

No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

Jimmy David Malone — PETITIONER
(Your Name)

VS.

United States of America — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States District Court Eastern District of Tennessee at Knoxville

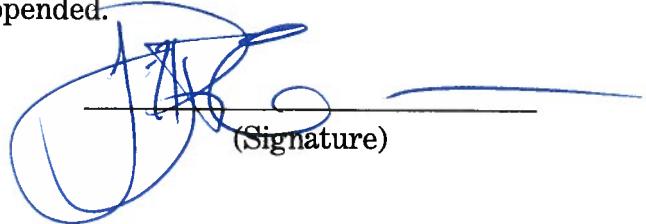
Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: _____
_____, or

a copy of the order of appointment is appended.



(Signature)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
JIMMY DAVID MALONE,)
Defendant.)
)

)) Nos. 3:07-CR-70
3:16-CR-58
(VARLAN / SHIRLEY)

MEMORANDUM AND ORDER

This case came before the Court on August 9, 2016, for a motion hearing on the Defendant's Motion to Review Appointment of Counsel [Doc. 14], filed on July 19, 2016, and referred [Doc. 15] to the undersigned on July 29, 2016. See 28 U.S.C. § 636(b). Assistant United States Attorney LaToyia T. Carpenter represented the Government. Assistant Federal Defenders Benjamin G. Sharp and Stephen A. Ferrell appeared with the Defendant. The motion asks that the Court substitute new appointed counsel for the Defendant because the attorney-client relationship has deteriorated to the point that counsel cannot work with the Defendant to prepare the case for trial.

At the hearing, Mr. Sharp stated that his relationship with the Defendant got off to a rocky start and had only deteriorated from that point. He said that the Defendant lacked confidence in the Federal Defender Services as a whole and had been verbally abusive to counsel. He said that the substitution of counsel would be in the Defendant's best interest because the Defendant would not perceive CJA counsel to be "part of the system."

The Court conducted a sealed, *ex parte* hearing in order to learn the nature and extent of the problems with the attorney-client relationship. Without going into the confidential nature of that discussion, the Court concludes that the communication between the Defendant and counsel has broken down. Based upon the statements of defense counsel and Defendant, the Court concludes that the communication necessary for an adequate defense no longer exists in the attorney-client relationship and that the situation is unlikely to improve. Accordingly, the Court finds that good cause exists to substitute new counsel to represent the Defendant.

Based upon good cause shown, the Motion to Review Appointment of Counsel [Doc. 14] is **GRANTED**, and Mr. Sharp, Mr. Ferrell, and the Federal Defender Services are relieved as counsel for the Defendant. See Wilson v. Mintzes, 761 F.2d 275, 280 (6th Cir. 1985) (holding that a defendant seeking to substitute counsel must show good cause). The Court recognizes the need for the Defendant to be continuously represented by conflict-free counsel. Attorney Robert R. Kurtz was present at the hearing and agreed to accept representation of the Defendant. The Court **SUBSTITUTES** and **APPOINTS** Mr. Kurtz under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, as counsel of record for the Defendant. Mr. Sharp and the Federal Defenders Services are **DIRECTED** to provide Mr. Kurtz with the discovery from the Government and relevant information from the Defendant's file.

At the conclusion of the hearing, the Court noted that the trial of this case remains set for September 20, 2016. If, after review of the file and discussion with the Defendant, new counsel finds that he needs additional time to prepare, he should file a motion in this regard as soon as possible. AUSA Carpenter stated that in light of the substitution of defense counsel, the Government would extend the pending plea offer for one week from August 9. Finally, during

the sealed portion of the hearing, the Defendant mentioned several issues relating to his detention. The Court instructed Mr. Kurtz to look into these matters for the Defendant.

Accordingly, it is **ORDERED**:

- (1) The Defendant's Motion to Review Appointment of Counsel [**Doc. 14**] is **GRANTED**, and Assistant Federal Defenders Benjamin G. Sharp and Stephen A. Ferrell and the Federal Defenders Services of Eastern Tennessee are relieved of representation of the Defendant;
- (2) Attorney Robert R. Kurtz is **SUBSTITUTED** and **APPOINTED** as the Defendant's counsel of record under the CJA; and
- (3) Mr. Sharp is **DIRECTED** to provide the discovery and file materials to Mr. Kurtz as expeditiously as possible.

IT IS SO ORDERED.

ENTER:

s/ C. Clifford Shirley, Jr.
United States Magistrate Judge