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

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

**DEFENDANT'S REPLY TO THE GOVERNMENT'S ANSWER IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL WITH DEFENSE SUGGESTIONS IN SUPPORT**

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Defendant argued in his opening motion for new trial that "[i]t is apparent from the sheer number of . . .motions and letters that his working relationship with the public defender was likely non-existent. He was thus left to his own devices . . . His defense therefore was so flawed and ineffective as to constitute 'structural error' that denied him a fundamentally fair trial." Cited ***inter ali*** was ***United States v. Gonzalez-Lopez***, 548 U.S. (2006). Indeed, defendant submits that his own performance if done by a licensed attorney would have been judged so poor and flawed as to easily meet the prior ***Strickland v. Washington***, 466 U.S. 668 (1984) standard of lack of performance amounting to a "farce and mockery" of

justice. See ***Cross v. United States v. United States***, 392 F.2d 360 (8th Cir. 1968); ***Cardarella v. Untied States***, 375 F.2nd 222 (8th Cir. 1967).

The government's answer brief does not appear to address defendant's argument head on, but instead simply falls back on a waiver argument. Also absent in the government's answer is a meaningful discussion of whether the trial court had an affirmative obligation to intervene under these somewhat unique set of facts. As to the trial court's obligation, the 11th Circuit held in ***United States v. Wilson***, 149 F.3d 1298 (11th Cir. 1998), at least in the context of closing argument error by the prosecutor, that:

> where a prosecutor's transgressions are excessive, "`the trial judge has an obligation in the interests of fairness and justice to stop the prosecutor delivering a greatly prejudicial argument ***sua sponte***.'" ***Garza***, 608 F.2d at 666 n.7 (quoting ***United States v. Corona***, 551 F.2d 1386, 1391 n.5 (5th Cir. 1977)).

In ***United States v. Garza***, 608 F.2d 659 (5th Cir. 1979) at n.7, the Court indicated it was important to observe that in such circumstances "the trial judge has an obligation in the interests of fairness and justice to stop the prosecutor from delivering a greatly prejudicial argument ***sua sponte***." But see ***United States v. Daas***, 198 F.3d 1167 (9th Cir. 1999) (no independent obligation of court to intervene where it appears failure to object may have had sound strategic reason).

Defendant does not contend or suggest that in every case the court has a

constitutional obligation to intervene to protect a defendant from himself. Indeed, if a defendant chooses to represent himself and never affirmatively asks for assistance from a licensed practitioner, the trial court has no obligation to make a licensed practitioner available to him ***sua sponte***. ***United States v. Knoll***, 16 F.3d 1313 (2nd Cir. 1994). Also see ***United States v. Cantor***, 470 (F.2d 890 (3rd Cir. 1972) ("A courtroom is not a forum for the legal training of defendants with advocative ambitions").

The docket in this case makes it abundantly clear that defendant's relationship with his appointed public defender was in shambles. Defendant contends that the relationship was so poor as to constitute a non-existent relationship. Indeed, he was so upset at one point that he apparently overturned a counsel table in the Magistrate's courtroom. Under such conditions and metal strain, one can argue that in his mind he had no standby counsel as a matter of law." And because of this, he was required to rely exclusively on his own wanting talents as a fledgling trial advocate.

Whether one characterizes what happened as a "structural error", a "due process error", or dubs it after the fact a "farce and mockery of justice", the bottom line is defendant did not receive a constitutionally fair trial where he had no one to turn to for advice and no one to protect him from himself and his own floundering.

In summary, the trial court should have stopped the proceedings ***sua sponte*** and conducted a hearing to determine exactly what was going on between defendant and his public defender and assess whether it was reasonable under all the facts and circumstances to appoint a replacement attorney for him. Indeed, this appears to be exactly what has now occurred and it seems the Magistrate judge has upon further reflection arrived at the conclusion that it is probably far more prudent to afford Mr. Taylor a different appointed attorney for the remainder of the proceedings. This is of course a somewhat belated gesture and may or may not benefit him in some miniscule fashion at sentencing.

Obviously, there may well be matters important to the resolution of this issue that can only be ascertained through testimony of defendant and his former stand-by counsel. Should the court be inclined to accept the government's argument of waiver based on the record now before it, defendant submits that a hearing should be granted to further explore the issues raised herein.

WHEREFORE, defendant again urges the Court to grant him a new trial as a simple gesture of fairness or, in the alternative, such other relief as deemed necessary including but not limited to an evidentiary hearing to determine and document the history of his relationship with his former counsel.

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 on Tuesday, February 16, 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