

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 05-282 (MJD/JJG)

UNITED STATES OF AMERICA,)	
)	
)	
Plaintiff,)	
)	
v.)	UNITED STATES' RESPONSE
)	TO DEFENDANT'S MOTION
)	TO BE APPOINTED COUNSEL
(1)CHRISTOPHER WILLIAM SMITH,)	FOR HIS UPCOMING APPEAL
)	
)	
Defendant.)	

The United States of America, by and through its attorneys Rachel K. Paulose, United States Attorney for the District of Minnesota, and Assistant United States Attorney, Nicole A. Engisch, hereby responds to defendant Christopher William Smith's motion to be appointed counsel for his upcoming appeal, made orally during the recent sentencing hearing.

INTRODUCTION

At the recent sentencing hearing, the defendant's current counsel, Joseph Friedberg, indicated that he will no longer be representing the defendant and that, due to the defendant's indigency status, the defendant seeks a court appointed attorney. Thus, the defendant is apparently now moving the Court, pursuant to

Federal Rule of Criminal Procedure 44 and 18 U.S.C. § 3006A, to obtain appointed counsel to file a notice of appeal and for all subsequent proceedings in this matter.

The United States will not oppose this motion, provided 1) the defendant meets his burden of demonstrating that he is financially unable to pay for counsel, specifically by explaining under oath what happened to the bulk of the \$24 million he earned from his online pharmacy operations, 2) the defendant is treated the same as other indigent defendants and appointed competent counsel from the Public Defender's CJA panel¹ rather than being permitted to select his counsel, and 3) the defendant is put on notice that he will be ordered to reimburse the government for all defense costs expended, in the event that he subsequently retains private counsel, as he suggests in recent jail recordings he plans to do.

Pursuant to the Criminal Justice Act, those who are unable to pay for counsel are entitled to appointed counsel "if the court is satisfied after 'appropriate inquiry' that the defendant is 'financially unable to obtain counsel.'" United States v. Brockman, 183 F.3d 891, 897 (8th Cir. 1999) (citing 18 U.S.C. §3006A(b) and United States v. Barcelon, 833 F.2d 894, 896 (10th Cir. 1987)). "When requesting the appointment of counsel, the

¹The Public Defender's Office likely cannot represent the defendant due to a conflict of interest. That office previously represented material witnesses, Philip Tritabaugh and Ramesh Ramnaraine.

burden is on the defendant to show that he is 'financially unable' to afford representation." Id. (citing United States v. Lefkowitz, 125 F.3d 608, 621 (8th Cir. 1997)). If the defendant's request is based only on "conclusory protestations of poverty," it should be denied. United States v. Martinez-Torres, 556 F. Supp. 1275, 1280 (S.D.N.Y. 1983). Moreover, "the court may . . . refuse to appoint counsel if it finds that the defendant's portrayal of financial ability lacks credibility." Barcelon, 833 F.2d at 897; see Lefkowitz, 125 F.3d at 621 (the defendant "presented nothing more than his personal testimony. The district court found that testimony to be entirely lacking in credibility, as do we.").

In this case, the defendant should be required to itemize, under oath, exactly what happened to the rest of the \$24 million that he obtained from the online pharmacy operation, after deducting the approximately \$4.5 million in forfeitable assets, the expenses incurred to run the pharmacy, and the subsequent receivership expenses.² At the very least, he should be required to explain what happened to the remainder of the \$2,920,375 in cash that was delivered by Brinks truck in the weeks before Online Payment Solutions was shut down, after deducting the \$569,025 in cash that was turned over by the defendant's attorneys and family members. See Affidavit of Special Agent Chad Vetter (Document No.

²Previously, in connection with his sentencing, the defendant refused to sign an affidavit describing his financial condition, as required by 18 U.S.C. § 3664(d)(3).

387), at 2.³ If his testimony is not credible or is conclusory, the Court is permitted to reject his request for appointed counsel.

If the defendant provides a sufficient explanation of what happened to the rest of his illegal proceeds, the government does not oppose his request for appointed counsel.⁴ The government, however, will oppose any request by the defendant to be appointed *particular* counsel. Meyer v. Sargent, 854 F.2d 1110, 1113-14 (8th Cir. 1988) (it is "well-settled that a 'criminal defendant does not have the absolute right to counsel of his own choosing.'").

The government has understood for some time that the defendant had retained Paul Engh, for the purpose of preparing his appeal.⁵

³When he was at the Sherburne County Jail, as recently as March 2006, the defendant bragged to other inmates that the government only seized a small portion of his assets and that he had many more millions stashed away.

⁴To the extent the defendant is continuing to seek attorney's fees out of the receivership monies, which are now the subject of the Preliminary Order of Forfeiture, that request should again be denied because the defendant is not entitled to use such funds to pay for his criminal defense. United States v. Monsanto, 491 U.S. 600 (1989) ; Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

⁵Because Paul Engh represented co-defendant Bruce Lieberman at trial, the government was concerned that Christopher Smith could later raise (such as in a habeas petition) the argument that Mr. Engh's representation was compromised by his representation of Mr. Lieberman. The government expressed these concerns to Mr. Engh and Mr. Friedberg in a conference call in March 2007 and requested written waivers from both the defendant and Mr. Lieberman. To date, it has not received any waivers. To the extent the Public Defender's Office has a conflict, it would seem the same sort of conflict applies to Paul Engh. Moreover, the government will be having ongoing forfeiture related proceedings involving Mr. Lieberman and online pharmacy proceeds

For example, on January 18, 2007, the Court entered an order granting the defendant's motion to modify his custodial conditions which included, among other things, a paragraph allowing the defendant to meet with Paul Engh in person to discuss the defendant's possible appeal. See Document No. 360. In jail conversations with family members, the defendant mentioned how he was going to petition the court to have Mr. Engh, a member of the Public Defender's CJA panel, appointed to represent him for free. The defendant also discussed how he would arrange to pay for Mr. Engh in the event Mr. Engh was not appointed by the Court. For example, the defendant discussed with his mother having his mother take out a second mortgage on one of the three homes that she and the defendant's stepfather own together (in Minnesota, Kentucky, and Florida).⁶ The defendant also discussed his plans to have his grandparents and sister provide money for his appeal.

In sum, the government opposes any request by the defendant to be appointed particular counsel. So that the defendant is treated

that he withdrew from bank accounts he maintained. Mr. Lieberman may wish to retain Paul Engh for these proceedings or to have Mr. Engh consult with whomever Mr. Lieberman does retain.

⁶At least some courts hold that if the defendant has funds available to him from sources such as family, friends, trusts, etc., he should be denied appointed counsel. Martinez-Torres, 556 F. Supp. at 1279. Other courts go the other way, however. See United States v. Rubinson, 543 F.2d 951, 964 (2d Cir. 1976) ("a defendant should not be denied appointment of counsel solely because other members of his family have assets and income."). In this case, the defendant's family previously paid for his counsel, but they thereafter reimbursed themselves approximately \$175,000 to \$200,000 from online pharmacy proceeds they had agreed to hide for the defendant.

no differently from other indigent defendants and to avoid any appearance of manipulation of the process, he should not be allowed to select his own counsel.

In very recent telephone recordings with family members, the defendant discussed how Paul Engh may no longer be willing to represent him, at least at the CJA panel rate. But the defendant may have another plan to manipulate the court appointment process. Specifically, in recent calls to his sister and his ex-wife, the defendant indicated that, if he obtains a court appointed panel attorney, he will have that attorney arrange to pay the approximately \$20,000 that, according to him, he needs for trial transcript fees. Thereafter, once those fees are paid by the government, he stated that he plans to secure retained counsel of his choosing.

Based on the defendant's own recorded comments, it appears he may be scheming to arrange for a portion of his court costs to be paid for by the government, despite that he has the ability to pay for his own counsel. Courts have faced similar scenarios before. See Lefkowitz, 125 F.3d at 621 (where the court determines that a defendant has funds to pay for representation, it may order the defendant to reimburse the government for the costs of defense pursuant to 18 U.S.C. 3006A(f)). Thus, if the defendant is appointed counsel, he should be put on notice that, if he later terminates that appointed counsel, he may well be ordered to

reimburse the government for all prior costs paid for by the government on his behalf.

CONCLUSION

The defendant has the burden of demonstrating that he cannot afford privately retained counsel. If he meets that burden, the government does not oppose his motion for appointed counsel. But, even if he succeeds in demonstrating his indigency status to the satisfaction of the Court, he should not be permitted to select his own counsel. The government further respectfully requests that the defendant be put on notice that if he later terminates his appointed counsel and retains his own counsel, he may be required to reimburse the government for all costs of his defense previously incurred by the government.

Dated: August 14, 2007

Respectfully submitted,

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s/ Nicole A. Engisch
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