No. _____

In The
Supreme Court of the United States

JEROME D. LEE, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

APPENDIX VOLUME II

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,	:	
v.	:	CRIMINAL ACTION NO. 1:19-CR-0077-LMM-RGV
FREDRICO PACHECO-ROMERO, *et al.*,	:	(UNDER SEAL)
Defendants.	:	

SEALED ORDER

This matter is before the Court on attorneys Jerome D. Lee, Stephen Elijah Brown-Bennett, and Taylor Lee & Associates (collectively "prior counsel")'s Objections to the Magistrate Court's Order Regarding the Distribution of Escrowed Funds [203]. After due consideration, the Court enters the following Order:

I. BACKGROUND

The facts of this matter are fully set forth in the Court's previous Order denying prior counsel's motion for reconsideration [170]; the Court incorporates those facts herein. After that Order, prior counsel deposited $15,000 in funds into the registry of the Court and filed an accounting of legal services rendered. Dkt. No. [171]. The Court then referred this matter to the Magistrate Judge to determine how the escrowed funds should be distributed pursuant to the

Criminal Justice Act ("CJA"), 18 U.S.C. § 3006A(f). Dkt. No. [173]. Mr. Lee subsequently filed an affidavit regarding the receipt and disposition of payments. Dkt. No. [184]. Following a hearing held on September 19, 2019, the Magistrate Judge determined that prior counsel had received a total of at least $21,000 from the family members of the six defendants in this case and had retained $6,000 of said fees after depositing $15,000 into the Court's registry. See Dkt. Nos. [191]; [195] at 2-3. The Magistrate Judge then reviewed prior counsel's accounting of legal services rendered and, after making several adjustments, directed the Clerk of Court to disburse $8,000 plus accrued interest minus any statutory fees to prior counsel and apply the remaining $7,000 deposited into the Court's registry to the CJA fund. See Dkt. No. [195] at 5-6. Prior counsel now raises six objections to the Magistrate Judge's Order. Dkt. No. [203].

II. DISCUSSION

Pursuant to Section 3006A(f) of the CJA, a district court may direct funds to be deposited in the Treasury as reimbursement when the court "finds that funds are available for payment from or on behalf of a person furnished representation." 18 U.S.C. § 3006A(f).[1] In applying this statute, the Eleventh

[1] 18 U.S.C. § 3006A(f) provides, "Whenever the United States magistrate judge or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the

Circuit has explained that a district court may not "summarily" disburse funds to the Treasury without first "mak[ing] an 'appropriate inquiry' as to the availability of the funds for payment as required under subsection (f)." United States v. Nelson, 609 F. App'x 559, 571 (11th Cir. 2015) (citing United States v. Bursey, 515 F.2d 1228, 1238 (5th Cir. 1975)).[2]

As set forth above, prior counsel raises six objections to the Magistrate Judge's Order. First, prior counsel argues the Magistrate Judge "exceeded its jurisdiction" by issuing orders related to prior counsel's fees when neither defendants or prior counsel raised the issue. Dkt. No. [203] ¶ 1. This objection is without merit because prior counsel has already conceded that this Court has jurisdiction under 18 U.S.C. § 3006A(f) to obtain both the fees and accounting. Dkt. No. [170] at 7 n.3. Moreover, prior counsel offers no authority for their position that a court must wait for a party to raise the issue before inquiring into

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court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant."

[2] An order for payment of funds under Section 3006A(f) is not a final appealable order within the meaning of 28 U.S.C. § 1291 because such orders "are not made appealable by the CJA, are left to the discretion of the trial judge, are made in an administrative setting, are unrelated to the outcome of the case, and can be made without prior adversary hearings." United States v. Griggs, 240 F.3d 974, 974 (11th Cir. 2001). However, the question of whether a district court "complied with the procedural requirements before entering the § 3006A(f) ruling" is subject to review. United States v. Homrighausen, 366 F. App'x 76, 78 n. 3 (11th Cir. 2010).

the availability of funds under Section 3006A(f). See Dkt. No. [203] ¶ 1. Indeed, this view runs counter to the plain language of the statute, which provides for disbursement to the Treasury "*[w]henever* the United States magistrate judge or the court finds that funds are available for payment . . . ." 18 U.S.C. § 3006A(f) (emphasis added). Prior counsel's first objection is therefore overruled.

Second, prior counsel argues that the Magistrate Judge did not satisfy the requirements of 18 U.S.C. § 3006A(f) because he failed to conduct an appropriate inquiry before ordering prior counsel "to disgorge $15,000." Dkt. Nos. [152] at 19; [203] ¶ 2. This objection likewise misses the mark. As discussed *supra*, the Eleventh Circuit's decision in Bursey prohibits a district court from summarily disbursing funds under 3006A(f) without first making an "appropriate inquiry." 515 F.2d at 1238. By way of illustration, in Bursey the district court directed the clerk of court to deposit the defendant's cash deposit on his bond–paid by his parents—into the registry of the court for reimbursement for costs of the defendant's appointed counsel absent any notice to the parties. Id. at 1231-32. The former Fifth Circuit found that the district court erred in "summarily appropriating the cash deposit," because "[a]t the very least, such an inquiry should have involved notice to [the parties] of the anticipated disbursement and an opportunity . . . to present their objections thereto." Id. at 1238-39.

By contrast, here, the Magistrate Judge did not summarily disburse funds without notice to prior counsel. The Magistrate Judge afforded prior counsel

multiple opportunities to submit an accounting of the amount they claim to have earned before their disqualification and also held an *ex parte* hearing on the matter. See, e.g., Dkt. Nos. [79; 107]. Prior counsel's failure to provide an accounting in a timely manner does not render the Magistrate Judge's actions circumspect. Moreover, following prior counsel's deposit of $15,000 into the registry of the Court and submission of Mr. Lee's affidavit, the Magistrate Judge again held a hearing to allow prior counsel another opportunity to present evidence and be heard before making a final decision as to the disbursement of funds. See Dkt. No. [191]. Given that the Magistrate Judge's inquiry involved repeated notice to the parties and multiple hearings on the matter, the Court finds that the Magistrate Judge more than satisfied the requirements set forth in Bursey. Prior counsel's second objection is likewise overruled.

Third, prior counsel avers that "[f]unds paid on behalf of a criminal defendant to an attorney for legal representation are not 'available for payment' within the meaning of 18 U.S.C. § 3006A(f)." Dkt. No. [203] ¶ 3. Prior counsel relies primarily on Bursey for support. Id.[3] However, in Bursey, the district court erred by concluding—absent any evidence in the record—that the deposit on the

[3] Prior counsel also offers a cursory cite to United States v. Crosby, 602 F.2d 24, 28 (2d Cir. 1979) to support this objection. Dkt. No. [203] ¶ 3. However, even if the Court were persuaded by a non-binding case, the Court finds the facts of Crosby highly distinguishable, as the case involved a unique situation whereby the defendant's mother retained counsel for her son *after* her he had already been appointed a CJA attorney. 602 F.2d at 27-28.

defendant's bond was also available for payment of counsel fees. 515 F.2d at 1239. The Bursey court explained, "nothing in [the CJA] or the Bail Reform Act mandates that a person who has made funds available for deposit on an accused's bond also has necessarily dedicated the funds to or for counsel fees." Id. But unlike in Bursey, the Magistrate Judge did not summarily conclude that unrelated funds were available for payment under Section 3006A(f). See id. Rather, the Magistrate Judge determined based on records, hearings, and an affidavit, that the six defendants paid prior counsel a retainer and therefore had made funds available for payment for their representation within the meaning of 18 U.S.C. § 3006A(f). Dkt. No. [195] at 5-6.

In a similar vein, the Court is not persuaded by prior counsel's reference to its earlier argument that, pursuant to Bursey, a court "should refrain from exercising jurisdiction . . . where the funds are not clearly the property of the defendant." Dkt. No. [152] at 18. In Bursey, the court reasoned that "there is no reason to presume" that the defendant's parents' bail deposit "was alternatively available to the defendant for payment of representation." 515 F.2d at 1236. The situation in the present case is entirely distinguishable because prior counsel is not a third party sponsor; rather, the funds are clearly the property of the six defendants who paid prior counsel a retainer for representation. Because prior counsel was disqualified early in the case, the Magistrate Judge appropriately determined that they had not earned the entire amount of the retainer and,

accordingly, a portion of the funds the defendants had paid for representation remained available for payment under 18 U.S.C. § 3006A(f).

Fourth, prior counsel contends that because their engagement agreements with their former clients included arbitration clauses, the Magistrate Judge lacked any authority to address any fee dispute between the parties. Dkt. No. [203] ¶ 4. As the Court has previously explained, this is not a fee dispute but an inquiry for information pursuant to 18 U.S.C. 18 U.S.C. § 3006A(f). See Dkt. No. [170] at 6. Prior counsel acknowledged as much at a prior hearing before this Court. Id. at 7. Thus, the arbitration clauses in prior counsel's engagement agreements with their previous clients are of no import, and this objection is overruled.

Fifth, prior counsel argues the Magistrate Judge lacked authority to order an accounting and "arbitrarily reduce" prior counsel's fees. Dkt. No. [203] ¶ 5. Prior counsel offers no authority for this summary assertion. In the Court's view, the statutory authority under 18 U.S.C. § 3006A(f) to find that funds are available for payment necessarily encompasses the ability to order an accounting to determine the exact amount available. Moreover, having reviewed the Magistrate Judge's order, the Court does not find that the reduction of fees was arbitrary.[4] This objection is therefore overruled.

[4] As set forth in the Magistrate Judge's order, the Magistrate Judge carefully reviewed prior counsel's accounting for in-court time as compared to the Court's

Sixth, prior counsel objects that because the funds for appointed counsel "have not yet been appropriated," no reimbursement is due "yet." Dkt. No. [203] ¶ 6. Prior counsel again offers no support for their argument and the Court sees no reason to merely delay payment of funds. Thus, this objection is overruled.

III. CONCLUSION

In light of the foregoing, prior counsel's Objections to the Magistrate Court's Order Regarding the Distribution of Escrowed Funds [203] is **DENIED.** The Clerk is **DIRECTED** to comply with the Magistrate Judge's Order to disburse $8,000 plus accrued interest minus any statutory fees to the law firm of Taylor, Lee & Associates, LLC by U.S. mail to 6855 Jimmy Carter Boulevard, Suite 2150, Norcross, Georgia 30071 and to apply the remaining $7,000 deposited into the Court's registry to the Criminal Justice Act fund to defray the expense associated with appointing counsel for five of the defendants in this case.

IT IS SO ORDERED this 24th day of October, 2019.

Leigh Martin May
United States District Judge

TO THE COURT
It is hereby certified that rule 67 has been complied with and that there is on deposit in the Registry of this Court
PRINCIPAL BALANCE OF $ 15,000.
plus interest of $ 122.05
as of OCTOBER 23RD, 2019

Deputy Clerk
Financial Intake Section

records, and properly reduced excessive out-of-court hours. See Dkt. No. [195] at 4-5.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA	:	
	:	
	:	CRIMINAL CASE NO.
v.	:	1:19-CR-00077-LMM-RGV
	:	
	:	(UNDER SEAL)
FREDRICO PACHECO-ROMERO, *et al.*,	:	

ORDER

Following the deposit of $15,000 in funds into the registry of the Court, [Docket entry dated 6/19/2019], and the filing of an accounting of legal services rendered, [Doc. 171 (under seal)], by disqualified attorneys Jerome D. Lee ("Lee") and S. Eli Bennett ("Bennett") and their law firm, Taylor, Lee & Associates, LLC (collectively, "prior counsel"), the matter was referred to the undersigned "to determine how the escrowed funds should be distributed pursuant to 18 U.S.C. § 3006A(f)," [Doc. 173]. The Court conducted a hearing on September 19, 2019, [Doc. 191], to allow prior counsel the opportunity to present evidence and be heard after prior counsel had also filed an affidavit of Lee regarding the receipt and disposition of payments made to prior counsel for representation of the defendants in this case, [Doc. 184 (under seal)]. Prior counsel did not present any additional supporting documentation at the hearing.

For the reasons stated on the record at the hearing, the Court finds that prior counsel received a total of at least $21,000 from family members of the six defendants in this case, and were required to deposit $15,000 into the registry of the Court after their disqualification.[1] [Doc. 107]. Lee's affidavit states that it "appears" a sum exceeding the amount paid on behalf of one defendant was refunded to his family, [Doc. 184 at 2 (under seal)], but prior counsel produced no records to support this assertion, and there is no credible evidence before the Court to find that a refund in the amount of $4,000 actually was made to the defendant's family.[2] The Court provided multiple opportunities for prior counsel to demonstrate the amount of fees received, refunded, and retained, but counsel did not produce any records beyond the initial engagement letters and affidavits previously submitted to support their contentions. Hence, the Court finds on the record before it that prior counsel

[1] According to the terms of the engagement letters, each defendant's family member made a down payment of $3,500, and was required to make monthly payments in the amount of $500 thereafter until the total fee of $7,500 was paid in full. [Doc. 84 (under seal)]. Prior counsel were not disqualified until after at least one monthly payment was due under the terms of the engagement letters, which means prior counsel could have received as much as $24,000 before being disqualified. Prior counsel did not produce any accounting or bank records to show the receipt and deposit of funds paid for the representation of these defendants.

[2] If prior counsel in fact refunded $4,000 to one defendant's family member, it suggests that at least that defendant's family made one $500 monthly payment under the terms of the engagement letter in addition to the $3,500 down payment.

retained $6,000 of the $21,000 paid by family members of the defendants after depositing $15,000 into the Court's registry.[3]

In considering how the funds on deposit with the Court should be disbursed, the Court reviewed prior counsel's accounting of legal services rendered, [Doc. 171 (under seal)], and upon comparing the in-court time claimed by prior counsel to the Court's own records of proceedings in this case, the Court finds that the hours claimed for in-court time are excessive. For example, prior counsel claimed three hours of in-court time for the detention hearing on February 20, 2019, in this case, [id. at 2], but the Court's records reflect that the detention hearing lasted only one hour and six minutes. [Doc. 26, 28, 30, 32 & 34]. Similarly, prior counsel claimed 2.5 hours of in-court time for the Rule 44 hearing held on March 14, 2019, [Doc. 171 at 3 (under seal)], but the Court's records reflect that the detention hearing lasted only one hour and 18 minutes, [Doc. 72]. Bennett stated at the hearing that he did not maintain actual records of his time spent on this case and the hours claimed represented his "best guess" by reconstructing the record from his memory. Lee added that the in-court hours claimed actually included time conferring with family members of the defendants before or after the proceedings and the time they "ran

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[3] If a refund was made, it was done outside of the procedure established by the Court when counsel was disqualified, see [Doc. 107], and exceeded the amount prior counsel claims the family actually paid them. Thus, the Court finds that prior counsel voluntarily disbursed a portion of the fees they retained above the funds deposited with the Court.

around the courthouse" getting things done. The Court does not find prior counsel's "best guess" estimate of hours spent in court to be credible or reliable in view of the Court's own records regarding the Court proceedings. The Court also does not find it reasonable to credit both counsel for appearing at the initial appearance and arraignment of the defendants when one counsel could adequately handle those proceedings, and once again, the in-court hours claimed for those proceedings substantially exceeded the Court's own records of the length of the proceedings as recited at the hearing. Consequently, the Court credits Bennett with 4 hours in-court time and Lee with 2.5 hours in-court time.

As for the out-of-court hours claimed by prior counsel, the Court does not find the reconstructed time claimed by counsel to be reliable based on the demonstrably excessive time prior counsel estimated for in-court services, and the Court further finds several entries excessive for the reasons stated on the record. For example, prior counsel claims 12 hours for legal research and drafting regarding Rule 59 objections to the disqualification order, after spending 6 hours conducting legal research and drafting a response to the motion to disqualify. [Doc. 171 at 3 (under seal)]. On the record in this case that clearly required prior counsel's disqualification from representing six co-defendants in a drug distribution conspiracy, the amount of time spent conducting legal research opposing disqualification and seeking review of the order of disqualification clearly was

excessive. Counsel claims seven hours for legal research regarding review of the detention orders of two defendants, [id. at 2], which the Court finds to be excessive for the issues presented. Counsel also claims seven hours for reviewing discovery in the case the day before the Rule 44 hearing, [id. at 2], which again, was unwarranted and excessive given the record requiring disqualification in this case. In sum, the Court finds prior counsel's estimate and best guess of out-of-court time to be unreliable and excessive, and upon review of the record, credits Bennett with 30 out-of-court hours and Lee with 12 out-of court hours.

The Court accepts the out-of-court hourly rates asserted by prior counsel, but based on the Court's familiarity with rates in the Northern District of Georgia and counsel's experience and skill, reduces Bennett's in-court hourly rate to $300 per hour and Lee's to $400 per hour. Using the lodestar method for calculating a reasonable fee for prior counsel as a benchmark in determining how the escrowed funds should be distributed pursuant to 18 U.S.C. § 3006A(f), see Norman v. Housing Auth. of City of Montgomery, 836 F.2d 1292, 1299 (11th Cir. 1988), the Court finds that a reasonable fee for prior counsel's representation of the defendants in the case is $14,000. Since prior counsel retained $6,000 of the fees paid on behalf of the defendants, the Clerk of Court is **DIRECTED** to disburse $8,000 plus accrued interest minus any statutory fees to the law firm of Taylor, Lee & Associates, LLC, by U.S. mail to 6855 Jimmy Carter Boulevard, Suite 2150, Norcross, Georgia 30071,

and to apply the remaining $7,000 deposited into the Court's registry to the Criminal Justice Act fund to defray the expense associated with appointing counsel for five of the defendants in this case since funds were available for payment from or on behalf of the persons furnished representation when prior counsel undertook representation of all of the defendants where there was an obvious potential conflict of interest from the outset for which they were disqualified.

IT IS SO ORDERED, this 20th day of September, 2019.

Russell G. Vineyard

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

and to apply the remaining $7,000 deposited into the Court's registry to the Criminal Justice Act fund to defray the expense associated with appointing counsel for five of the defendants in this case since funds were available for payment from or on behalf of the persons furnished representation when prior counsel undertook representation of all of the defendants where there was an obvious potential conflict of interest from the outset for which they were disqualified.

IT IS SO ORDERED, this ____ day of September, 2019.

RUSSELL G. VINEYARD
UNITED STATES MAGISTRATE JUDGE

TO THE COURT

It is hereby certified that rule 67 has been complied with and that there is on deposit in the Registry of this Court $15,000.00

plus interest of $90.25
as of September 20, 2019

Deputy Clerk
Financial Intake Section