IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR-08-CO-245-S
	)	
LARRY P. LANGFORD	)	
WILLIAM B. BLOUNT	)	
ALBERT W. LAPIERRE	)	

ORDER APPOINTING COUNSEL

Before the court are two unnumbered motions. The first is a motion to seal the documents which provide the basis for the relief sought in the second. The second motion is a request for appointment of counsel under the Criminal Justice Act. Despite the constitutional origins of such a request, the appointment of counsel at public expense is a judicial function which is characteristically ministerial. In the present case, however, the request for appointment of counsel comes from a defendant well known in the community and illuminates an issue which lies at the intersection of two discrete constitutional mandates. A defendant's right to a fair trial implicates both the Fifth and Sixth Amendments. The public's unequivocal right of access to judicial proceedings and judicial decision making is protected by the First Amendment as well as a substantial body of common law. Where there is tension between these conflating aspirational goals, courts must make distinctions and, of equal importance, explain why distinctions are proper. The conflict and the distinctions are addressed below.

Appointment Of Counsel Under the Criminal Justice Act

The Sixth Amendment of the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." United States Constitution, Amendment VI. Courts have held that the Sixth Amendment right to counsel guarantees that a defendant who cannot afford to hire an attorney has an absolute right to counsel appointed for him by the court. See *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938). In 1964 Congress enacted the Criminal Justice Act ("CJA"), Title 18 U.S.C. § 3006A, to help facilitate this constitutional guarantee. See F.R.Cr.P. 44(a) (right to appointed counsel). The CJA requires each district court to establish "... a plan for furnishing representation for any person financially unable to obtain adequate representation ...." 18 U.S.C. § 3006A(a).[1] In addition to the CJA itself and the Plan of the Northern District of Alabama, aspects of the CJA Plan adopted by the Eleventh Circuit Court of Appeals is material to the consideration of the issue presently before the court. Addendum 4, the Eleventh Circuit Plan under the CJA and more specifically ¶ (d)(2) have a bearing on the outcome. (*Alabama Rules of Court, Federal*, United States Court of Appeals for the Eleventh Circuit, pp. 307-313, *Alabama Rules of Court*, West 2009).[2]

1/ The CJA Plan of the Northern District of Alabama was approved on March 30, 2009, following the approval of an amended plan submitted to the Eleventh Circuit Court of Appeals. The Plan, as amended, supersedes all prior CJA Plans for the Northern District of Alabama. (See *Alabama Rules of Court*, United States District Court – Northern District, CJA Plan, pp. 360-366 (*Alabama Rules of Court, Federal*, West, 2009)).

2/ The primary purpose of the Addendum 4 inquiry is to ensure that it is not counsel's fees which have impoverished the defendant. The intent is to prevent an attorney from extracting large fees, then either abandoning the client or obtain compensation from the taxpayers. Under the CJA Plan of the Circuit, the Addendum 4(d) proceeding is conducted *in camera*. "The purpose of *in camera* disclosure in the first instance is to protect the defendant's right to a fair trial. Information may be revealed which, if it became public may prejudice the defense." *United States v. Ellis*, 90 F.3d 447, 450 (11th Cir. 1996) The court examines the financial arrangement between lawyer and client. Only when it is clear that counsel has not received an appropriate fee he or she had a reasonable basis for expecting does the issue become one which implicates the CJA. Addendum 4 allows the circuit court to determine whether the district court properly considered that prior relationship.

The principal objective of the CJA Plan for the Northern District of Alabama is to ensure "... equality before the law for all persons." For that reason the Plan requires that it be "... administered so that those accused of a crime, or otherwise eligible for services pursuant to the CJA, will not be deprived, because they are financially unable to pay for adequate representation, of any element of representation necessary to an effective defense." (Northern District Plan, II, A.(1)). The purpose of the CJA is to provide for adequate representation to the defendants who are otherwise unable to retain their own counsel, and the CJA specifically provides that the United States must bear the costs and expense of counsel "for any person financially unable to obtain representation." 18 U.S.C. § 3006A(b). In all cases, "the defendant bears the burden of showing that he is 'financially eligible for CJA appointment.'" *United States v. O'Neil*, 18 F.3d 65, 74 (2d Cir.), *cert. denied,* 522 U.S. 1064 (1998). Financial inability to obtain counsel, however, is not "complete indigency." *United States v. Ellis*, 154 F.R.D. 697, 699 (M.D. Fla. 1993). For example,

> A person is 'financially unable to obtain counsel' within the meaning [of the CJA] <u>if his net financial resources and income are insufficient to enable him to obtain qualified counsel</u>. In determining whether such insufficiency exists, consideration should be given to (a) the costs of providing the person and his dependents with the necessities of life, and (b) the costs of the defendant's bail bond if financial conditions are imposed, or the amount of the cash deposit the defendant is required to secure his bond. (emphasis added).

See, Administrative Office of the United States Courts, *Guide to Judiciary Policies and Procedures* ("Guide"), Vol. II at § 2.04. "Any doubts as to the person's eligibility should be resolved in his favor; erroneous determinations of eligibility may be corrected at a later time." *Id.* Volume VII, Chapter II, § 2.06 states:

> *Family resources*
>
> The initial determination of eligibility should be made without regard to the financial ability of the person's family, unless his family indicates a willingness and financial ability to retain counsel promptly. At or following the appointment of counsel, the judicial officer may inquire into the financial situation of the person's spouse... and if such spouse ... indicates their willingness to pay all or a part of the cost of counsel, the judicial officer may direct deposit or reimbursement.

Vol. VII, Chapter II, § 2.06. In the first instance, a person is eligible for court appointed counsel if, after the United States Magistrate Judge or the court conducts an "appropriate inquiry," the court is satisfied that "the person is financially unable to obtain counsel." 18 U.S.C. § 3006A(b). An appropriate inquiry may include an examination by the court or a review of documents submitted under penalty of perjury or a combination of both. As noted above, financial inability to obtain counsel is not the same as being indigent or destitute. It remains true, however, that the defendant must establish that he is financially unable to obtain counsel. See, e.g., *Museitef v. United States,* 131 F.3d 714, 716 (8th Cir. 1997).

Doubts as to a person's eligibility are to be resolved in favor of the defendant in part because the CJA generally and the Plan for the Northern District of Alabama anticipate that the court has the inherent ability to correct an erroneous determination of eligibility before the matter is finally concluded. In the Northern District of Alabama the rule clearly provides that

> 4. If, at any time after the appointment of counsel, the judicial officer finds the person is financially able to obtain counsel, or make partial

> payment for the representation, the judicial officer may terminate the appointment of counsel or recommend that any funds available to the person be ordered paid as provided in 18 U.S.C. § 3006A(f). (emphasis added).

Northern District CJA Plan. A defendant appearing with retained counsel at an earlier stage of a proceeding may apply for the financial assistance afforded by the CJA under appropriate circumstances. In the Northern District of Alabama the rule is that

> 5. If, at any stage of the trial proceeding, the judicial officer finds that a person is financially unable to continue to pay retained counsel, the judicial officer may make an original appointment of counsel in accordance with the general procedures set forth in this Plan. (emphasis added).

Northern District of Alabama Plan at § IX, ¶ 5. Of course as a prudential matter, the court is obliged to ensure that a defendant does not seek to select his own attorney, renege on a contract of employment, and rely upon government largess to fund his defense with his personally selected attorney.[3] Regardless of the stage at which the request is made, a district court is required to determine a defendant's financial eligibility through a "full inquiry" into the defendant's actual ability to retain counsel. A full-scale adversarial hearing is not required, however, before a district court may order the appointment of counsel or the repayment of attorney's fees under the CJA. See e.g., *United States v. Parker*, 439 F.3d 81, 93 (2d Cir. 2006) (Reviewing a district court's mid-case

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[3] The Northern District of Alabama Plan is clear that "the person shall not have the right to select his or her appointed counsel from the CJA panel, or otherwise." *Id.* There are occasions upon which a slavish adherence to that prudential principle would result in an unfairness to the defendant, the government, and the public. For reasons set forth below, this is one of those cases.

appointment of counsel.) In *Parker*, the Second Circuit observed that "the task necessarily varies with the circumstances presented, and no one method or combination of methods is required [to determine eligibility]." In some cases a court's inquiry may be limited to a defendant's personal statements on the financial affidavit. *United States v. Brockman*, 183 F.3d 891, 897 (8th Cir. 1999) (Emphasizing any doubt that the defendant's eligibility for court appointed counsel should be resolved in the defendant's favor.) A district court may investigate information contained in the affidavit if the information provided renders the defendant's eligibility questionable. An initial determination can be amended as new information comes to light. See *In Re Boston Herald, Inc.*, 321 F.3d 174, 179 (1st Cir. 2003) (Erroneous eligibility determinations can be corrected at a later time.)

In the Northern District of Alabama, judicial officers are directed to "inquire into and make a finding as to whether the person is financially able to obtain counsel." VIII, ¶ A. The Northern District Plan requires that a form affidavit be provided to a person seeking the appointment of counsel. The Plan vests the responsibility for providing such a form to an applicant in the Clerk of Court for the Northern District of Alabama. The Plan also requires the Clerk, upon receipt of a financial affidavit, to "promptly communicate with a judicial officer for consideration of the appointment of counsel." (Northern District Plan, IXB(b)). After a review of the material presented, the judicial officer is required to determine whether the individual is presently financially able to obtain counsel. If the court concludes the defendant is not presently able to obtain counsel, the Plan requires the appointment of an attorney to be compensated under the CJA with the understanding that a defendant may be required to pay all or a part of the attorneys fees at a later time.

A second question implicated by Mr. Langford's request for the appointment of counsel is whether his current counsel, Michael V. Rasmussen, should be appointed *nunc pro tunc* if the defendant is found to be eligible for an appointed attorney. While the Northern District of Alabama Plan is designed to preclude a defendant from manipulating the system by selecting his own lawyer, reneging on the agreement, and then requiring the government to expend taxpayer money for his defense, in the present case, fundamental fairness to all parties requires that Rasmussen be appointed to represent Langford. As Mr. Langford is currently eligible for the appointment of counsel, appointing a new attorney would require a continuance of the trial, and the length of that continuance would undoubtedly prove to be protracted. Rasmussen has reviewed the extensive discovery provided by the government. New counsel would be required to start at the beginning. Langford's co-defendant and the citizens are entitled to a resolution of the charges in the indictment.

In light of the requirements of the CJA, the Eleventh Circuit's CJA Plan, the Plan of the Northern District of Alabama and applicable law, Mr. Langford is entitled to the appointment of counsel. The CJA is designed to allow the court to err on the side of appointment. *United States v. Gonzalez*, 2007 WL 3407627 (N.D. Ga. 2007). The government or the court *sua sponte* may seek reimbursement if the defendant has financial wherewithal to provide it. As the Fifth Circuit observed in *United States v. Deutsche*, 599 F.2d, 46, 49 (5th Cir. 1979), a district court may "... properly consider appointed counsel if [the court] becomes concerned about the financial burden upon [the defendant] of paying an attorney. The United States may always seek reimbursement for any funds expended." With the understanding that if the court determines at any time that Mr. Langford can pay all or a portion of his attorney's fees, he will be required to do so.

Sealing the Underlying Documents

Beyond the First Amendment's explicit constitutional guarantee that Congress is without power to intervene and restrict publication, courts have continued to interpret the First Amendment as promoting the media's watchdog role and encouraging both comment on and criticism of governmental affairs. Access to the judicial system is essential in enabling the press to maintain its watchdog role, allowing it to cast a careful eye on the Third Branch of government to ensure that system's integrity is upheld. The Supreme Court has consistently held that "[t]he First Amendment is ... broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary for the enjoyment of other First Amendment rights." *Globe Newspapers Company v. Superior Court*, 457 U.S. 596, 604 (1982) (citing *Richmond Newspapers, Inc. v. Virginia*, 488 U.S. 555, 596 (1980) (plurality)). Even where the First Amendment may not apply directly, the public's right of access to judicial record has long been acknowledged as commonlaw. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). Historically it has been clear that "what transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947). "[J]ustice cannot survive behind walls of silence...." *Sheppard v. Maxwell*, 384 U.S. 333, 349, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). "[S]ecret judicial proceedings would be a menace to liberty." *Gannett Company v. DePasquale*, 443 U.S. 368, 412, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (Blackmon, J., concurring and dissenting).

"In both civil and criminal cases courts recognize a common-law public right of access to judicial proceedings and records. ... That right stands in tension with litigant privacy, security (etc.) interests. Courts must thus draw lines." *United States v. Bradley*, 2007 WL 1703232 (S.D. Ga.

2007). "The press and the public enjoy a qualified First Amendment right of access to criminal trial proceedings. Open criminal proceedings have been an 'indispensable attribute of Anglo-American trials' for centuries." *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1028-29 (11th Cir. 2005). "The right extends not only to the criminal trial itself, but also to other integral parts of the trial process such as voir dire proceedings and preliminary hearings," as well as docket sheets. (*Id.*, p. 1029, n.14). In order to overcome the First Amendment presumption of openness, a party must show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (*Id.*, p. 1030 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*)). When "sealing proceedings or documents, a court must articulate the overriding interests along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Ochoa-Vasquez*, 428 F.3d at 1030. There also exists a commonlaw right of access to court documents and filings. For example, a "motion that is presented to the court to invoke its powers or affect its decisions, whether or not characterized as dispositive, is subject to the public [common-law] right of access." *Romero v. Drummond Co.*, 480 F.3d 1234, 1246 (11th Cir. 2007). The commonlaw right of access "may be overcome by a showing of good cause, which requires balancing the asserted right of access against the other party's interest in keeping the information confidential." Federal courts consider such factors as "whether allowing access would impair court functions or harm legitimate privacy interests, the degree of and likelihood of injury if made public, the reliability of the information, whether there will be an opportunity to respond to the information, whether the information concerns public officials or public concerns, and the availability of less onerous alternatives to sealing the documents." *Romero*, 480 F.3d at 1246. If, however, a court

concludes that matters are to be sealed, the Eleventh Circuit has explained that finding a public order as to the need for sealing "need not be extensive. Indeed should a court say too much the very secrecy which the sealing was intended to preserve could be impaired. The finding need only be sufficient for a reviewing court to be able to determine, in conjunction with a review of the sealed documents themselves, what important interest or interests the district court found sufficiently compelling to justify the denial of public access." *United States v. Kooistra*, 796 F.2d 1390, 1391 (11th Cir. 1986).

A number of courts have addressed the pretrial disclosure of documents in support of a request for appointed counsel. Most often the motion to seal is granted albeit only for the period deemed necessary to accomplish the purpose. *United States v. McGee*, 2007 WL 2570240 (E.D. Wis. 2007)("Hearst [the media] does not have a right of access to McGee's CJA form 23.") The most frequently cited detailed analysis of the question is found in *In Re Boston Herald, Inc.*, 321 F.3d 171 (1st Cir. 2003). In *In Re Boston Herald*, the First Circuit considered the disclosure of CJA documents in the case of a former FBI agent charged with conspiring with gangsters in the Boston area to commit crimes including murder. The defendant was initially represented by retained counsel. While the defendant possessed a number of assets, the assets aggregated to less than his then current liabilities. A magistrate judge granted the defendant's motion to seal three documents that he had submitted to demonstrate his CJA eligibility. Two of the three sealed documents included an original and amended version of the defendant's completed CJA 23 form and a standard "financial affidavit" signed under penalty of perjury. A third document related to the inquiry of the court concerning outstanding legal fees from the date of the indictment. While the underlying documents were sealed, the magistrate judge's written order appointing the defendant's lawyer under

the CJA was entered publically. After the appointment the *Boston Herald* intervened, seeking to compel the unsealing of the underlying documents. The newspaper's motion was denied, and the First Circuit addressed the question.

In assessing the intervention, the First Circuit observed that both the Constitution and commonlaw right of access have traditionally been applied only to "judicial documents." The First Circuit found the CJA documents were merely administrative, not judicial documents. Significantly, the court observed however that

> While we think these are not judicial documents, we hesitate to decide the issue here on that basis alone. Disentangling judges' judicial and administrative roles can be tricky, as can be seen in other areas, such as absolute immunity. .... While we do not rely on this as a basis for our decision, we note that the administrative process of determining CJA eligibility is far removed from the core of the judicial function.

In Re Boston Herald, 321 F.3d at 181. After an extensive, detailed analysis of both the commonlaw and constitutional right of access, the First Circuit concluded that

> ... the [district] court did not conduct its review of [the defendant's] finances in order to dispose of any issue as to the element of the criminal charge against him. ..., the CJA eligibility documents relate merely to the judge's role in the management of the trial. ... Other administrative decisions that effectuate constitutional rights are made outside of the judiciary entirely, and create no presumption of access to documents used in the decision. For example prisoners are constitutionally entitled to medical treatment, but the decision to provide medical treatment is not thereby "judicial," nor do the prisoner's medical records thereby become 'judicial documents.'
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> . . . .

> Personal financial information, such as one's income or bank account balance is universally presumed to be private, not public. ... The magistrate judge sensibly concluded that [the defendant's] strong interest in privacy of his and his family's personal finances and information outweighed the commonlaw presumption in these circumstances.
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> Recognition of the importance of financial privacy is also enshrined in public policy. [Citing to the Freedom of Information Act].
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> In addition, the Supreme Court has explained that a court considering the commonlaw presumption enjoys "supervisory power" to deny access where "court files might have become a vehicle for improper purposes." And to "ensure that its records are 'used to gratify private spite or promote public scandal.'" *Nixon*, 425 U.S. at 598, 98 S.Ct. 1306 (quoting *In Re Caswell*, 18 R.I. 835, 29 A 259 (R.I. 1893)).

In Re Boston Herald, 321 F.3d at 190. The court also stated that the disclosure of CJA documents in order to validate the reliability of judicial decision making is no less effective after a trial than before it. Virtually all courts have upheld the sealing of CJA documents when the disclosure has true potential for a measurable prejudice.

A party may overcome the presumption of public access by showing an overriding interest based on the finding that closure is essential to preserve the higher value and that the sealing is narrowly tailored to serve that interest. *United States v. Bradley*, 2007 WL 1703232 (S.D. Ga. 2007) (citing *United States v. Ochoa-Vasquez*, 428 F.3d at 1030). Courts frequently seal documents for the government and apply the same standard in doing so. *United States v. Steinger*, 2009 WL 1674798 (S.D. Fla. 2009) (continuing investigations). The potential harm must itself be of a constitutional nature as the mere risk of a defendant's embarrassment alone may be trumped by the

public's interest in being able to ascertain how and why judges and other government officials do what they do. *Id.* Mr. Langford has offered reasons for sealing his supporting papers. The proffered reasons have been considered in light of the prevailing law, and the court finds the motion to seal to be well taken. The supporting documents will be sealed. An order sealing the document until the conclusion of the trial will more than adequately ensure that the public is able to assess the reasons for the appointment of counsel under the CJA and determine whether the court's decision conforms to the constitutional rights of Mr. Langford and the public as well as with the court's statutory obligation as imposed by the CJA.

Accordingly, the motion to seal the documents is GRANTED, specifically including the financial information on the CJA Form 23 and attachments. The order sealing these documents extends only until the conclusion of the trial portion of the proceedings yet to come. The court APPOINTS Michael V. Rasmussen to represent the defendant Langford *nunc pro tunc* to December 8, 2008.[4] The Addendum 4(d) inquiry of July 21, 2009, will also be noted on the docket sheet. The transcript of that proceeding will remain sealed for review by the Eleventh Circuit Court of Appeals.

As to the foregoing it is SO ORDERED this the 14th day of August, 2009.

PAUL W. GREENE
CHIEF MAGISTRATE JUDGE

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[4] Two lawyers appear on the docket sheet in addition to Mr. Rasmussen. This order does not extend to either. These lawyers have served *pro bono* and will not receive CJA compensation.