2006

State of Utah v. Wade Maughan : Reply Brief

Utah Court of Appeals

IN THE UTAH SUPREME COURT

STATE OF UTAH	:	
Appellee/Cross-Appellant	:	
v.	:	
		Case No. 20060189
WADE MAUGHAN	:	
Appellant/Cross-Appelle	:	

REPLY BRIEF OF AMICUS CURIAE,
UTAH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Interlocutory appeal from a district court order that disqualified one of Defendant/Appellant Wade Maughan's defense attorneys in a capital murder prosecution in the First Judicial District Court, in and for Box Elder County, the Honorable Ben H. Hadfield, presiding. The order required Mr. Maughan to choose to keep one of his defense attorneys and to remove the other. The Utah Association of Criminal Defense Lawyers ("UACDL"), files this brief in support of Mr. Maughan's challenge to the district court's order.

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INTRODUCTION

The State misidentifies the law in arguing that indigent criminal defendants have no constitutional right to maintain an existing attorney/client relationship. The State urges this Court to overrule *Arguelles* in which this Court established an indigent defendant's constitutional right to retain counsel. In place of that right, the State proposes allowing it to interfere with attorney/client relationships whenever a "reasonable possibility" of a conflict of interest exists. Although indigent defendants may not select a specific lawyer to represent them, the United States Supreme Court has established indigent criminal defendants' right to retain appointed counsel. The State's proposed low threshold for removing defense counsel would discourage competent counsel from accepting appointments in capital cases, contradict numerous state courts' contrary conclusions, and violate the ABA Guidelines for capital cases. The State would also be free to spy on defense teams and arrest their members as was done in this case.

ARGUMENT

IN *ARGUELLES* THIS COURT CORRECTLY ESTABLISHED THE SAME CONSTITUTIONAL RIGHT TO RETAIN CHOSEN COUNSEL THAT THE UNITED STATES SUPREME COURT FOUND IN *WHEAT*.

Contrary to the State's assertions, the United States Supreme Court has not rejected indigent defendants' right to continued representation by a specific lawyer. Rather, the Supreme Court's decision in *Wheat v. United States*, 486 U.S. 153 (1988), remains the constitutional standard when the prosecution seeks to interfere with an indigent person's relationship with appointed counsel. In *State v. Arguelles*, 2003 UT 1, ¶¶87-89, 63 P.3d 731, this Court correctly applied *Wheat*'s limited constitutional right to retain chosen counsel. Not only does the State fail to provide any reasoned basis for eliminating this constitutional right, the survival of the rights to a fair trial and independent defense counsel require protection from unwarranted prosecutorial interference. Given the compelling reasons to secure the attorney-client relationship and this Court's well-founded reliance on *Wheat*, no justification supports overruling *Arguelles*' right to "be represented by an attorney of one's choosing." *Arguelles*, 2003 UT 1, ¶87, 63 P.3d 731.

A. *Wheat*'s Establishment of Indigent Criminal Defendants' Constitutional Right to Retain Chosen Counsel Controls This Appeal.

In conflict with *Wheat* the State unabashedly urges this Court to overrule *Arguelles*' constitutional right to retain chosen counsel. State's Brief at 15-18 & n.4. In

place of *Arguelles*, the State seeks the ability to disrupt the attorney-client relationship whenever a "reasonable possibility" of a conflict of interest may exist. State's Brief at 14-22, 37. The State's only justification for overturning this precedent is its claim that the United States Supreme Court has rejected indigent criminal defendants' right to retain chosen counsel. State's Brief at 16.

The State errs in this assertion. Recently, in *United States v. Gonzalez-Lopez*, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), the Supreme Court reaffirmed that *Wheat* controls an indigent defendant's right to maintain a relationship with appointed counsel. The criminal defendant in *Gonzalez-Lopez* privately retained an out-of-state attorney to represent him in a criminal matter. 126 S.Ct. at 2560. When the retained attorney violated a court ruling, the federal district court judge revoked the out-of-state attorney's *pro hac vice* status. *Id.* The defendant objected and later appealed the district court judge's decision. The Supreme Court ruled that the right to retain an attorney was so fundamental to a fair trial and essential to the Sixth Amendment right to counsel that the deprivation of those rights constituted structural error. *Id.* at 2564.

In doing so, the Court limited it's holding to non-indigent defendants and commented that *Wheat* controlled "defendants who require counsel to be appointed for them." *Id.* at 2565. Specifically, citing *Wheat*, the Court reaffirmed that criminal defendants may not "insist on representation by a person who is not a member of the bar, or demand that a court honor a waiver of conflict-free representation." *Id.* at 2566.

Rather, the Court, relying again on *Wheat*, held that trial courts have a duty to ensure that "'criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.'" *Id.* (quoting *Wheat*, 486 U.S. at 160). *Gonzalez-Lopez*, thus, confirms that *Wheat* remains the test for protecting an indigent defendant's right to retain appointed counsel.

Because *Arguelles* rests on *Wheat*, the State erroneously urges this Court to overrule *Arguelles*. Subject to the limitations enumerated in *Gonzalez-Lopez*, *Wheat* established a Sixth Amendment "right to select and be represented by one's preferred attorney . . . ." 486 U.S. at 159. Identically, in *Arguelles* this Court acknowledged *Wheat* as recognizing "a limited right to select and be represented by an attorney of one's choosing . . . ." 2003 UT 1, ¶87, 63 P.3d 731. And, just as this Court ruled in *Arguelles*, *Wheat* invoked a "Sixth Amendment presumption in favor of counsel of choice." 486 U.S. at 160. Thus, contrary to the State's arguments, *Wheat* establishes indigent criminal defendants' constitutional right to retain chosen counsel. Because no reason supports the State's request to overrule *Arguelles*, this Court should decline to do so.

The State's arguments further misapprehend other related Supreme Court cases. In *Gonzalez-Lopez*, that Court clarified that *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989), and *Morris v. Slappy*, 461 U.S. 1 (1983), stand for the uncontested propositions that trial courts have "power to enforce rules or adhere to practices that determine which attorneys may appear before [them], or to make scheduling and other

decisions that effectively exclude a defendant's **first** choice of counsel." 126 S.Ct. 2566 (emphasis added). As this analysis demonstraights, these cases do not affirmatively reject indigent defendants' right to retain appointed counsel. *See* Anne Bowen Poulin, *Strengthening the Criminal Defendant's Right to counsel*, 28 Cardozo L. Rev. 1213, 1251-54 (2006); *see also* Wayne D. Holly, *Rethinking the Sixth Amendment For the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 Brook. L. Rev. 181 (1998) (discussing right to retain counsel).

In contrast to the **initial** appointment of counsel discussed in those cases, this appeal addresses the constitutional right of protecting defendants from State interfere with an existing attorney-client relationship. UACDL does not contest that indigent criminal defendants have no right to be appointed a specific attorney. Rather, it has argued both in its motion and memorandum in the trial court and in this appeal that *Wheat* and *Arguelles* constitutionally require trial judges to presume that once counsel is appointed, an indigent defendant may retain that attorney. UACDL's Brief at 6-9. "This presumption may only be overcome by a demonstration of an actual conflict or a showing of a serious potential conflict." *Arguelles*, 2003 UT 1, ¶87, 63 P.3d 731. The State's proposed "reasonable possibility" test falls short of this constitutional standard.

B. The Essential Importance of Protecting the Independence of the Attorney-Client Relationship Demands Affirming *Wheat* and *Arguelles*.

Retaining *Wheat* and *Arguelles* are not only constitutionally mandated but adopting the State's proposed "reasonable possibility" test would lead to unfair trials and denials of the right to counsel. As detailed in UACDL's original brief, many state courts recognize the dangers of easily allowing the prosecution to disrupt the attorney-client relationship, especially in death penalty cases. UACDL's Brief at 6-9, 18-27. The risk of criminal defendants losing trust in their appointed attorneys and the real fear of dissuading defense attorneys from representing capital defendants provide strong support for removing defense counsel in rare circumstances. Indeed, the State devotes a significant portion of its brief recognizing the need for restraint. State's Brief at 22-27. The State's own acknowledgment of the risk of unwarranted interference in the attorney-client relationship demonstrates the inadequacy of its proposed "reasonable possibility" test.

The primary defect in the State's reasoning rests on the ease in which the State proposes to wield its ability to raise potential conflicts of interests and to interfere in the attorney-client relationship. Should this Court uphold the State's and the trial court's view that a mere possibility of a conflict supports removing defense counsel, this Court can expect prosecutorial interference to become much more common. *State v. Huskey*, 82 S.W.3d 297, 305-09 (Tenn. Crim. App. 2002); *Stearnes v. Clinton*, 780 S.W.2d 216,

225 (Tex. Crim. App. 1989). UACDL has observed that since the arrest of Richard Mauro and Ted Cilwick and the protracted litigation that has ensued fewer and fewer of its members are willing to accept appointments in capital cases. The State's efforts to establish a low threshold for removing defense counsel indicates that defense lawyers' concerns for interference are well-founded.

The State also minimizes the overwhelming number of state courts that have agreed to discourage motions to remove defense counsel. In addition to the cases cited in UACDL's original brief, numerous other state courts have ruled that the attorney-client relationship is "inviolate" and entitled to constitutional protection. *McKinnon v. State*, 526 P.2d 18, 23 (Alaska 1974); *Clements v. State*, 817 S.W.2d 194, 198-200 (Ark. 1991); *Weaver v. State*, 894 So. 2d 178, 188 (Fla. 2004); *People v. Davis*, 449 N.E.2d 237, 241 (Ill. App. 1983); *In re M.R.S.*, 400 N.W.2d 147, 152 (Minn. App. 1987). In addition to due process and Sixth Amendment grounds, these cases have relied on the same equal protection concerns that UACDL raised in the trial court and in its appellate brief and which the State dismisses on appeal. UACDL Brief at 7 (citing *Smith v. Superior Court*, 440 P.2d 65, 74 (Cal. 1968)); State's Brief at 19-21; *see McKinnon*, 526 P.2d at 23 (citing *Smith*); *Clements*, 817 S.W.2d at 199-200 (relying on *Smith*); *Weaver*, 894 So. 2d at 188-89 (citing equal protection concerns); *Davis*, 449 N.E.2d at 241 (relying on *Smith*); *M.R.S.*, 400 N.W.2d at 152 (relying on *Smith*). Although the State may be entitled to some say in how state funds are used when appointing counsel, these

cases establish the necessity of limiting the State's ability to interfere with defense counsel. Moreover, regardless of the source of these courts base their rulings on constitutional or policy concerns, the sheer number of state courts that have recognized the potential for unwarranted prosecutorial interference and state discrimination based on poverty is persuasive.

As further supports for limiting the state from interfering with defense counsel, the ABA Guidelines on capital representation impose strong limits on prosecutorial interference in death penalty cases. In contrast, the State regards the ABA Guidelines as mere guides and not requirements. State's Brief at 24-25. To the contrary, both this Court and the Supreme Court have endorsed those guidelines as the minimal standards for representation in capital cases. *Rompilla v. Beard*, 545 U.S. 374, 124 S.Ct. 2456, 2466 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Menzies v. Galetka*, 2006 UT 81, ¶90, 150 P.3d 480.

Rather than arresting defense team members who diligently attempt to follow the ABA Guidelines, the State should encourage adherence to those minimal standards as a means of ensuring the fairness and integrity of capital prosecutions. As Mr. Maughan indicates in his reply brief, the ABA Guidelines specifically direct defense teams to employ two team members to avoid the very claims the State is now raising. Maughan Reply Brief at 7-8. Nevertheless, the State dismisses this textbook example of conducting capital investigations.

Finally, the States request to overrule *Arguas* minimises its role in creating the alleged conflict in this case . It argues that it had "no control" over Mr. Mauro's and Mr. Cilwick's unfounded arrests. State's Brief at 27-28. To the contrary, UACDL does not allege that the states attorney in the appeal orchestrated the events below. Rather, the record demonstrates that jail personnel in Box Elder County listened in on privileged attorney-client communications between defense counsel and Mr. Maughan and then informed Spokane police officials that the defense team would be interviewing specific witnesses the next day. Spokane police then approached these witnesses and pressured them into claiming witness tampering against the defense team. After the denfense team endored further allegation of witness tampering, other false charges followed, including the fantastical claim that Mr. Mauro posed as a television news reporter. Then, the prosecutors in the trial court ratified this official misconduct and attempted to remove defense counsel. The Attorney General's office now advances and endorses the State Officials conduct. The State's role in this case, through these various actors, is self-evident.

CONCLUSION

To ensure the sanctity of the attorney-client relationship, UACDL requests this Court to reverse the district court's ruling disqualifying one of the defense attorneys but allowing the other defense counsel to remain on the case.

Dated this 17th day of September, 2007.

KENT R. HART
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CERTIFICATE OF DELIVERY

I, KENT R. HART, hereby certify that I have caused to be delivered this brief and ten copies to the Utah Supreme Court, 450 South State, 5th Floor, P.O. Box 140210, Salt Lake City, Utah 84114-0210, mailed two copies to Thomas B. Brunker, Assistant Attorney General, 160 East 300 South, Sixth Floor, P.O. Box. 140854, Salt Lake City, Utah 84114-0854; Richard Mauro and Scott Williams, 43 East 400 South, Salt Lake City, Utah 84111.

Dated this 17th day of September, 2007.

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