningful representation" between an attorney and a client, and also that there is no right for an indigent defendant to choose his initial attorney. Accordingly, both concluded that an indigent defendant has no right to continuity of appointed counsel, regardless of the established attorney-client relationship. Both the prosecution and the Georgia Supreme Court have misinterpreted these rulings when they connote that there is no right to continued counsel to be found in the Sixth Amendment.[108] While the obvious solution to the prosecution in *Weis* was to replace Citronberg and West, who refused to continue without pay, with already salaried public defenders, the Constitutional rights of an indigent defendant are no less substantial because he or she is indigent. The benefits of an attorney-client relationship and the continuity of that relationship have been discussed above. These benefits are constitutionally guaranteed to those who retain private counsel, and should not be diminished for those who cannot. Although they declined to do so in the *Weis* case, the Supreme Court needs to find that its language in *Strickland* and in *Morris* does not preclude it from holding that an indigent defendant has a right to retain counsel as if he or she had privately retained the counsel. To find otherwise is to put a price tag on our constitutional rights and continue to ignore the injustice that *Gideon* sought to correct over forty-five years ago.

Conclusion

The Supreme Court has continually refused to set specific guidelines for effective counsel, assuming that states and local bar associations would conform to certain agreed-upon standards. However, twenty-five years after *Strickland*, it is clear that this is not always the case. The Court needs to recognize many of the base standards of effective defense counsel, beginning with the right to continued counsel. The Georgia Supreme Court erred in finding that Weis and his attorneys were to blame for the delay in his case, and thus, erred in concluding that it was acceptable to remove Weis' original appointed counsel despite Weis' objections. The dissent in *Weis* was correct; a state

cannot adequately fund its prosecution and underfund its defense.[109] However, the real harm done by the state's lack of funding was to deprive Weis of his appointed counsel. Depriving Weis of his appointed counsel gave the prosecution an automatic advantage, and thus, denied Weis of his Constitutional right to a fair trial. The Supreme Court erred in not granting certiorari to Weis's case and taking the opportunity to rule that a state cannot deny an indigent defendant his right to continued counsel. The State of Georgia has already begun applying its decision in *Weis* to other cases and will continue to deprive Georgia's indigent defendants of their constitutional rights until the Supreme Court takes action.[110]

Endnotes

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[2] Pascal F. Calogero, Jr., *The Right to Counsel and Indigent Defense,* 41 Loy. L. Rev. 265, 278 (1995) (quoting Justice Learned Hand).

[3] Weis v. Georgia, 694 S.E.2d 350, 353 (Ga. 2010), *reh'g denied*, April 9, 2010, *cert. denied*, No. 09-10715, 2010 WL 1903558 (U.S. Oct. 4, 2010).

[4] Brief for Appellant at 4, *Weis*, 694 S.E.2d 350 (No. S09A1951), 2009 WL 4028414, at *4.

[5] Georgia Indigent Defense Act of 2003, Ga. Code Ann. § 17-12-12 (2008).

[6] *Weis*, 694 S.E.2d at 353; *see also*, Jessica Dweck, "Light Him Up Before the Jury Goes Home," Slate, June 2, 2010, http://www.slate.com/id/2253644/(reporting that the Georgia Public Defender Standards Council ran out of funds to support a rigorous investigation, pay expert witnesses, and pay for mitigation specialists for the case after six months after the Council spent almost all of its resources on a single case).

[7] *Weis*, 694 S.E.2d at 353.

[8] Brief for Appellant at 4, *Weis*, 694 S.E.2d 350 (No. S09A1951), 2009 WL 4028414, at *4.

[9] *The Nichols Case: Evolution of a Murder Trial*, Atlanta J.-Const., Dec. 14, 2008, *available at* http://www.ajc.com/services/content/printedition/2008/12/14/nicholstime.html.

[10] Reply Brief for Appellant at 3, *Weis*, 694 S.E.2d 350 (No. S09A1951), 2009 WL 6690604, at *3.

[11] Brief for Appellant at 5, *Weis*, 694 S.E.2d 350 (No. S09A1951), 2009 WL 4028414, at *5.

[12] *Id.* at 6, 2009 WL 4028414, at *6 ("Counsel for defense had been told verbally that there is no money in the Georgia Public Defender Standards Council or the Georgia Capital Defender budget to pay counsel.").

[13] *Id.*

[14] *Id.* at 7, 2009 WL 4028414, at *7.

[15] *Id.*

[16] *Id.* at 9, 2009 WL 4028414, at *9.

[17] *Id.* at 8-9, 2009 WL 4028414, at *8-9.

[18] *Id.* at 9, 2009 WL 4028414, at *9.

[19] *Id.* at 9-10, 2009 WL 4028414, at *9-10.

[20] *Id.* at 10-12, 2009 WL 4028414, at *10-12.

[21] Petition for Writ of Certiorari at 9, Weis v. Georgia, No. 09-10715 (U.S. May 10, 2010), 2010 WL 3922882, at *9.

[22] Brief for Appellant at 14, *Weis*, 694 S.E.2d 350 (No. S09A1951), 2009 WL 4028414, at *14.

[23] Brief for Appellee at 7, *Weis*, 694 S.E.2d 350 (No. S09A1951), 2009 WL 4028415, at *7.

[24] Adam Liptak, *Defendants Squeezed by Georgia's Tight Budget,* N.Y. Times, July 6, 2010, at A13, *available at* http://www.nytimes.com/2010/07/06/us/06bar.html.

[25] Petition for Writ of Certiorari at 9, *Weis*, No. 09-10715, 2010 WL 3922882, at *9.

[26] Brief for Appellee at 8, *Weis*, 694 S.E.2d 350 (No. S09A1951), 2009 WL 4028415, at *8.

[27] *Id.*

[28] *Weis*, 694 S.E.2d at 350.

[29] *Id.* at 354.

[30] *Id.* at 354.

[31] *Id.*

[32] *Id.* at 356.

[33] *Weis*, 694 S.E.2d at 356(citing Lane v. Alabama, CR-05-1443, 2010 WL 415248, at *16 (Ala. Crim. App. Feb. 5, 2010)).

[34] *Id.* at 355.

[35] *Id.*

[36] *Id.* at 357.

[37] *Id.*

[38] *Id.* at 357-358.

[39] *Weis*, 694 S.E.2d at 358.

[40] Lane v. Alabama, CR-05-1443, 2010 WL 415248, at *15 (Ala. Crim. App. Feb. 5, 2010) (quoting Smith v. Super. Ct. of L.A. Cnty., 440 P.2d 65, 74 (Cal. 1968)) .

[41] *Weis*, 694 S.E.2d at 361 (Thompson, J., dissenting).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Petition for Writ of Certiorari, Weis v. Georgia, No. 09-10715 (U.S. May 10, 2010), 2010 WL 3922882.

[46] *See id.* at 15-23, 2010 WL 3922882, at *15-23.

[47] Weis v. Georgia, No. 09-10715, 2010 WL 1903558, at *1 (U.S. Oct. 4 2010).

[48] Mempa v. Rhay, 389 U.S. 128, 134 (1967).

[49] U.S. Const. amend. VI.

[50] *See* Powell v. Alabama, 287 U.S. 45, 71 (1932) ("the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment.").

[51] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[52] *Id.*

[53] Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet,* 71 Fordham L. Rev. 1461, 1477 (2003).

[54] *See* Morris v. Slappy, 461 U.S. 1, 5-6 (1983).

[55] *Id.* at 13-14.

[56] *See id.* at 21-26 (Brennan, J. concurring).

[57] *See* Taylor-Thompson, *supra* note 53, at 1479 ("By pinning down the expectations embedded in the right to effective counsel, the Court could have set a meaningful threshold.").

[58] By comparison, England spends about $34 per person on indigent criminal defense; the United States spends about $10 per person. *See* ABA Standing Comm. on Legal Aid & Indigent Defendants, Gideon's Broken Promise: American's Continuing Quest for Equal Justice 8 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf [hereinafter Gideon's Broken Promise] (examining the problems of funding for state indigent defense programs and the problems with state versus local funding).

[59] Strickland v. Washington, 466 U.S. 668, 686 (1984).

[60] *Id.* at 687.

[61] Taylor-Thompson, *supra* note 53, at 1464.

[62] Strickland, 466 U.S. at 688.

[63] *Id.*

[64] *Id.* at 709 (Marshall, J., dissenting).

[65] *Id.* (noting various courts of appeals alternate attempts to provide standards for reasonable effectiveness). *See also* Jennifer M. Allen, *Free For All a Free for All: The Supreme Court's Abdication of Duty in Failing to Establish Standards for Indigent Defense,* 27 Law & Ineq. 365, 379 (2009) (noting that the Strickland decision provides zero guidance to states on minimum standards or funding).

[66] Strickland, 466 U.S. at 712-713 (Marshall, J., dissenting).

[67] *See id.* at 713.

[68] *See id.* at 713-715.

[69] Allen, *supra* note 65, at 386 ("As a result of the Court's failure to address systemic standards, States are able to perpetuate indigent defense systems that should render their attorneys ineffective by default.").

[70] *See* Gideon's Broken Promise, *supra* note 58.

[71] *See id. See also* Taylor-Thompson, *supra* note 53, at 1478 ("Thus began the states' race to the bottom in providing little more than technical compliance with the Sixth Amendment guarantee of counsel.").

[72] This paper will refer to vertical representation as "continued counsel" or the right to continued counsel.

[73] *See*, Lane v. Alabama, No. CR-05-1443, 2010 WL 415248, at *8-9 (Ala. Crim. App. Feb. 5, 2010) (discussing examples of state decisions upholding the indigent right to continued counsel in the states surrounding Georgia).

[74] *Id.* at *7.

[75] *Id.* at *13 (examining relevant federal and state law to demonstrate that most courts have not found a difference between appointed or retained counsel for the purposes of continued counsel).

[76] *Id.* at *15 (citing Buntion v. Harmon, 827 S.W.2d 945, 949 (Tex. Crim. App. 1992)). *See also* Stearnes v. Clinton, 780 S.W.2d 216, 223 (Tex. Crim. App. 1989) ("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.").

[77] Weaver v. Florida, 894 So. 2d 178, 188-189 (Fla. 2004).

[78] *Id.* at 189. *See also* Clements v. Arkansas, 817 S.W.2d. 194, 198 (Ark. 1991) ("the right to counsel of one's choosing is not absolute and may not be used to frustrate the inherent power of the court to command an orderly, efficient, and effective administration of justice.").

[79] Tennessee v. Huskey, 82 S.W.3d 297, 305-06 (Tenn. Crim. App. 2002) (quoting Smith v. Super. Ct. of L.A. Cnty., 440 P.2d 65, 74 (Cal. 1968)).

[80] *Id.* at 307 (citing *Smith*, 440 P.2d at 75).

[81] Petition for Writ of Certiorari at 19, Weis v. Georgia, No. 09-10715 (U.S. May 10, 2010) 2010 WL 3922882, at *19; Brief for Appellee at 12, Weis v. Georgia, 694 S.E.2d 350 (Ga. 2010) (No. S09A1951), 2009 WL 4028415, at *12 ("Georgia law does not recognize the absolute right of an indigent criminal defendant to the attorney of his own choosing."). *See also* Dweck, *supra* note 6.

[82] *Weis*, 694 S.E.2d at 355.

[83] Louisiana v. Reeves, 11 So. 3d 1031, 1055 (La. 2009).

[84] *Id.* at 1056 (citing Wheat v. United States, 486 U.S. 153, 159 (1988) ("those who do not have the means to hire their own lawyers have no cognizable complaint")); United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006) (holding that the right to counsel of choice does not apply to defendants with appointed counsel).

[85] *Reeves*, 11 So. 3d at 1056.

[86] Daniels v. Lafler, 501 F.3d 735, 739 (6th Cir. 2007).

[87] *Id.*

[88] United States v. Parker, 469 F.3d 57, 61 (2d Cir. 2006).

[89] Morris v. Slappy, 461 U.S. 1, 13-14 (1983).

[90] Strickland v. Washington, 466 U.S. 668, 688 (1984).

[91] Taylor-Thompson, *supra* note 53, at 1467.

[92] Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to Counsel*, 28 Cardozo L. Rev. 1213, 1252 (2007) (explaining the effect of current Supreme Court standards on indigent defendants' right to counsel).

[93] ABA, Ten Principles of a Public Defense Delivery System 3 (2002) *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf.

[94] *Id.*

[95] Gideon's Broken Promise, *supra* note 58, at 18-19.

[96] *Id.*

[97] *Id.*

[98] Strickland v. Washington, 466 U.S. 668, 680 (1984).

[99] *Id.* at 685 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275-76 (1942)).

[100] *Id.* at 688.

[101] Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. Rev. 245, 263 (2003).

[102] Taylor-Thompson, *supra* note 53, at 1501.

[103] United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979).

[104] *Id.* at 57.

[105] Poulin, *supra* note 92, at 1254.

[106] *Id.* at 1256.

[107] Brief for Appellant at 8, Weis v. Georgia, 694 S.E.2d 350 (Ga. 2010) 2009 WL 4028414, at *8.

[108] Petitioner's Reply Brief at 8, Weis v. Georgia, No. 09-10715 (U.S. June 18, 2010), 2010 WL 3841556, at *8.

[109] *See Weis*, 694 S.E.2d at 360-61, 362 (Thompson, J. dissenting).

[110] E. Wycliffe Orr, *Georgia's Indefensible Indigent Defense System – A Defense in Name Only?*, ACSblog (Sep. 21, 2010 11:20 AM), http://www.acslaw.org/node/17053. *See also* Phan v. Georgia, 600 S.E.2d 9 (Ga. 2010).