

## IN THE SUPREME COURT OF MISSISSIPPI

REINALDO BACALLAO

APPELLANT

V.

CAUSE NO. 2017-CA-0043-COA

MADISON COUNTY, MISSISSIPPI

APPELLEE

**PETITION FOR WRIT OF CERTIORARI**

COMES NOW Appellant, Reinaldo Bacallao (hereinafter “Reinaldo”), by and through counsel, and respectfully files this his *Petition for Writ of Certiorari* pursuant to Miss. R. App. P. 17 and in support of said petition would show as follows:

**Introduction**

Madison County Public Defender, Lisa Ross, Esq. (hereinafter “Ross”) represented, Reinaldo, for 154 days, on three felony counts of arson, conspiracy to commit arson, and insurance fraud. During that period, she never met him, spoke to him, or, more importantly, advised him of his mandatory court appearances. As a result of such failure to communicate, Reinaldo did not appear at his status conference, as required, and was arrested and incarcerated for 78 days. Throughout his incarceration, Ross never contacted or visited Reinaldo, though she visited his jail seven (7) times during that period. Shocking as that may seem, even more shocking is that the trial judge found Ross’ actions (or inactions) to be “adequate representation.” The appellate courts have failed to correct this injustice, and Reinaldo files this his *Petition for Writ of Certiorari* asking this Court to right the wrong he has suffered.

**History**

On March 3, 2010, Reinaldo and his wife, Oneida, were indicted on felony charges of arson, conspiracy to commit arson, and insurance fraud arising from a fire in their home. (Tr. 471.) Michael J. Malouf, Jr., Esq. (hereinafter “Mike Jr.”) appeared on their behalf at their initial

appearance but was never retained. (Tr. 217-218.) Upon Reinaldo's plea of "not guilty," the court entered an *Order Setting Trial, Pre-Trial Conference, and Status Conference*, wherein Reinaldo was ordered to appear at his three (3) assigned court dates (Ex. 15). Mike Jr. explained to Reinaldo that his absence on any of said dates would lead to his arrest and incarceration. (Tr. 221). Reinaldo and Oneida had separate indictments with different judges and were assigned different sets of court dates. (Ex. 15, 16.) Out of an abundance of caution, Reinaldo and Oneida both appeared at not only his/her three (3) court dates, but also the other's: totaling six (6) court appearances. (Tr. 221)

On September 27, 2010, the Circuit Court entered an Order finding Reinaldo indigent and relieving Mike Jr of his duties. (Ex. 23.) On September 29, 2010, the Court entered an Order appointing a public defender to represent Reinaldo. (Tr. 492; 29.) After repeated inquiries to the Madison County Circuit Court, Oneida was told that Ross might be her attorney. As Reinaldo did not speak English, Oneida made multiple calls to Ross on their behalf. After numerous phone calls to Ross' office, Oneida finally spoke to her and was told that she was not her attorney and demanded that she quit calling her. (Tr. 228.) Unbeknownst to Reinaldo, Ross was appointed as his attorney and had entered an *Agreed Order Continuing and Resetting Trial, Pre-Trial Conference, and Status Conference* ("Agreed Order") (Ex. 17). Under such Order, Reinaldo's required court appearances were: Status Conference on January 31, 2011, Pre-Trial Conference on February 7, 2011, and Trial on February 14, 2011. (Ex. 17.) Ross never communicated with Reinaldo and failed to send him a copy of that *Order* or otherwise inform him of his required court appearances. (Tr. 37.)

On November 23, 2010, Ross mailed Reinaldo a thick package containing the discovery she had received from the District Attorney's Office. (Ex. 2.) The cover letter in said package did not mention Reinaldo's required court appearances and did not contain the Court's *Agreed Order*

(Ex. 2), though it was Ross' standard practice to include such information (*See* Ex. 13, Ex. 31). Consequently, Reinaldo was unaware that he was required to attend his status conference set for 9:00 a.m. on Monday, January 31, 2011 and, thus, failed to attend. (Tr. 37.)

At trial, Ross testified that her only effort to inform Reinaldo of his status conference was to place two (2) phone calls, seconds apart, on Friday afternoon before his Monday morning status conference, after she realized she had not contacted him. (Tr. 364, Ex. 7 at 62.) At her deposition, Ross admitted that she did not speak to Reinaldo or leave a message. However, Ross changed her testimony at trial and "remembered" the specifics of the message she left on his voicemail. (Tr. 411.) Reinaldo and Oneida both testified that they never received such a message. (Tr. 214.) Ross made no other attempt to contact Reinaldo over the weekend or Monday morning.

Due to Reinaldo's absence at his status conference, the Circuit Judge issued a bench warrant for his arrest and Reinaldo was arrested on February 16, 2011. (Tr. 240-241.) Reinaldo's family made repeated efforts to contact Ross after his arrest, but Ross refused to speak with them. Reinaldo's sister-in-law, Elizabeth, was finally able to reach Ross who told her she could do nothing for Reinaldo and he would have to remain in jail until his new trial date. (Tr. 288-289, 297.) Ross then demanded that Elizabeth not call her again. (Tr. 289.) Ross made no other attempt to contact Reinaldo or his family, except a letter after his incarceration informing him of his new court dates. (Ex. 13.) When Ross refused to act and/or assist Reinaldo, his family retained the Malouf firm on April 7, 2011. That same day, without Ross' assistance, the Malouf firm filed a *Motion to Reinstate Bond* on Reinaldo's behalf. (Ex. 28.) After a hearing on same, Reinaldo was released from custody after being incarcerated for 78 days. The Malouf firm actively investigated the matter and was successful in having the criminal indictment against Reinaldo dismissed.

Reinaldo subsequently filed his *Complaint* (R. at 14-16) against Madison County, Mississippi and Ross in the County Court of Madison County, Mississippi, alleging that Ross failed to provide adequate representation resulting in Reinaldo's incarceration. Both Ross and Madison County filed separate *Answers* denying liability. Under the Mississippi Tort Claims Act, Madison County and Ross could not both be held liable. Madison County, however, refused to admit Ross was an employee of Madison County or seek a judicial determination of same. Reinaldo therefore filed a *Motion for Declaratory Judgment* (R. at 32-33) seeking a determination as to whether Ross was an "employee" of Madison County and entitled to protection under the MTCA or could be held personally liable. Though unquestionably one of the defendants should be dismissed, both Madison County (R. at 35-37) and Ross (R. at 38-40) shockingly **opposed** such a determination and the motion was denied. **Two years** after filing its *Answer* **and just weeks before trial**, Madison County finally admitted that Ross was, in fact, an employee pursuant to the MTCA and the action against Ross, individually, was dismissed. Reinaldo filed a *Motion for Sanctions* (R. at 55-57) due to the bad-faith delay in admitting Ross was an employee, which resulted in unnecessary litigation expense and hardship.

A three-day trial was had before Special Appointed County Judge Michael Ward. The trial court entered its *Opinion* (R. at 60-62), finding that Ross had "adequately represented" Reinaldo and, therefore, had not committed malpractice. The *Opinion* failed to address the particular failures of Ross or that Ross did nothing after Reinaldo's incarceration. Reinaldo timely appealed the trial court's ruling to the Circuit Court of Madison County, Mississippi, which was affirmed, and subsequently appealed to the Mississippi Court of Appeals which also affirmed the lower courts' decisions. The Court of Appeals also denied Reinaldo's *Motion for Rehearing*.

### **The Trial Court Erred in Its Findings.**

An attorney has the same duties and obligations to his client whether that attorney is privately retained, appointed, or serving in a legal aid or defender program. *Polk Cty. v. Dodson*, 454 U.S. 312, 449-50 (1981). An attorney must “execute the business entrusted to his professional management with that degree of care, skill, and diligence which is commonly possessed and exercised by attorneys in practice in the jurisdiction.” *Hutchinson v. Smith*, 417 So. 2d 926, 928 (Miss. 1982). Failure to do so constitutes a breach of an attorney’s duty of care. The Mississippi Supreme Court has held that a “basic defense” to a criminal charge requires attorneys to completely investigate and ascertain every material fact about the case; familiarize themselves with the scene and setting; learn the names of, interview, and get statements from every possible eyewitness; and learn all information held by the state through pre-trial motions. *Triplett v. State*, 666 So.2d 1356, 1361 (Miss. 1995). In short, no competent evidence should come as a surprise at trial. *Id.* Attorneys must also: 1) communicate with clients (*Tyson v. Moore*, 613 So. 2d 817, 827 (Miss. 1992)); 2) inform them of all matters of reasonable importance related to that representation (*Id.*); 3) exercise reasonable diligence in their representation of a client (*Singleton v. Stegall*, 580 So. 2d 1242, 1244 (Miss. 1991)); 4) sufficiently investigate the facts and circumstances of the case to make an informed evaluation of potential defenses (*Ross v. State*, 954 So. 2d 968, 1005 (Miss. 2007)); 5) interview all potential witnesses (*Ferguson v. State*, 507 So. 2d 94, 96 (Miss. 1987)); 6) assist the defendant (*Leatherwood v. State*, 473 So. 2d 964, 969 (Miss. 1985)); 7) advocate the defendant’s cause (*Id.*); 8) consult the defendant on important decisions (*Id.*); and 9) keep the defendant informed of important developments (*Id.*).

Unfortunately, the trial court failed to consider these duties in its *Opinion*. Instead, the trial court ruled that Ross “attempted to keep Plaintiff informed of his court dates” and, “in doing so

she adequately represented Plaintiff.” (Trial Ct.’s Op. 3.) The trial court’s *Opinion* acknowledges Reinaldo’s allegation that Ross failed to diligently represent him (Trial Ct.’s Op. 2) but failed to address the issue. It cannot be disputed that Ross failed to provide even a “basic defense.” Had the trial court applied the standard of care set out by the courts of Mississippi, it would have been abundantly clear that Ross failed to perform even her minimal duties in representing Reinaldo and, thus, breached the duty of care she owed. Because the trial court failed to acknowledge the required standard of care, the appellate courts should have applied a de novo standard of review to the facts of this case as opposed to being handcuffed to the more stringent standard of “substantial evidence and not manifestly wrong.”

Furthermore, trial court’s finding is not supported by substantial, credible, and reasonable evidence. In its *Opinion* (R. at 60-62), the trial court ruled that Ross placing two unanswered phone calls, seconds apart, to Reinaldo, on the Friday afternoon before his Monday morning status conference, was sufficient to constitute adequate representation. These simple acts do not constitute adequate representation. Realizing that she had failed to advise Reinaldo of his required court appearances, Ross attempted to contact him Friday afternoon, but was unsuccessful and failed to make any further attempt. At Reinaldo’s status conference, Ross further failed to inform the judge that she had been unable to reach Reinaldo or to ask for additional time. Additionally, Reinaldo presented overwhelming evidence that Ross failed to perform the basic duties she owed him, including, but not limited to:

1) Prior to Ross’ deposition on July 17, 2013 in this civil matter, Ross had **never met or spoken with Reinaldo**. (Tr. 213.) Ross was unaware that Reinaldo did not speak English, until this civil action was filed. (Tr. 480.)

2) In Ross' November 23, 2010 letter, she failed to inform Reinaldo of his court dates, though it was her common practice to do so. (Tr. 445, *See* Ex. 13 and Ex. 31.) Ross testified she did not do so because she was unaware that Reinaldo did not already know them, though it was her responsibility to inform him of the dates to which she agreed. (Tr. 432; Ex. 17.)

3) Ross' November 23, 2010 package to Reinaldo (Ex. 2) did not contain a copy of the *Order* with his court dates or otherwise mention them. Reinaldo and Oneida both testified that they thoroughly inspected the contents, specifically looking for a document listing Reinaldo's new court dates, since they both realized it was mandatory that they appear. (Tr. 32, 235-236.) When Oneida called Ross on Reinaldo's behalf, since he doesn't speak English, to inquire about the dates, Ross refused to speak with her and hung up on her. (Tr. 236-237.)

4) Ross never contacted Oneida's criminal attorney to discuss their case. (Tr. 478.)

5) When Ross realized she had failed to advise Reinaldo of his required court date, she attempted to call him on Friday afternoon, but was unable to reach him. She made no further effort to reach Reinaldo over the weekend or Monday morning. (Tr. 479-480.)

6) At Reinaldo's status conference, Ross failed to explain to Judge Emfinger that she had been unable to contact Reinaldo, nor did she request a continuance to investigate his absence.

7) After Reinaldo failed to attend his status conference, Ross made no attempt to contact him, other than to send him a letter informing him that a bench warrant had been issued for his arrest. (Tr. 455.)

8) After Reinaldo's arrest, Reinaldo's sister-in-law, Elizabeth, contacted Ross for assistance. (Tr. 284.) Ross refused to talk with Elizabeth, other than to advise that Reinaldo would have to remain in jail until his new court date. (Tr. 481.) At trial, Ross testified that she "did not have any facts to rely on to get [Reinaldo] out," but made no attempt to learn such facts. (Tr. 455-

456.) However, after a hearing on Reinaldo's *Motion to Reinstate Bond*, filed by the Malouf firm, Judge Emfinger released Reinaldo from custody, **after 78 days of incarceration**.

9) After Reinaldo's arrest, Ross refused to visit him to discuss his incarceration or his upcoming trial, though she knew where he was being held and personally visited that facility on seven (7) different occasions during his incarceration. (Tr. 458.) Ross failed and/or refused to call Reinaldo. (Tr. 468.) Ross, who has served as public defender for Madison County since 1998, testified that she did not make such a call, because she did not "know a number that [she] could call at the jail and reach [her] clients." (Tr. 468.) Ross took no action to free Reinaldo. (Tr. 456-457.)

Of utmost importance, Ross failed to investigate the facts surrounding Reinaldo's criminal charges before his status conference, scheduled two weeks before his trial. This is particularly significant, because in Madison County, counsel must announce at that time whether there would be a plea or trial. Any subsequent plea would have to be an open plea. In spite of this, Ross never contacted or interviewed any witnesses, **including Reinaldo**, or made any inquiry into his guilt or innocence. Ross never even spoke to the District Attorney's office about a plea agreement, though such plea agreement had to be announced that morning. (Tr. 469-470)

Ross' minimal attempts at communication were grossly insufficient to constitute adequate representation of a criminal defendant facing a potential sentence of twenty-eight (28) years. Had Ross performed her duties, Reinaldo would not have been arrested and imprisoned for **seventy-eight (78) days**.

It should further be noted that the Court of Appeals pointed out in its Opinion that "three different houses owned by [Reinaldo] have suffered fire damage since 2001." Reinaldo was never accused of arson and criminal charges were never filed on the two (2) earlier fires. Though such

information is completely irrelevant to this litigation and the duties Ross owed Reinaldo, the Court of Appeals allowed such bias to affect its decision.

**The Trial Court Erred by Not Allowing Exhibit 31 into Evidence.**

The trial court further erred in refusing to enter Exhibit 31 into evidence and offered no reason for its exclusion. (Tr. 447.) These letters evidenced Ross' customary practice to include in her initial letters to criminal clients their court dates and a warning that failure to appear would result in their arrest. The introduction of Exhibit 31 would have been proof that Ross deviated from her usual practice, which resulted in Reinaldo's arrest. As such, the trial court abused its discretion in failing to admit Exhibit 31.

**The Trial Court Erred by Failing to Consider and Award Sanctions Against Madison County.**

Reinaldo is entitled to Rule 11 sanctions due to Madison County's efforts to delay and thwart this litigation. A trial court may award sanctions for conduct intended to delay litigation. *Manning v. King's Daughters Med. Ctr.*, 138 So. 3d 109, 116-117 (Miss. 2014). Such sanctions and the nature of the sanctions is at the discretion of the trial court. *Bean v. Broussard*, 587 So. 2d 908, 911 (Miss. 1991). The trial court abused its discretion by not considering or ruling on Rule 11 sanctions based on Madison County's dilatory tactics.

On **April 30, 2012**, Madison County filed its *Answer*, denying Ross was its "employee." Madison County never sought a judicial decision on such and resisted Reinaldo's efforts to do so. On **May 2, 2014**, after **two years** of litigation, Madison County finally admitted Ross was an "employee." Ross' employment status should have been resolved early in litigation. Instead, Reinaldo was forced to prepare two distinct cases against two defendants, one a jury trial and one a bench trial. In finally conceding that Ross was an "employee" of Madison County, Madison County relied on a **2003** Attorney General opinion. Miss. A.G. Op., WL 22139802 (August 1,

2003). Such opinion was readily available to Madison County in April 2012 when it denied such fact. The only explanation for the two-year delay is that it was a successful strategy to delay litigation.

The Court of Appeals held that the trial court failed to address the sanctions in its order but ruled that Bacallao failed to seek an independent determination of sanctions. However, this mischaracterizes the sequence of events. Bacallao brought up his motion for sanctions at trial. The trial court deferred ruling after the trial, instead asking the parties to submit Findings of Fact and Conclusions of Law. Reinaldo fully briefed the issue of sanctions, which was his first opportunity to seek a ruling on same. The trial court, however, failed to address the issue, and the appellate courts erred in affirming such neglect.

### **Conclusion**

For the above cited errors of fact and law, Reinaldo asks that this Court grant certiorari and reverse the lower courts.

RESPECTFULLY SUBMITTED this the 18<sup>th</sup> day of September, 2018.

REINALDO BACALLAO, Appellant

BY: /s/ Michael J. Malouf  
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**CERTIFICATE OF SERVICE**

I, Michael J. Malouf, attorney for Appellant, Reinaldo Bacallao, do hereby certify that I have this day filed with the Clerk of the Supreme Court, via the MEC system, a true and correct copy of the above and foregoing *Petition for Writ of Certiorari*, which sent electronic notification of such filing to all counsel of record.

DATED this the 18<sup>th</sup> day of September, 2018.

/s/ Michael J. Malouf  
Michael J. Malouf