E. Wycliffe Orr, Sr.

598 Tommy Aaron Drive
Gainesville, GA. 30506
eworr@orrbrownjohnson.com

Office: (770) 534-1980

March 3, 2010

VIA E-MAIL TO preston.smith@senate.ga.gov,
Facsimile Transmission to (404) 463-4161,
AND VIA FIRST CLASS U.S. MAIL

State Senator Preston W. Smith
52nd Senate District
Georgia State Capitol
301-A Coverdell Legislative Office Building
Atlanta, Georgia 30334

Dear Senator Smith:

This letter responds to the "Annual Report" of the Legislative Oversight Committee (LOC) of the Georgia Public Defender Standards Council (GPDSC), issued by you as chair of the LOC on February 24, 2010. This letter also calls upon you to resign as member and chair of the LOC for the reasons set forth hereafter.

Rather than being a true annual report concerning the public defender system in Georgia, as called for by O.C.G.A. § 17-12-10.1(f), your "report" is a political tract, a wide-ranging rant and diatribe, and a slur against our State's courts and the State Bar of Georgia for simply performing the roles they are assigned by our judicial and constitutional systems. Since this "report" prominently bears your name as "chair" on its cover, focuses on "Sen. Preston Smith [having] chaired bicameral meetings of the General Oversight Committee," fn 1, p. 2, refers on pages 25 to "the opinion of the Chairman," and was released through the Senate Press Office under the headline of "Sen. Smith Releases Legislative Report on Public Defender Standards Council," the "report" is obviously largely your work. This attribution is further supported by the fact that the "report's" contents exhibit your trademark customary accusations and style, often heard at LOC meetings and elsewhere.

Your "report" manages to disparage and malign everyone from Georgia trial and appellate judges, to the State Bar of Georgia, the American Bar Association, the Southern Center for Human Rights and most everyone else who supports the Constitutions of the State of Georgia and the United States. Your "report," p. 2, lumps together supporters of the Constitutions and the public defender system as "ideological crusaders" with "all the purist ideological zest of an ivory-tower professor" who have "knee-capped" the public defender system. Suffice it to say such broad-scaled attacks make it a bit difficult for anyone to "partner with the General Assembly" as you suggest on page 2 of the "report." Along the way, your "report," pp. 15-16, manages, in what is supposed to deal with indigent defense, to throw in abortion, gun control, terrorism, military commissions, and affirmative action.

The "report" itself, when it does finally deign to address the public defender system, is filled with error, internal contradictions, distortions and mischaracterizations. To list all of those defects would take more time and space that I can give to this letter (and I have given plenty already). But among the many errors and distortions are the following:

1) The "report" in various places gratuitously and wrongly attacks our Courts and the State Bar. In doing so, it entirely misperceives the role and responsibilities of the Courts and the Bar, and thus reflects a fundamental misunderstanding of the relative roles of the Courts and Bar vis-a-vis the state legislature. The "report" assumes in error that the legislature is all-powerful and without Constitutional limitations. For example, in numerous places, it uses the word "usurp," pp. 2, 3, 12 and 25, arguing that for the Courts to do their Constitutionally-assigned job is to "usurp[ ]. . . legislative power . . . [by] . . . judicial fiat," p. 12. In like manner, the "report" complains, p. 3, of "the judiciary . . . substitut[ing] its policy judgment for that of the elected legislature," and that "the legislature should not be *forced* to provide poor criminals a higher level of defense than the Constitution requires at the expense of Georgians' other funding priorities like education, healthcare and the public safety of its citizens." (italics added). Amazingly, the "report," p. 2, criticizes those who have dared to "use[] litigation against the State and positional power within the State Bar of Georgia to seek judicial orders . . . ." There are *three* governmental branches in Georgia, not one or two. Contrary to your assumptions, legislators are not kings, queens and potentates, but members of only one of the three co-equal branches of Georgia government. Let me assure you that the Courts are precisely the place in a

Constitutional system where legislative failings of Constitutional dimension are to be corrected.

The "report" not only completely ignores the fact that it is *precisely* the duty of Georgia's courts to force the legislature to provide a constiutionaly adequate defense to indigent defendants when it fails to do so, but it also errs in suggesting equivalency between the Constitutional right to counsel and other state programs, and in implying that the state's failure to provide adequate funding for indigent defense is a consequence of other state funding needs. The existence of the "Indigent Defense Fund," as it is referred to on page 4, by itself negates that latter implication. Moreover, the "report" erroneously implies on pages 3 and 25 that the State has increased its funding for indigent defense to 110 million dollars annually, when in fact as your "report's" own chart shows, more than half of the annual money for the system still comes from Georgia's counties, and the funds that the State does provide are not tax dollars but "Indigent Defense Fund" moneys. The legislature has been unwilling to use the state's power of taxation to discharge its constitutional duty of protecting "the privilege and benefit of counsel," Georgia Constitution, Article I, Section I, Paragraph XIV.

2) The "report" now proposes to shift responsibility and costs for conflict counsel back to those counties as in the days before the GPDSC, thus shirking the State's responsibilities. This is nothing less than a prelude to returning to the shameless "system" so criticized by the Supreme Court Commission nearly a decade ago. And while trying to justify the State's inexcusable lack of support for the system by referring, p. 2, to the "scarce resources" due to the "national economic downturn," and to the "historic revenue shortfall," p. 25, and to "the enormous financial strain this economy places on our courts," as stated in your press release (an inadvertent outright admission that lack of money is the root cause of the GPDSC's distress and dysfunction), the "report" cannot hide the fact that the "indigent defense fund" created to fund indigent defense from civil and criminal case fees, forfeitures and fines raises millions of dollars that are siphoned off to the State's general fund. What your "report" also cannot conceal is the plain and simple fact that Georgia's public defender system is dying because the legislature refuses to properly fund it.

This failure of the legislature to properly fund and support the public defender system is admitted by your "report." On page 9, it is stated that the "austerity period" began in July 2008. Yet, as the funding chart, page 18, shows, the State's funding for the system was reduced by two million dollars

($2,000,000.00) from 2006-2007, with no real increase since. This reduction is part of the unending undermining of the GPDSC by the legislature, a process that began in 2007 with the non-sensical and politically-motivated transfer of the GPDSC to the executive branch (completely at odds with Georgia's two centuries plus of legal history and practice), where it has withered for lack of support, and continued in 2008 when the GPDSC director was removed from the employ of the council and placed in the Governor's employ, along with eroding the council's authority to run the system. Those changes have prevented the GPDSC governing council from exercising any real control over the system or its director, leaving council members devoid of the ability to effectively counter much of what is identified in this letter as deterioration of the statewide public defender system.

3) The "report" also gratuitously attacks Judge Baxter's ruling[1] in the Flournoy case and the State Supreme Court's ruling in the Garland case and the Flournoy case.

The Flournoy case.

Nowhere does your "report" come to grips with the undeniable facts, as set forth in the Flournoy case:

a) As Judge Baxter ruled, it is undisputed that "five of the six plaintiffs in this action were convicted in 2008 or earlier, and therefore had been without a lawyer to handle their motion for new trial and appeal for between one and three-and-a-half years," Order dated February 23, 2010, page 3;

b) As of November 23, 2009, 187 indigent defendants, undoubtedly most if not all of them in jail or prison, were without conflict-free appellate counsel, Order, page 6, with one indigent defendant having been without conflict-free appellate counsel for seven years, and with an expected "15 to 30 more individuals per month who will request and potentially be without conflict-free counsel in the future," Order, page 16;

---

[1] Your "report" also betrays inexperience and unfamiliarity with Georgia's judicial system. On p. 14 of the "report," you complain that "Judge Baxter allowed the Plaintiffs' attorneys . . . to draft the proposed Order for the Court to enter. Judge Baxter entered the Plaintiffs' attorneys proposed Order on February 23, 2010." While I do not know whether that is correct, you are apparently unfamiliar with the fact that it is common practice in Georgia's state courts, and has been for decades if not longer, for trial courts to direct and empower the prevailing party's attorney to prepare a proposed order for review, possible change, and entry by the Court. In fact, frequently all parties are asked to prepare a proposed order setting forth the ruling they seek from the Court. In any event, your "report" leaves lay readers with the erroneous impression that there was some favoritism or impropriety in this procedure.

c) That "it is this Court's duty to order the relief Plaintiffs now request," as to do otherwise "would abdicate [the Court's] own constitutional duty," Order, page 35. These failings of the system are violations of law and of the State Constitution as declared by our State Supreme Court. In the separation of powers that your "report" mentions in name only, it is the Supreme Court's duty, not your duty, to make that determination, a role and prerogative that you not only fail to honor, but denigrate instead.

d) "As both the United States and Georgia Supreme Courts have held, lack of funding does not excuse a failure to adequately provide indigent defense." Order, p. 35. Judge Baxter's Order goes on, fn 38, p. 35, to note that "given that the Indigent Defense Fund has collected a surplus of over $23 million in court filing fees and fines in the last four years that has not been appropriated to indigent defense, it is difficult for Defendants to credibly argue that there are no funds available to remedy the Appellate Division's present inability to provide counsel." Your "report" does not deal with that fact because it *cannot* deal with or refute it. Instead, your "report," p. 25, attempts to divert attention from this fact by once again pleading "an historic revenue shortfall," and again close-mindedly protesting that "often judges tend to be concerned with fair trials without adequate regard to cost consideration," p. 5. How awful your "report" suggests it is to have judges who are concerned with guaranteeing that defendants receive a trial that comports with the Constitution.

e) That recently-entered "flat-fee" contracts entered by the GPDSC with private attorneys for appellate representation were "for a flat fee of $1200 to $1500 per case, each contract attorney agree[ing] to take on between 10 and 15 cases," without the attorneys being informed of the identity of their clients or the nature of the cases or the complexity of issues in those cases. Order, p. 9. In an extremely thorough order, Judge Baxter found that this arrangement renders it "highly unlikely, if not practically impossible, for an attorney to provide effective representation to the named Plaintiffs and other class members under such a contractual arrangement." Order, p. 33. **Yet, your "report" reflects not the slightest concern for these facts, or that lack of money, due to legislative failure, is denying Georgians their constitutional rights.**

f) Seemingly, your "report," p. 6, suggests that there should be some "penalty for a lawyer asserting his/her belief that a conflict exists (or may arise) and withdrawing from representation," as your "report" comments upon there presently being no such penalty. So now, rather than providing clearly-available

and needed funds to run a Constitutionally-adequate public defender system, you apparently want to penalize lawyers for respecting Constitutional prohibitions against inadequacy of counsel arising from conflicts! It is therefore no surprise that your "report" lambastes the State Bar of Georgia for having the temerity to take seriously, through its advisory opinion function, the issue of whether public defenders under the same roof can defend multiple defendants in a case where their respective defenses conflict. Rather than respecting Georgia's institutions in which responsibility for interpreting and applying our State Constitution and laws concerning the public defender system has been placed, your "report," when it does not arrogate to itself that role, chooses to defer, if not delegate, to other states, the Constitutions, laws and systems of which are unique unto themselves, a superior right to determine Georgia's solutions and needs for indigent defense. So much for Georgia's sovereignty and self-determination.

Taken with the Cantwell case pending in the Northern Circuit, the Flournoy case demonstrates beyond cavil that at both the trial and appellate levels, Georgia is failing to meet its constitutional duty to provide adequate counsel for those who cannot afford a lawyer in criminal cases. Why? Because of lack of legislative support, both financial and otherwise. And your "report" reflects *not an iota* of genuine concern over these manifest failures of our State to meet its constitutional duties. Your "report" utterly fails to recognize or deal with the indisputable fact that so many indigent defendants, many in pre-trial or post-conviction confinement, are either without lawyers or with lawyers unpaid, underpaid and/or without resources for expert witnesses or other support necessary for effective assistance of counsel and an adequate defense or constitutionally-required appeal. Instead, your "report" simply casts aspersions on anyone and everyone in sight.

The Garland Case. Your "report" also erroneously and hypercritically takes a shot at the State Supreme Court for its decision in Garland v. State, 283 Ga. 201 (2008). The "report," p. 7, characterizes that decision as "holding that every single defendant was entitled to assert an 'ineffective assistance of council [sic]' appeal and the State was required to pay for that appeal too." The "report" goes on to editorialize that after conviction, a defendant "is entitled to have another new lawyer appointed (and paid for by the State) to pursue an appeal to try and prove that the first State-provided lawyer was ineffective in order to overturn a conviction by a jury of his peers. This court ruling has substantially expanded the financial cost of the system." This is nothing less than "rabble-rousing" at its worst. Your "report" leaves the impression that the Georgia Supreme Court created some new, unfounded and revolutionary right for those convicted in a criminal

trial. In so describing the Garland decision, the "report" wholly ignores the fact that, as the Garland decision itself clearly shows, the rights enforced in Garland are based on long-standing United States Supreme Court precedent. As cited and quoted in Garland, the United States Supreme Court held long ago, nearly half a century ago in 1963, in Douglas v. California, 372 U.S. 353 (1963), and other cases cited in Garland that

> "Appellant's right to effective assistance of counsel extends to a direct appeal from his criminal conviction. *Evitts v. Lucey*, 469 U.S. 387 II(A), 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Because appellant was found to lack the financial resources to retain counsel, the State was required to provide counsel for his trial, *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), and for his first appeal as a matter of right. *Douglas v. California* 372 U.S. 353, 835 S. Ct. 814, 9 L.E.. 2d 811 (1963). Appointed counsel, no less than retained counsel, is required to provide effective assistance. *Cuyler v. Sullivan*, supra at 344-345(III), 100 S. Ct. 1708. Effective counsel is counsel free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)." Garland, 283 Ga. at 202.
>
> * * *
>
> "'The Constitution of the United States is no respecter of the financial status of persons, and rich and poor are to be accorded equal rights under it.'" [Cit.] *State of Georgia v. Sanks*, 225 Ga. 88, 90, 166 S.E. 2d 19 (1969) '[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel [in a state criminal case], we think an unconstitutional line has been drawn between rich and poor' that violates the Fourteenth Amendment. (Emphasis omitted.)' *Douglas v. California*, supra, 372 U.S. at 357, 83 S. Ct. 814. . . .' *Reid v. State*, 235 Ga. 378, 381(1), 219 S. E. 2d 740 (1975)." (brackets in original) Garland, 283 Ga. at 204.

The drafters of your "report" should have actually read Garland, an exercise that may have saved them, and you, from so baselessly criticizing the Court in such obvious error. In sum, as the Garland court held, "the Constitutions of the United States and Georgia, not the Council's policies, are the governing authority here." 283 Ga. at 203. That is a lesson still unlearned by the LOC and your "report." In like manner, the State and Federal Constitutions, as interpreted and applied by the Courts, ultimately control, not the laws passed by you and your legislative colleagues or the interpretation you place upon indigent defense issues.

g) Nowhere in the "report" is there any real recognition of the sorry past of Georgia's previous hodge-podge unconstitutional system of indigent defense, which system was investigated and excoriated by the blue-ribbon Georgia Supreme Court Commission after a two-year review. That Commission's work concluded with a report which led to the 2003 legislative creation of the GPDSC as the measure necessary to cure the many ills which pervaded indigent defense in Georgia. Instead of supporting that 2003 legislative response to the constitutionally-inadequate earlier "system," the LOC has chosen to savage the GPDSC. Rather than constructively, candidly and accurately reporting on Georgia's still-young statewide public defender system, your "report" is just another step, much like Senate Bill 42 now pending in the legislature, toward completion of an ill-conceived plan, well underway since 2007, to dismantle the GPDSC and roll the clock back to yesteryear, depriving Georgia's counties of state-funded support of indigent defense and indigent defendants of the effective assistance of counsel that the Constitutions guarantee them, and terribly costly (in human and financial terms) wrongful imprisonments, appeals and re-trials. Indeed, your "report" even appears to presage that dismantlement, contemplating as it does on page 8 the day when "the current system is simply disbanded and the State returns to the previous system where all defendants were represented by individual contract or panel attorneys -- which seems to be the only logical conclusion to draw from the Bar's position." A very revealing statement, to say the least.

To serve on the LOC, and especially to chair that committee, requires many qualifications, among them genuine concern for the success of the GPDSC and a commitment to that success, accompanied by respect for the judicial system as a co-equal branch of Georgia's government. Instead of demonstrating those qualities, your "report" is replete with preoccupation, even obsession, with *legislative power*, as well as active *animus against* the judiciary, the GPDSC, the State Bar and indigent defense. In several places the "report" cites the prerogatives of the "elected legislature," as if Georgia's judges are not elected. Elected our judges are, with the express Constitutional charge to restrain the legislature when it exceeds the limits placed on it by the people of Georgia, including those people's specific command that our judiciary declare void " [l]egislative acts in violation of the Constitution or the Constitution of the United States." Georgia Constitution, Article I, Section II, Paragraph V. Your "report" shows no respect for our Courts, for the State Bar of Georgia, or for other institutions which also serve to protect the rule of law and the people of Georgia. Rather, your "report" reflects much disrespect, if not contempt, for these institutions. Your "report" wrongly alleges

that "[r]ecent Court developments and State Bar of Georgia actions likely have destroyed Georgia's ability to provide and fund a comprehensive public defenders' system," p. 2, and wrongly accuses "the State Bar and the Courts [of] hav[ing] rendered a statewide system unsustainable," p. 25, a false accusation and as bad an example of buck-passing and shifting of responsibility (from the true culprit, the legislature, to the State Bar and Courts) if ever there were one. The LOC's duties are of "oversight," and "to review and evaluate" information, plans and reports of the Council, O.C.G.A. § 17-12-10.1(c), not to act as constant critics and detractors of the public defender system. Simply stated, the LOC is supposed to be an *overseer*, not an *overlord*. The obvious intent and purpose of the LOC is to work with and assist the GPDSC in accomplishing its mission of "be[ing] responsible for assuring that adequate and effective legal representation is provided,…." O.C.G.A. § 17-12-1(c) The LOC's "annual report" is not a license to destroy the public defender system, and to constantly scan the horizon for opportunities to target for castigation the Courts, the State Bar, GPDSC and others who support the public defender system and compliance with Constitutional ideals and mandates. The LOC has wholly failed to perform its assigned function.

Accordingly, I, as a member of the GPDSC speaking for myself only and not for the Council (although I would if I could) or any other Council member, call upon you to withdraw this so-called "annual report," to apologize to all whom it so brazenly maligns, and to resign as both member and chair of the LOC. The views and prejudices which so thoroughly dominate this "report" disqualify you from serving on the LOC, much less from chairing it. Should you not do so, I intend to ask the Lieutenant Governor to remove you from the LOC.

I am releasing this letter to the press, since you have used the Senate Press Office to widely disseminate your "report." The public deserves to know the facts in these matters, including the fact that the Georgia taxpayers' several hundred million dollar investment in building one of the nation's finest public defender systems is in jeopardy of being squandered by incessant political attacks such as your "report" represents. As a member of the GPDSC, I am statutorily required to "at all times act in the best interest of indigent defendants," O.C.G.A §17-12- 7(a). The "best interest of indigent defendants" demands that your "report" be countered. In short, you have no right to lash out at so many as you do in your "report" without a reply. The field is not entirely yours -- in fact you occupy only a small part of that field, in the end.

Since being appointed to the Georgia Indigent Defense Council some quarter century ago by the late renowned Georgia jurist, Justice (later Chief Justice) Charles Longstreet Weltner, I have watched countless obstacles be overcome to finally achieve a great state-wide public defender system in Georgia. I for one do not intend to stand by to watch you and others destroy that system. But whatever happens, you and your legislative colleagues cannot repeal the U.S. Constitution's Sixth Amendment right to counsel, or its State of Georgia counterpart in the Georgia Constitution, Article I, Section I, Paragraph XIV. That, thank goodness, is not within your "legislative power."

Sincerely yours,

E. Wycliffe Orr, Sr.
Member, Georgia Public
Defender Standards Council

EWO, Sr./hbb