

Since the indictment issued on August 16, 2006, Mr. Smith has diligently sought to obtain this evidence from the government. He has been unsuccessful. Evidence has been withheld by the CDC, which conducted the investigation upon which this prosecution is based and which has selectively provided information and materials to the government. Mr. Smith is entitled to this evidence – whether from the government or the CDC – pursuant to Rules 16 and 17 of the Federal Rules of Criminal Procedure and the *Brady Doctrine*.

## **II. Fraud Charges**

The indictment alleges that, between 1997 and 2004, Mr. Smith engaged in a kickback scheme with entities controlled by his co-defendant, Anton Zgoznik, by which he: (1) caused the CDC to hire the Zgoznik Entities<sup>1</sup> to perform accounting, computer, and financial services at inflated prices; (2) caused the CDC to unnecessarily outsource certain of its functions to the Zgoznik Entities at inflated prices; (3) received kickbacks from the Zgoznik Entities in the amount of \$784,627.25; (4) which were not disclosed on the records of the CDC or disclosed to Diocesan Officials. (ECF 1, ¶¶ 17-24). Based on these allegations, Mr. Smith has been charged with mail fraud (18 U.S.C. §§ 1341 and 1346), money laundering (18 U.S.C. § 1956(a)(1)(B)(i)), and conspiracy to commit mail fraud (18 U.S.C. §§ 371 and 1349). (ECF 1, Counts 1 - 17).

These allegations are false. Mr. Smith is not guilty of these charges. Mr. Smith is entitled to obtain materials to use as evidence at trial to establish his innocence.

### **A. Father Wright Authorized the Additional Compensation.**

The compensation that Mr. Smith received from the Zgoznik Entities was authorized and directed by Father John Wright, who was Chief Financial and Legal Officer of the CDC for more than 20 years and Mr. Smith's and Mr. Zgoznik's boss<sup>2</sup>. If the compensation was authorized, Mr.

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<sup>1</sup> See ECF 1, ¶ 16 for definition. Unless otherwise noted, ECF 1 citations are to paragraphs in the General Allegations, pp. 1-14.

<sup>2</sup> Mr. Zgoznik was Assistant Treasurer of the CDC. (ECF 1, ¶ 15).

Smith is not guilty, since the government must establish, among other things that the payments were not authorized, and that Mr. Smith knew they were not authorized. *See, e.g., U.S. v. Frost*, 125 F. 3d 346, 368 (6<sup>th</sup> Cir. 1997) (government must establish that employee intended to breach fiduciary duty and foresaw harm to employer to convict for honest services fraud); 18 U.S.C. § 1956(a)(1) (requiring government to establish that defendant knew transaction involved proceeds of illegal activity under money laundering law). Indeed, if Mr. Smith believed that the payments were authorized by Father Wright, he is not guilty, since good faith is a complete defense to a specific intent crime. *See, e.g., U.S. v. Wulger*, 981 F.2d 1497, 1502 (6<sup>th</sup> Cir. 1992) (good faith belief negates criminal intent); *U.S. v. D'Amato*, 39 F. 3d 1249, 1257 (2<sup>nd</sup> Cir. 1994) ("Mail fraud cannot be charged against a corporate agent who in good faith believes that his or her \*\*\* conduct is in the corporation's best interests.").

There is substantial evidence that Father Wright authorized the payments to Mr. Smith. The indictment acknowledges that, beginning in 1996, Father Wright decided to provide Mr. Smith with additional compensation from Diocesan funds to induce him to remain an employee with the CDC and not to accept more lucrative positions in the private sector. (ECF 1, ¶ 30). Father Wright did not want other Diocesan employees to know that Mr. Smith was receiving additional compensation, so he developed methods of providing the additional compensation to Mr. Smith which would not appear on the CDC's financial statements and would not be disclosed to the CDC's payroll department. (*Id.* ¶ 33).

Father Wright opened an account with Fidelity Investments, using the tax I.D. number of the CDC, into which he directed the deposit of additional compensation for Mr. Smith. (*Id.* ¶ 31). In this manner, Father Wright provided \$270,000 in additional compensation to Mr. Smith in

1996 and 1997. (*Id.* ¶¶ 31-32).<sup>3</sup> Thereafter, Father Wright directed that additional compensation to Mr. Smith be paid through the Zgoznic Entities, which was done through 2003 in the total amount of \$784,624.85.

Father Wright admits that he authorized additional undisclosed compensation to Mr. Smith. However, we understand that, while he admits having authorized \$270,000 of undisclosed compensation, Father Wright denies having authorized the additional \$785,000 and claims he was "duped". In addition, he denies having approved the use of an off-book Diocesan account, or use of the Zgoznic Entities, to provide additional compensation to Smith.<sup>4</sup>

The indictment takes no position regarding whether Father Wright was authorized to pay Mr. Smith additional compensation, or to not disclose it on the CDC's financial records, or to conceal it from others within the Diocese. Father Wright and Mr. Smith have not been charged criminally, or sued civilly, with regard to the \$270,000 in additional compensation.<sup>5</sup> Mr. Smith has been charged with regard to the \$784,624.85.

A reasonable juror could disbelieve Father Wright's claim that he only authorized a portion of the additional compensation to Mr. Smith. A reasonable juror could conclude that if Father Wright wanted to pay Mr. Smith additional compensation so he would not leave in 1996 and 1997, his desire to do so did not end in 1997 but continued thereafter. A reasonable juror could conclude that if Father Wright wanted Mr. Smith's additional compensation in 1996 and 1997 to be kept confidential, his instructions remained unchanged thereafter with regard to subsequent years. A reasonable juror could conclude that Mr. Smith believed that the additional compensation he received was authorized by Father Wright, his superior, who had authority to

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<sup>3</sup> Attached as Ex. A are documents evidencing Father Wright's authorization of the creation of the Fidelity account and additional compensation to Mr. Smith.

<sup>4</sup> Plain Dealer Article 8/24/06, attached as Ex. B.

<sup>5</sup> The indictment charges Mr. Smith with tax offenses relating to the \$270,000, which we will address below.

do so and to not disclose it on the CDC's financial statements. If the jury reaches any of these conclusions, Mr. Smith will be acquitted.

Father Wright is a key witness. His credibility and conduct will be at issue. A jury will have to decide how plausible it is that Father Wright authorized only a portion of the additional compensation or that he was duped. In determining whether Father Wright authorized Mr. Smith to receive the additional undisclosed compensation, and whether Mr. Smith reasonably believed Father Wright had authority to do so, there are specific documents we have requested relating to specific transactions which are material and will be evidence at trial to assist the jury in determining whether Father Wright's version of events is credible.

**B. Mr. Smith is Entitled to Documents that Establish that Father Wright Authorized Additional Compensation to Himself and Others.**

Father Wright was not duped. He is a financially sophisticated attorney. He arranged for other Diocesan employees to receive compensation through the Zgoznic Entities, so that it would not be disclosed on the CDC's books and records. He has a history of engaging in transactions where he provides compensation to people without additional authorization which are not disclosed on the CDC's books and records. There is documentation of these transactions which we have requested, which includes the following:

1. Father Wright gave his secretary, Maria Milos, \$63,000 in CDC funds in July 1996 without any additional authorization. Although initially listed as a receivable on the CDC's books, Father Wright removed it in June 2000. In preparation for this trial, Father Wright has put it back on the books of the CDC's affiliate, the Catholic Cemeteries Association ("CCA"), of which Father Wright is Chief Executive Officer. We request the documentation relating to the payment of additional compensation to Ms. Milos and the general ledger entries by which it was