

STATE OF TENNESSEE

NO(S) 280020

VS.

CRIMINAL COURT, DIVISION I
11TH JUDICIAL DISTRICT
CHATTANOOGA, HAMILTON COUNTY
TENNESSEE

JESSE RAY MATHEWS

ORDER

Rule 13 of the Rules of the Supreme Court of the State of Tennessee (hereafter "Rule 13") provides for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel. Subsection (4)(A) provides that the Court shall appoint the District Public Defender's Office . . . unless in the sound discretion of the trial Judge appointment of other counsel is necessary. (*Emphasis added*). This Court finds and concludes that it is necessary to appoint counsel other than the Public Defender to represent the defendant for the reasons stated herein.

The Court finds that adding the appointment of this death penalty case to the current workload of the Public Defender could at least seriously jeopardize counsel's ability to render, or actually prevent counsel from rendering, effective representation to the defendant as well as other existing and future clients in accordance with constitutional and professional standards.

This case is one in which the State has filed a Notice of Intent to Seek the Death Penalty. The practice of the Public Defender in Hamilton County has been to assign the defense of capital cases to the Executive Assistant Public Defender Karla Gothard and Assistant Public Defender Mary Ann Green. It appears that this practice will be continued in this case as Attorneys Gothard and Green represented the defendant three weeks ago



in his preliminary hearing in General Sessions Court. Attorney Green has informed the Court that she currently represents 103 defendants in pending cases. This representation was made in a hearing on May 2, 2011. (*Transcript of hearing is Exhibit 1 at page 3*) She further represented that the investigators employed by the Public Defender are seriously over burdened by the workload of the office. (*Exhibit 1 page 12*) Assistant Public Defender Jane Buffaloe, who along with Attorney Green is assigned to this Division of Criminal Court, and who assisted in the Preliminary Hearing of Mr. Mathews for the defense, has repeatedly told the Court that she too represents at least 100 defendants.

Furthermore, the District Public Defender's Office has experienced long-term difficulty in staffing the Courts in Hamilton County. News articles from February and March 2010 document that these difficulties date back to over one year ago, and are related in part to the illness of Executive Assistant Public Defender Karla Gothard, who is the lead member of the capital case defense team when the Public Defender is appointed. (*Exhibits 2, 3, and 4*) Motions to Withdraw from Representation were filed by Public Defender Ardena Garth during this time period citing limited resources. Examples of Motions are attached hereto as exhibits 4a and 4b. Attorney Gothard has been absent from Court for much of the last year. Attorney Gothard's health condition could adversely affect Attorney Green's ability to work on the defendant's case as well as the cases of her existing clients as Attorney Green is a care-giver to Gothard. The staffing shortages have continued not only related to Attorney Gothard's illness but also due to the illness and absence of another Assistant Public Defender who had been assigned to Criminal Court.

Death penalty cases require an extraordinary amount of time and attention to defend. If appointed to this case, representatives of the Public Defender's office, both

attorneys and investigators, would be forced to reallocate time and attention away from the cases of existing and future clients when the workload is currently extremely heavy and the staffing is limited. This fragile situation poses a substantial but unnecessary threat to the interests of justice in a case in which the State seeks a death sentence. The Court finds that these current workload and staffing issues necessitate the appointment of defense counsel other than the Public Defender.

Also, the Court finds that the past trial performance in death penalty cases of Attorneys Gothard and Green and their post conviction actions and claims in such cases necessitate the appointment of counsel other than the Public Defender.

In 1992 a jury convicted Leroy Hall, Jr. of first degree premeditated murder and it sentenced him to death. Attorney Gothard was Co-defense Counsel in the trial of this case. In May of 2002 a hearing on Leroy Hall's post conviction petition was held. In the hearing Attorney Gothard testified that neither she nor her Co-Counsel were effective in their representation of the defendant at trial. She testified that she never approached the trial judge to tell him she had little contact with lead counsel and felt she was unprepared for the defendant's case. (*Exhibit 5 page 14 of 36*) She explained that she was ineffective by allowing inadequate investigation and by relying too much on Co-Counsel's assertions that things were being handled. (*Exhibit 5 page 15 of 36*) Attorney Gothard did not self report her alleged ineffectiveness, so her opinion was not a matter of record until she testified ten years after the conviction. All the while, the defendant remained on death row under his sentence.

In November 2003 a jury convicted Marlon Duane Kiser of first degree murder and it sentenced him to death. Attorneys Gothard and Green worked together in defense of

Kiser as the Public Defender had been designated lead counsel. After the jury convicted Kiser, his attorneys announced in the sentencing phase of the trial that he had instructed them not to present any mitigating evidence. When the trial Judge immediately inquired regarding the defendant's competency to waive the presentation of mitigating evidence, Attorney Green told the Court that "there's no indication that I know of, of incompetency to make the decision." (*Emphasis added*) She added "it's been difficult at times to try to explain to Mr. Kiser some of the concepts of mitigation, but that's about it". Attorney Gothard represented to the Court that "I have no questions about his competency to make this decision." (*Emphasis added*) (See *Exhibit 6 at page 9-10 of 56*) The Court thereafter concluded that Kiser knowingly, voluntarily and understandingly waived the right to present mitigating evidence and proceeded to complete the sentencing hearing. (*Exhibit 6a at page 49 of 55*)

After the trial and sentencing, the trial Judge became terminally ill and was unable to preside over the Court for an extended period of time. During his absence, Attorney Green filed an affidavit to accompany a Motion for New Trial alleging that she had privately informed the Judge, on the morning of the sentencing hearing and prior to the Court's questioning of her and Attorney Gothard on the record, (previously summarized herein), that she had personal concerns regarding Kiser's competency to waive mitigation. (*Exhibit 7 pages 4 and 5*) The trial Judge ultimately returned to hear the Motion for New Trial and said the following with regard to the conversation alleged in the affidavit:

"Since you keep mentioning conversation in chambers, which is nowhere on the record, and you keep bringing that up, - - you're making it sound like that she told me that, that he (Kiser) had some competency issues and it should be inquired into. That never happened. That never happened. She never at any time told me that he was incompetent or that there should be a

hearing to determine his competency to waive mitigation. That never happened. (Emphasis added) (Exhibit 8 at page 26)

The Trial Judge's Order denying the Motion for New Trial states the following:

"Despite her affidavit, Attorney Green did not state at the time of the hearing that she believed the defendant was not competent. Lead Attorney Gothard stated that she had no question about the defendant's competency to make the decision. (Exhibit 9 page 1)

On June 12, 2002 Isaac Jones was indicted by a Hamilton County Grand Jury and charged with the premeditated killing of an on-duty police officer. The State sought capital punishment and Attorneys Gothard and Green were appointed to represent the defendant. In June of 2005 the defendant was tried. While the defendant was in jeopardy of receiving the death penalty, Attorneys Gothard and Green rested the defendant's case without a Momon hearing. The defendant was convicted of second degree murder and then filed a Motion for New Trial alleging that the trial Court erred when it failed to conduct a Momon hearing.

At the hearing of the Motion for New Trial the defendant testified that he had desired to testify at trial. (Exhibit 10 page 37) Furthermore, in the hearing and upon questioning from the State's attorney Gothard said the following:

MR. COX: So you're saying that in the representation of this defendant in a death penalty case, you failed to satisfy yourself that he wished to waive his right to testify in the case; is that what you're saying?

MS. GOTHARD: Pains me to say this, but yes. (Exhibit 11 page 18)

MR. COX: So your testimony is that you did or did not advise this defendant of his right to testify in this death penalty case?

MS. GOTHARD: My testimony is, as it has been when I first started talking, that I always advise my clients. I did advise him prior to the trial that it's his opportunity to - - his decision to make.

MR. COX: And he didn't exercise that opportunity?

MS. GOTHARD: I didn't discuss it with him before telling Mary Ann to close out the case. (*Exhibit 11 pages 21 - 22*)

MS. GOTHARD: (to Judge) I just don't ever recall asking him or even talking to him, giving him the opportunity to talk to me about whether he would testify or not. (*Exhibit 11 page 26*)

Gothard further referred to the decision for the defendant not to testify as her "unilateral" decision. (*Exhibit 11 page 15*) In the post conviction Order Judge Jon Kerry Blackwood concluded that the failure of the trial counsel to request the Mormon hearing was deficient. (*Exhibit 12 page 3*)

In the Jones Motion for New Trial Attorney Gothard stated that she could recall having been counsel in five death penalty cases that had actually proceeded to trial. (*Exhibit 11 page 16*) Three of the cases are the cases described herein, Hall, Kiser and Jones. Each of these cases resulted in Attorneys Gothard and/or Green claiming that they committed short-comings, error and/or ineffective assistance. This pattern of self-initiated post-conviction claims in each of the last three death penalty cases tried in Hamilton County which resulted in guilty verdicts necessitates appointing counsel other than the Public Defender to represent the defendant.

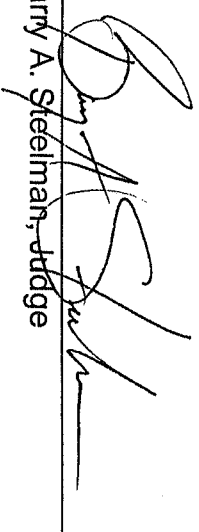
Finally the Court finds that because it is necessary to appoint counsel other than the Public Defender, such necessity eliminates any possibility of designating the Public Defender as counsel pursuant to Section 3 (b) (1) of Rule 13. While each of the findings in this Order standing alone would substantially concern the Court regarding the ability of the Public Defender to render effective representation to the defendant, the existence of both factors concurrently i.e. current case load/staffing issues and a pattern of post trial

claims of error/ineffective assistance weighs heavily against the appointment of the Public Defender as counsel herein.

Therefore, it is hereby

ORDERED that Attorney Lee Davis is appointed to represent the defendant as lead counsel and Attorney Brian Hoss is appointed as co-counsel pursuant to Rule 13.

ENTER this the 6th day of May, 2011.



Barry A. Steelman, Judge

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Order

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BY _____ D.C.