

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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AHCENE ZEMIRI, <i>et al.</i>	)	
	)	
	)	
Petitioners,	)	
	)	
v.	)	Civil Action No. 04-2046-CKK
	)	
GEORGE W. BUSH,	)	
President of the United States,	)	
<i>et al.</i> ,	)	
	)	
Respondents.	)	

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**RESPONDENTS’ MEMORANDUM IN OPPOSITION TO PETITIONER’S MOTION  
FOR APPOINTMENT OF COUNSEL PURSUANT TO 18 U.S.C. § 3006A(a)(2)(B)**

Petitioner Ahcene Zemiri, through his next friend, has moved the Court for an Order appointing John W. Lundquist, James E. Dorsey and other lawyers from Fredrikson & Byron, P.A. as his counsel under the Criminal Justice Act (“CJA”), 18 U.S.C. § 3006A, for reimbursement of litigation expenses.<sup>1</sup> As explained below, to the extent the CJA applies, petitioner’s next friend has failed to make a proper showing to warrant the appointment of counsel pursuant to the CJA.<sup>2</sup>

**ARGUMENT**

As a threshold matter, petitioner has failed to establish that the CJA even applies in the context of this litigation. While the statute allows appointments of counsel in actions “seeking

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<sup>1</sup> Petitioner’s motion makes clear that counsel seeks “reimbursement of expenses only, and not legal fees.” See Petitioner’s Motion for Appointment of Counsel, at 1.

<sup>2</sup> Respondents previously have opposed similar motions for appointment of counsel in two other Guantanamo Bay detainee cases: O.K. et al. v. Bush et al., 04-CV-1136-JDB (dkt. 69) and El-Banna et al. v. Bush et al., 04-CV-1144-RWR (dkt. 42).

relief under section 2241, 2254 or 2255 of title 18,” where “the court determines that the interests of justice so require,” 18 U.S.C. § 3006A(a)(2), the Eleventh Circuit has explained that the CJA only provides “for the appointment of counsel in criminal proceedings or in those proceedings ‘intimately related to the criminal process.’ ” Perez-Perez v. Hanberry, 781 F.2d 1477, 1480 (11th Cir. 1986) (emphasis in original) (quoting H.R. Rep. No. 1546, 91st Cong., 2d Sess. (1970)). As petitioner does not seek relief relating to a criminal conviction or proceeding, he should not be entitled to the appointment of counsel under the CJA.

Even assuming the CJA applies to a non-criminal habeas petition, the motion seeks a CJA appointment for counsel previously retained by petitioner’s next-friend. In fact, petitioner is not even asking the Court to appoint him counsel – nor could he – because his next friend has already retained private counsel to act on his behalf.<sup>3</sup> Instead, petitioner is merely requesting litigation expenses for his next friend’s privately retained counsel from taxpayer funds. Because appointments of counsel under these circumstances conflict with the underlying purposes of the CJA, courts have viewed similar motions with skepticism, requiring the moving party – in this case, petitioner’s next friend – to submit detailed evidence regarding the circumstances of the representation.

CJA appointments of retained counsel are disfavored because they manipulate the CJA by permitting qualifying parties to select their own attorneys. Instead of courts choosing counsel from the established CJA panel list, CJA appointments for retained counsel permit the party

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<sup>3</sup> In fact, counsel notes that they have already “worked with [petitioner’s next friend] in drafting Mr. Zemiri’s habeas petition and developing the support for this motion.” See Petitioner’s Motion for Appointment of Counsel, at 10.

seeking representation to circumvent the district's CJA Plan by selecting the counsel of their choice and then moving to have the attorney compensated from taxpayer funds. "Such a situation would turn the carefully crafted District Plan into little more than a default mechanism."<sup>4</sup> United States v. Zaccaria, 1997 WL 642985, at \*1 (W.D.N.Y. 1997); see also United States v. Hinckley, 721 F. Supp. 323, 324-25 (D.D.C. 1989) (expressing concern that allowing a defendant to select his own counsel under the CJA "is contrary to the purposes of the Act and the guidelines and plan for its local enforcement").

For these reasons, courts faced with similar requests for appointments of retained counsel have inquired into the circumstances of the representation to ensure that they are "neither being manipulated into allowing a defendant to select his own attorney under the CJA nor having taxpayers provide a form of fee insurance to retained counsel." United States v. Littlehale, 2004 WL 1087374, \*2 (S.D. Ind. 2004) (citing cases). This analysis requires consideration of "of the pertinent facts, including the circumstances under which counsel was initially retained; the financial arrangements which were agreed upon; the payments, if any, . . . made to the attorney pursuant to the retainer agreement; and the changed conditions which are alleged to constitute grounds for the appointment." See United States v. Thompson, 361 F. Supp. 879, 888 (D.D.C. 1973), vacated in part, aff'd in part without opinion, 489 F.2d 1273 (D.C. Cir. 1974), overruled on other grounds, United States v. Hunter, 394 F. Supp. 997 (D.D.C. 1975). Furthermore, the Court should consider the extent of the attorney's work on the case, whether the attorney knew of

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<sup>4</sup> Indeed, the Court's CJA Plan recognizes this concern: "Consideration for preserving the integrity of the panel selection process suggests that such appointments should be made only in exceptional circumstances." See Plan, § III(G) (attached as Exhibit G to petitioner's motion).

the client's indigent status at the time the attorney accepted representation, and the attorney's willingness to receive compensation at CJA rates. Id. at 889.

Because petitioner's next-friend has not made the required evidentiary showing to justify appointment of retained counsel under the CJA, the Court should deny petitioner's motion or, in the alternative, require petitioner's next friend to submit additional evidence concerning the circumstances of her representation in order to ensure compliance with the underlying tenets of the CJA.

### **CONCLUSION**

For the foregoing reasons, petitioner's motion for appointment of counsel should be denied.

Dated: December 13, 2004

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