UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 08-141S
	:	
ERVIN FIGUEROA	:	

MEMORANDUM AND ORDER

Pending before me for determination (28 U.S.C. § 636(b)(1)(A)) is the Renewed Motion for Court Appointment as CJA Defense Attorney – Nunc Pro Tunc. (Document No. 185). The Movant is Attorney Robert D. Watt, Jr. who represented Defendant Ervin Figueroa ("EF") through trial and sentencing before this Court. EF was charged, along with five other Defendants, in a twenty-three count indictment alleging a drug trafficking conspiracy. Three of the defendants (Lazala, Pena and Carrasquillo) pled guilty. EF went to trial along with his brother, Defendant Elio Figueroa, and Defendant Carlos Roberto Rodas. All three were found guilty by the jury after a trial spanning eight days and they have all been sentenced. Defendant Elio Figueroa was represented by the Federal Public Defender and Defendant Carlos Roberto Rodas by court-appointed counsel.

EF initially requested and was found to be financially eligible for Court-appointed counsel on September 22, 2008. However, shortly thereafter on September 30, 2008, Attorney Watt was retained to represent EF, and he replaced court-appointed counsel on the case. Attorney Watt credibly represents to the Court that he agreed to represent EF for a fee of $5,000.00 "if the case were to be resolved by plea" and received an initial payment of $2,500.00

from EF's cousin, but was never paid the remaining $2,500.00. See Document No. 202, Watt Declaration at ¶¶ 4-7.

After a fairly lengthy pretrial period including briefing and hearing on an unsuccessful Motion to Suppress Wiretap Evidence (Document No. 117), EF elected not to plead guilty and exercised his right to proceed to trial. At some point just prior to or at the commencement of the trial, Attorney Watt raised the issue of court-appointment with Judge Smith and was directed to file a motion. Attorney Watt filed his Motion on December 5, 2010 in the middle (after day three) of the jury trial. (Document No. 155). After the trial, the Motion was referred to me, and a hearing held on January 18, 2011. The Motion was deemed withdrawn on February 3, 2011 in view of Attorney Watt's failure to file supporting materials as requested. Attorney Watt renewed the Motion on June 10, 2011 and has now submitted the requested supporting materials. (Document Nos. 185, 202 and 203). For the following reasons, the Renewed Motion for Appointment as CJA Defense Attorney – Nunc Pro Tunc is GRANTED in part.

First, as a matter of law, the Court is authorized to make a retroactive appointment under the express terms of the Criminal Justice Act ("CJA"). See United States v. Littlehale, No. NA03-1-CR-1H/N, 2004 WL 1087374 at *2 (S.D. Ind. April 13, 2004) ("The CJA authorizes retroactive appointments of defense counsel.").[1] In particular, the CJA provides that "appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment." 18 U.S.C. § 3006A(b). The CJA also provides that "[i]f at any stage

[1] In United States v. Alexander, 742 F. Supp. 54 (N.D.N.Y. 1990), the Court concluded that the CJA did not authorize retroactive appointment of previously retained counsel. However, the facts in Alexander are distinguishable and reflect an abusive request for CJA appointment. The request was made well after the conclusion of trial and solely because retained counsel was not "fully" paid. Finally, the defendant had two retained attorneys who had been paid significant sums for their work which exceeded the CJA maximums.

of the proceedings,...the United States Magistrate Judge or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate." 18 U.S.C. § 3006A(c).

Second, despite this legal authority, requests for retroactive CJA appointment should be examined strictly and with caution to avoid any improper or manipulative use of taxpayer funding of defense costs.[2] United States v. Littlehale, supra at *2 (courts should be cautious in ruling on requests for retroactive CJA appointment to prevent manipulation in the CJA appointment process or abuse such that the CJA mechanism is used as "a form of fee insurance to retained counsel").

Based on the unique circumstances presented here, the Court does not find this request to be an attempt to either manipulate choice of counsel or abuse the CJA process. Attorney Watt is a respected attorney who appears before this Court both as appointed counsel on our CJA panel and retained counsel. To my knowledge, this is the first time Attorney Watt has made such a request and I am not aware of other similar requests having been made by other defense counsel in this District. Attorney Watt undertook representation of EF for a limited fee certain with the understanding that the case would be resolved by plea. Attorney Watt did not move to

[2] For instance, if retained defense counsel received a substantial retainer intended to compensate him or her for all services including trial, it would be an abuse of the CJA process to permit retained counsel to withdraw prior to trial after exhausting the retainer and replace him or her with court-appointed taxpayer funded defense counsel for trial. Also, although indigent defendants have a right to competent, court-appointed counsel, they do not have the right to request appointment of a particular defense counsel and it is the Court who selects and appoints appropriate counsel. Thus, it would be a manipulation of the appointment process if an indigent or near indigent defendant retained a particular defense counsel for a nominal or limited fee with the intent of later asking the Court to convert that representation to a taxpayer-funded appointment under the CJA. As discussed below, neither of these circumstances are present here.

withdraw when he did not receive the second half of the agreed fee and did not move to withdraw when it was apparent that the case would go to trial. Rather than abandoning his client, Attorney Watt represented him vigorously during this complex conspiracy trial spanning several days. Although he preliminarily raised the issue of retroactive CJA appointment with Judge Smith around the start of the trial, Attorney Watt was advised to file a motion and he stayed in the case with absolutely no assurance that he would ultimately be court-appointed and receive compensation. In fact, after his initial Motion for Appointment was denied,[3] Attorney Watt continued to represent EF in the sentencing process and represents that he traveled to Guatemala (EF's native country) at his own expense to gather information for the presentence report.

EF was initially found to be financially eligible for court-appointed counsel, and subsequent submissions by Attorney Watt presently confirm that eligibility. Although Attorney Watt has made a case for retroactive CJA appointment, the Court finds that retroactive appointment to the date of Attorney Watt's first appearance in this case would not be reasonable or just under these circumstances. Attorney Watt voluntarily undertook the representation of EF for a limited fee and made a business decision to enter the case after receiving only one-half of that fee up front. Also, Attorney Watt did not immediately address the representation issue when it was apparent that the case was headed to trial. In hindsight, Attorney Watt should have moved to withdraw at that time or, alternatively, to be appointed under the CJA. The Court could have then considered and ruled on the issue in a timely fashion.

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[3] In that Motion, Attorney Watt indicated that he "felt and feels ethically bound to continue the within representation [of EF] regardless of the Court's ruling." (Document No. 155 at p. 1).

Taking these factors into consideration, the Court finds that the interests of justice dictate a CJA appointment in this case but only retroactive to the first day of trial (December 1, 2010) which is around the time Attorney Watt first raised the issue of CJA appointment with Judge Smith. Attorney Watt agreed to a limited "non-trial retainer" and was paid $2,500.00. Although that amount will not fully compensate him for all of his time on the extensive pretrial proceedings in this case, including the suppression hearing, he agreed to bear that financial risk and should do so. Furthermore, if Attorney Watt had moved to withdraw on the eve of trial, the Court would likely have appointed Attorney Watt to continue to represent EF at that time as the most cost-effective option since he is on the Court's CJA panel, and would not have needed to invest any duplicative time getting up to speed on this complicated, multi-defendant conspiracy case. See United States v. Zaccaria, No. 95-CR-97S-29, 1997 WL 642985 at *3 (W.D.N.Y. April 11, 1997) (granting retained counsel's Motion for CJA appointment, in part, because "[h]e knows his client's case better than anyone else th[e] Court could appoint"); and United States v. Herbawi, 913 F. Supp. 170, 173 (W.D.N.Y. 1996) (noting that CJA appointment of previously retained counsel was, given complexity of case, "the most efficient and least disruptive course of action").

For the foregoing reasons and based on the unique circumstances presented here, Attorney Watt's Renewed Motion for Nunc Pro Tunc Court Appointment as CJA Defense Attorney (Document No. 185) is GRANTED, in part, retroactive only to December 1, 2010. The Court will execute and enter a CJA 20 Appointment Form reflecting a nunc pro tunc appointment date of December 1, 2010. However, Attorney Watt and other members of the local

defense bar are advised that post-trial requests for retroactive CJA appointment are disfavored by the Court, will be strictly scrutinized and more likely than not will be denied. As noted, this request presents a very unique set of circumstances and is not in any way suggestive of an effort to manipulate the process or abuse the limited taxpayer resources underlying the important CJA appointment mechanism.

SO ORDERED

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
July 15, 2011