

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	
	§	No. 3:13-cr-422-M
DAVID LYMAN SPALDING,	§	
	§	
Defendant.	§	

ORDER

This case is set for trial on March 30, 2015 based on United States District Judge Barbara M.G. Lynn's Fifth Order Continuing Trial and Pretrial Deadlines. See Dkt. No. 67. Defendant David Lyman Spalding has filed a *pro se* Motion to Request Appointment of New Defense Counsel. See Dkt. No. 76. Judge Lynn has referred this motion to the undersigned United States magistrate judge for hearing, if necessary, and determination. See Dkt. No. 77.

The Court held a hearing on this motion on March 3, 2015, with Defendant David Lyman Spalding present along with his appointed counsel from the Federal Public Defender for the Northern District of Texas ("FPD") and counsel for the government. The government's counsel stated on the record that the government opposes the motion where FPD has adequately represented Defendant from the case's outset; where the motion is untimely filed on the eve of trial and likely for purposes of delay; where there is no conflict of interest but only, apparently, discomfort by Defendant with appointed counsel; where an indigent defendant has no constitutional

right to appointed counsel of his choice; and where granting the motion would require a continuance of the March 30, 2015 trial date that has been set for some time.

Because Defendant's *pro se* motion implicates matters that required a discussion of information subject to protection as attorney work-product and by the attorney-client privilege, the Court conducted a portion of the hearing *in camera* with Defendant and his appointed counsel and outside the presence of the government's counsel, and the recording of that portion of the hearing is ordered to be maintained under seal. As the Court explained in making its oral ruling of Defendant's *pro se* Motion to Request Appointment of New Defense Counsel, the Court will not include any of the specific information from the *in camera* portion of the hearing in this order so as to preserve Defendant's and his counsel's privilege and work-product protections. As the Court further explained, the Court will consider Defendant's March 2, 2015 *pro se, ex parte* filing [Dkt. No. 81] as a supplement in support of his *pro se* motion but will maintain that as an *ex parte* filing that is unavailable to the government based on the filing's containing information that is subject to protection as attorney work-product and by the attorney-client privilege.

Defendant's *pro se* Motion to Request Appointment of New Defense Counsel is essentially a motion for substitution of counsel, seeking a new appointed counsel to replace the FPD as his appointed counsel. Defendant requests appointment of new counsel "because of a lack of comprehensive defense strategy, continuing lack of competent communications and [because his] attorney-client relationship has deteriorated." Dkt. No. 76 at 1. Defendant clearly states that he does not contend that

the FPD's representation of him to date does not amount to constitutionally ineffective assistance of counsel or constitutionally deficient under the test established in *Strickland v. Washington*, 466 U.S. 668 (1984). *See id.* at 2.

The Court finds that Defendant does not present any complaint that would amount to a violation of his Sixth Amendment rights. Rather, he asks for appointment of new counsel in a manner that is left to the district court's sound discretion and requires him to show good cause. *See United States v. Elam*, 561 F. App'x 432, 433 (5th Cir. 2014).

Defendant has no "right to appointed counsel of [his] choice," *United States v. Fields*, 483 F.3d 313, 350 (5th Cir. 2007), where "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them," *United States v. Gonzales-Lopez*, 548 U.S. 140, 151 (2006). The Court "is constitutionally required to provide substitute counsel only if there is a substantial conflict or problem affecting the ability to represent the defendant," that is, a showing of conflict of interest, a complete breakdown in communication, or an irreconcilable conflict. *United States v. Mitchell*, 709 F.3d 436, 441 (5th Cir. 2013). A communication breakdown caused by a defendant's unwillingness to cooperate or communicate with his attorneys generally does not justify appointment of new counsel. *See, e.g., United States v. Simpson*, 645 F.3d 300, 307-08 (5th Cir. 2011). Neither is appointment of new counsel generally required where counsel continues to meet and communicate with a defendant whose complaints relate mainly to disagreement with counsel's trial strategy or who might, if he were an attorney or representing himself, prepare and try the case differently. *See, e.g., United*

States v. Hernandez, 502 F. App'x 363, 367 (5th Cir. 2012). As the United States Court of Appeals for the Fifth Circuit has explained,

[a] defendant is entitled to counsel capable of rendering competent, meaningful assistance in the preparation and trial of the pending charges, including appropriate evaluation and advice with reference to a plea of guilty. A defendant is not entitled to an attorney who agrees with the defendant's personal view of the prevailing law or the equities of the prosecutor's case. A defendant is entitled to an attorney who will consider the defendant's views and seek to accommodate all reasonable requests with respect to trial preparation and trial tactics. A defendant is entitled to appointment of an attorney with whom he can communicate reasonably, but has no right to an attorney who will docilely do as he is told. Every defendant is entitled to the assistance of counsel dedicated to the proposition, and capable of assuring that, the prosecution's case shall be presented in conformity with the Constitution, rules of evidence and all other controlling rules and practices. No defendant has a right to more.

United States v. Moore, 706 F.2d 538, 540 (5th Cir. 1983). And, even where a defendant requests to retain counsel to substitute for appointed counsel, "[t]he freedom to have counsel of one's own choosing may not be used for purposes of delay," and "[l]ast minute requests are disfavored." *United States v. Silva*, 611 F.2d 78, 79 (5th Cir. 1980).

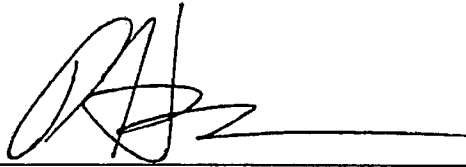
Defendant has made no claim of a conflict of interest with the FPD, and the record does not show any conflict of interest. On the record before the Court, the Court finds there is not a complete breakdown of communication between Defendant and his appointed counsel and that any communication difficulties are not the sort that would justify – or likely would be solved by – substitution of appointed counsel. Likewise, the Court finds that the record does not reflect a deterioration of the attorney-client relationship that would justify – or, again, likely would be solved by – substitution of appointed counsel. The Court, in short, finds that substitution of appointed counsel is

not constitutionally required here where there is not a substantial conflict or problem affecting the FPD's ability to represent Defendant. The Court further finds, in its sound discretion, after considering all of the circumstances, that there is no good cause to order the substitution of appointed counsel.

Accordingly, Defendant David Lyman Spalding's *pro se* Motion to Request Appointment of New Defense Counsel [Dkt. No. 76] is DENIED.

SO ORDERED.

DATED: March 3, 2015

A handwritten signature in black ink, appearing to be 'D. Horan', written over a horizontal line.

DAVID L. HORAN
UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**

May 29, 2018

Scott S. Harris

Michael Duggan

Office of the Court Clerks

Supreme Court of the United States

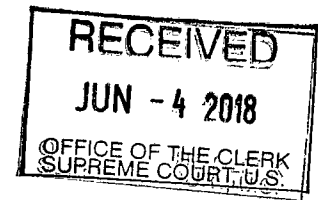
1 Front Str., N.E.

Washington, DC 20543 - 0001

RE: United States v. David Spalding

No. 17 - 8167

Certified Mail - #7016-0910-0001-9163-6498



Dear Mr. Duggan -

Please find my Petition for a Rehearing, enclosed, referring to the above mentioned case, with full supporting addendums and exhibits.

As noted in my original Writ of Certiorari, docketed on March 20, 2018 - I have argued that the Office of the Court Clerks for the Fifth Circuit, acted without proper authority and lacked jurisdiction when they DENIED my four (4) Motions under 28 U.S.C. § 1654 - because they stated I needed to attend a 'Faretta Hearing'... I am incarcerated, scheduling was not an issue.

I sincerely hope this revised Petition now conforms with the Supreme Court rules. Your continuing assistance is greatly appreciated.

Sincerely,

A handwritten signature in dark ink, appearing to read "David L. Spalding". The signature is fluid and cursive, with a long horizontal stroke at the end.

David L. Spalding

#47371 - 177

Box 9000

Seagoville, TX 75159 - 9000