IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 09-cr-00112-ODS**
	)	
CLIFFTON TAYLOR,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION FOR NEW TRIAL WITH SUGGESTIONS IN SUPPORT

COMES NOW defendant through stand-by counsel and moves the court to grant defendant a new trial. As grounds therefore, counsel states:

Undersigned counsel was appointed on Friday of last week to replace the public defender as stand-by counsel for defendant. Defendant was convicted by the jury on January 21, 2010 and has until Thursday, January 28, 2010 to file a motion for new trial. This motion is therefore timely filed.

Counsel has not had the opportunity to meet with Mr. Taylor personally or discuss the case with him in great detail at this point.[1] Counsel has read the

[1] Counsel faxed a copy of this motion to CCA for defendant's review and thereafter

account of the trail in an article entitled, "Robber Bungles Heist, Then his Defense" in the ***Kansas City Star*** as reported by Mark Morris, the local assigned courthouse reporter. Based on the content of the article and its assumed reasonable accuracy as well as brief conversation with the former stand-by counsel, undersigned counsel believes the trial court committed reversible error by failing to ***sua sponte*** intervene and stop the proceedings and declare a mistrial at the point where Mr. Taylor's presentation of DNA evidence against himself and the revelation of his own prior criminal record significantly bolstered the government's case against him. This, coupled with the failure to provide him with a stand-by counsel with whom he could effectively communicate, amounts to reversible error.

Undersigned Counsel has reviewed the docket and notes the numerous attempts by Mr. Taylor to have a different appointed counsel as early as six months prior to trial (see docket entries #27, #35, #41, #51, #61, #64, and #83). Mr. Taylor readily admitted in a number of these pleadings that he had no schooling in the law.

It is apparent from the sheer number of these motions and letters that his working relationship with the public defender was likely non-existent. He was

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discussed it briefly with him by telephone this afternoon. Mr. Taylor has approved the motion and joins in it.

thus left to his own devices which, being charitable, were painfully lacking. His defense therefore was so flawed and ineffective as to constitute "structural error" that denied him a fundamentally fair trial. ***United States v. Gonzalez-Lopez***, 548 U.S. (2006); ***Raymond v. Weber***, 552 F.3d 680 (8th Cir. 2009). Also See ***Young v. Lockhart***, 892 F.2nd 1348 (8th Cir. 1989) (note 2); ***United States v. Wodtke***, 951 F.2nd 176 (8th Cir. 1991). In ***Gonzalez-Lopez*** the Court once again defined structural defect in a trial as:

> The second class of constitutional error we called "structural defects." These "defy analysis by `harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." Id., at 309-310.[fn4] See also ***Neder v. United States***, 527 U.S. 1, 7-9 (1999). Such errors include the denial of counsel, see ***Gideon v. Wainwright***, 372 U.S. 335 (1963), the denial of the right of self-representation, see ***McKaskle v. Wiggins***, 465 U.S. 168, 177-178, n. 8 (1984), the denial of the right to public trial, see ***Waller v. Georgia***, 467 U.S. 39, 49, n. 9 (1984), and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction, see ***Sullivan v. Louisiana***, 508 U.S. 275 (1993).

In ***Gonzalez-Lopez*** the defendant was prohibited from using his counsel of choice that he had retained under the rubric that the retained attorney had violated

a local rule of Court and a Missouri Bar Rule concerning contact with represented persons. Defendant then represented himself unsuccessfully. The Supreme Court held the district court's refusal to allow Mr. Gonzalez-Lopez's chosen attorney to try his case was reversible error because it amounted to a structural defect on 6th Amendment grounds.

While the case is distinguishable in that Mr. Taylor was not seeking to use a named retained attorney, there is little real distinction in what was at stake in both ***Gonzalez-Lopez*** and Mr. Taylor's situation. Mr. Taylor's relationship with his appointed public defender, according to Mr. Taylor, was so poor and so lacking in mutual communication and trust that it can truthfully be said he tried his case without the assistance of meaningful and effective stand-by counsel. This ultimate structural flaw in the proceedings could have easily been cured by simply giving Mr. Taylor a replacement standby counsel. Indeed, it does not appear that Mr. Taylor was attempting to have an attorney of choice appointed – only one that he could communicate with and work with. Moreover, this was not seemingly done with bad motive or intent to delay or obfuscate the proceedings.

A district court judge is faced with a difficult balancing task when a defendant is adamant that he wishes to defend himself. There must be a knowing and voluntary waiver of right to counsel and even then the court should be willing to allow stand-by counsel the opportunity to take over where it is apparent such is

necessary. This of course subsumes that such an attorney is counsel that defendant has at least minimal confidence in and communicates with and is available to step up to the plate. See ***United States v. Mahasin***, 442 F.3d 687 (8th Cir. 2006). Courts have a continuing duty to protect the defendant from himself in these situations and the court here should have intervened (assuming press accounts are accurate) and stopped the proceedings. See ***United States v. Kind,*** 194 F.3d 8th Cir. 1999).

One might flippantly observe that if the article undersigned counsel refers to in his motion is a fair account of the proceedings, then the evidence was so overwhelming that any presentation of a defense at a new trial, whether by Mr. Taylor, or the very best criminal defense "dream team" money could buy, would result in a repeat outcome of a guilty verdict.[2]

Assuming the Court were to grant this motion and defendant is placed back at square one, then defendant would be in a position to re-evaluate his entire situation. As it stands now defendant will lose three U.S.S.G. points for having not resolved his situation through a plea and acceptance of responsibility and will likely receive an additional two points for obstruction at trial for denying the offense. See U.S.S.G., Section 3C1.1.

[2] Counsel is not unmindful that defendant would likely be confronted with his own testimony and statements at a re-trial that would further undermine any likely defense a new competent attorney might try to mount.

When all this is factored in, defendant may well serve an additional four to five years in this case as the record now stands. This is time that perhaps could have been avoided had defendant been able to receive the advice of an attorney he truly had confidence in. He should at least be given the opportunity now to consider these options.

Alternatively, he may wish to again try the case with the assistance of an attorney he has confidence in with the hope that a different attorney with a different approach might convince a new jury that there is reasonable doubt in the case. Granting him a new trial will restore both these options.

WHEREFORE, defendant moves the court to set aside the verdict in this case and order a new trial.

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed via the ECF system Monday, January 25, 2010 and caused to be served via ECF email on:

Dan Nelson
Assistant US Attorney

US Court - 900 East 9th
Kansas City, MO 64106

/s/
JOHN R. OSGOOD