

IN THE SUPREME COURT OF THE UNITED STATES
PETITION FOR REHEARING
No. 18-9308

CLARENCE SCRANAGE, JR., PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

TO THE HONORABLE JUDGES OF THE SUPREME COURT:

COMES NOW, Clarence Scranage, Jr., ("Unrepresented Defendant") files this Petition For Rehearing under Supreme Court Rule 44 and would show this Court as follows:

GROUND ONE FOR REHEARING

WHETHER DR. SCRANAGE KNOWINGLY AND VOLUNTARILY WAIVED HIS SIXTH AMENDMENT RIGHT TO BE REPRESENTED BY COUNSEL

The Lower court abused it's discretion in determining that Unrepresented Defendant could afford counsel and violated Unrepresented Defendant's Sixth Amendment rights to have a counsel appointed because Unrepresented Defendant was too poor to hire a counsel.

In determining whether to appoint counsel the Court stated it did not have any fixed income or assets number but, "looked at dependants and stuff like that." (JA 132). Although the Court admitted there was no fixed basis used to determine whether someone should be appointed counsel, the Magistrate Judge determined Unrepresented Defendant did not qualify for an appointed counsel. (JA 141-143).

According to Farretta V California, 422 U.S. 809,819 (1975), the decision to represent one's self must be knowing and intelligent, Id. at 835, and the courts must entertain every reasonable presumption against waiver of counsel.

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Brewer V. Williams, 430 U.S. 387,404 (1977). The record must show that the waiver is clear, voluntary, knowing, and intelligent. United States V. Bernard, 708 F. 3d 583,588 (4th Cir. 2013).

In Unrepresented Defendant's case the waiver was not voluntary nor intelligently freely requested because Unrepresented Defendant did not want to represent himself, he was just too poor to hire a lawyer, but he did inform the Court that he had hired an attorney by the name of Anthony Burch, (nine months prior) who was in a murder trial in Chicago. When Unrepresented Defendant's counsel could not appear on his behalf, after the lower court instructed Unrepresented Defendant that he must have counsel to appear for him at the next detention hearing on March 3, 2017, with Mr. Burch was still involved in the murder trial, the Court appointed counsel and continued the Hearing until March 7th, 2017.

This is not the voluntary acts of someone who wishes to represent himself at trial. It is more of a person who needed counsel and was too poor to hire another counsel since he was abandoned by his previously hired counsel, Mr. Burch.

This rehearing is not about Unrepresented Defendant's conduct but about whether or not he was denied his Sixth Amendment Rights to have a counsel appointed to represent him among other things.

The Court of Appeals Opinion stated that the court repeatedly reminded Unrepresented Defendant that "standby counsel was available to assist him. Further, the record is devoid of any indication that the Court's consideration of a plan to require [Unrepresented Defendant] to sell a few identifiable assets to reimburse [742 Fed. Appx. 747] court-appointed counsel amounted to financial duress compelling [Unrepresented Defendant] to proceed pro se. See J.A 134 which disputes the Court of Appeals opinion as stated above.

The conclusion of the Court's Opinion is incorrect. The record and the waiver of his rights to be represented by counsel, as to the reason why Unrepresented Defendant would want to proceed without counsel and that reason was never addressed. Therefore, the waiver of his rights to be represented by counsel was invalid and involuntary which goes to the base of the foundation of violation of Unrepresented Defendant's Sixth Amendment rights to have an attorney appointed.

The real reason "why" Unrepresented Defendant chose to represent himself was never concluded. If the Court had conducted a complete assessment of the evidence of whether Unrepresented Defendant voluntarily waived his rights to counsel without anything attached that would be the product of choosing to represent himself. This question should have been included in the assessment to whether Unrepresented Defendant really wanted to represent himself to satisfy the requirements whether to appoint counsel and if there is an erroneous assessment of the facts, Unrepresented Defendant would be denied his Sixth Amendment rights to Counsel and the waiver would be invalid.

The court did not at any time, ask Unrepresented Defendant the reason he chose to represent himself. This question should have been included in the assessment as to whether Unrepresented Defendant really wanted to represent himself to satisfy the waiver requirements and whether or not to deny the waiver and appoint counsel to prevent erroneous assessments of the facts. Without this critical question articulated, Unrepresented Defendant would be denied his Sixth Amendment rights to counsel and the waiver would be invalid.

Unrepresented Defendant's assets did not equal 25% of the cost of an attorney. The court agreed to pay the rest of the attorney's fee that Unrepresented Defendant's untainted assets could not cover. There is some evidence that Unrepresented Defendant does not have enough assets to hire an attorney even when he sells everything he has. The Court should have appointed Unrepresented Defendant counsel in accordance with the right to have an attorney appointed, if Unrepresented Defendant is too poor to afford one.

The Magistrate Judge erroneously determined that Unrepresented Defendant did not qualify for an appointed lawyer (JA 141-143).

Upon the prosecutor pointing out the listed assets in the affidavit, the Magistrate Judge replied, "Well, now you're starting to think like I'm thinking...that's where we should have been in the first place". (J.A. 134). The Magistrate Judge and the prosecutor together reviewed Unrepresented Defendant 's assets as listed in his affidavit. They determined all his listed (i.e. total) assets must be liquidated to repay the cost of the appointed counsel, except one [antique] automobile.(J.A.134)(See 3:17cr0023-HEH, Doc 37 Filed 3/28/17 pg 2 Pg ID # 88). The Appellate Court erroneously concluded the liquidation order or the plan does not exist. Unrepresented Defendant initiated the ordered sales. Two days after the order was issued to liquidate all his assets except one unreliable vehicle, Unrepresented Defendant requested his CJA Panel attorney to withdraw and requested the Court to allow him to represent himself.(J.A.144-145).

On April 6, 2017, the Court held a hearing to determine if Unrepresented Defendant's request to represent himself was knowing and voluntary. Although the Court asked Unrepresented Defendant a series of leading questions to determine if .. Unrepresented Defendant's waiver of his Sixth Amendment rights was knowing and voluntary, the Court never asked Unrepresented Defendant 'why' he would like to represent himself. The Court appointed the same CJA panel attorney as standby explaining she was only there if something bad happens and she has to take over the case, otherwise he was on his own. (J. A. 185, 176-177; 196-198).

The comparison between co-defendant, Anthony Harper, and Unrepresented Defendant were treated so differently in the same court. On February 24, 2017, both Unrepresented Defendant and his co-defendant, Mr. Harper, made their initial appearance in the Eastern District of Virginia. Both men informed the Court he had or would hire an attorney and a detention hearing was set. (J.A. 41).

On March 1, 2017, Unrepresented Defendant and his co-defendant, Anthony Harper, appeared at the scheduled detention hearing without an attorney. Unrepresented Defendant informed the Court he had hired Anthony Burch, who was in a murder trial in Chicago (J.A. 45). Harper indicated, due to fee issues with his chosen attorney, he would like the Court to appoint counsel. (J.A. 48). After Mr. Harper filled out a financial affidavit, he was appointed an attorney. (J.A. 49).

The Government did not object and did not seek to put on evidence regarding the money and assets Mr. Harper obtained over the course of the indicted conspiracy (J.A. 49).

According to U.S. Probation Office, Mr. Harper's role in the offense was described as a leader in the offense. Mr. Harper was alleged to have obtained the Oxycodone prescriptions from Unrepresented Defendant, recruited and pay multiple pill fillers, and distribute Oxycodone pills. (J.A. 1436), but he was appointed counsel, no contest to his affidavit.

The Unrepresented Defendant's statement of affidavit was contested and the FBI added overact monies. FBI incorrectly opined that she had extrapolated an extraordinary yearly income of Unrepresented Defendant for 2012, 2013, 2014 (J.A. 110-113). This inferred income was based upon the statement made in 2012 regarding the percent of his practice devoted to pain management and price per-visit. (J.A. 106,107).

The agent then relied on the Virginia Prescription Monitoring Program (Herein "PMP"). The PMP was the Virginia based system which tracks individuals who fill prescriptions. Based on this PMP's list, the agent determined the number of visits per year. (J.A. 108). However, the evidence at trial indicated the "Pill fillers" did not oftentimes have office visits. Ms. Jordan testified that between herself, her mother, Ms. Bloomfield, and her step-father, Mr. Bloomfield, they filled a combined total of 60 different prescriptions without ever having an office visit. (J.A. 461).

Further, the FBI admitted they had failed to take into account the costs of Unrepresented Defendant's office, payroll, insurance premiums, and inventory. (J.A.. 117-118). Even with such a deficit of information, the agent went on to opine that Unrepresented Defendant may have over \$3.4 million dollars of unaccounted for assets. The Agent admitted that she had searched for but did not find the assumed unaccounted assets (J.A. 120) or evidence of it's previous existence.

Again, in determining whether to appoint counsel, the Court stated it did not have any fixed income or asset numbers but "looked at dependents and stuff like that". (J.A. 132). Unrepresented Defendant had two dependents, a daughter, 21 in college and an 11 year old daughter (J.A. 1445). His dependents [nor his parents] were not considered in the hearing.

In any event, the Court adopted the high income numbers opined by the FBI. (J.A. 127). Although the Court admitted there was no fixed basis used to determine whether some one should be appointed counsel. The facts used to come to this conclusion remain confusing even on review.

Interestingly, the PSR found Unrepresented Defendant had known assets totaling \$13,300 which included cash, business assets, and two vehicles, but also had liabilities of \$4,758 (J.A. 1450). Further, the PSR noted ... Unrepresented Defendant filed Chapter 7 Bankruptcy four separate times with the most recent discharge of debts on November 22, 2004. (J.A. 1450). After assessing the readily available information regarding his known assets, liabilities, dependents, and custodial status, the PSR indicated it appeared Unrepresented Defendant would be unable to even pay a fine. (J.A. 1451).

The Court of Appeals erred in permitting Unrepresented Defendant to waive counsel and represent himself at trial. The record demonstrates that Unrepresented Defendant's waiver of counsel was not knowing and intelligent with the understanding why he would have to represent himself.

The constitutional right to self-representation is closely tied to the right to be represented by counsel. A criminal defendant may waive the right to counsel if it is done knowing and intelligently. For a waiver of the Sixth Amendment right to be valid, the defendant must clearly and unequivocally assert his right of self-representation.

The government bears the burden of proving the waiver's validity which the government did not do.

Upon a defendant's clear request to self-representation, a district court should hold a Faretta hearing to ensure the defendant is aware of the nature of the charges against him, possible punishments, basic trial procedure, and the hazards of self-representation. Factors the Court should address and fairly conclude after conducting a searching inquiry to determine whether a waiver is knowing and intelligent include:

- 1) the defendant's age, health , and education;
- 2) the defendant's knowledge of the nature of the charges;
- 3) Possible defenses to the charges and circumstances in mitigation thereof, and penalties;
- 4) the defendant's understanding of the rules of evidence, procedure and courtroom decorum;
- 5) whether standby counsel was appointed and, if so, the extent to which standby counsel aided in the trial;
- 6)any mistreatment or coercion;

7) whether the defendant was attempting to manipulate the trial.

1) The court abused its discretion in determining Unrepresented Defendant's age, health, and education by holding him to a higher standard of qualification. At the time of the trial, Unrepresented Defendant's age was 62 and he was actively being treated for cancer.

Although he earned a medical degree at the age of 27, his expertise in medicine does not compare with his inexperience of the law and the effects of being out of his lane. Leading questions of yes or no questions are not searching nor penetrating enough to fully evaluate and prove a defendant's understanding as in the instant case at bar.

2) The Unrepresented Defendant's knowledge of the nature of the charges with the perils and disadvantages was stated but never explained nor demonstrated to a reasonable level of understanding.

3) The Unrepresented Defendant's possible defenses, and penalties were never mentioned nor remotely explained in the colloquy. The penalties were vaguely mentioned. These are vital to the decision making process required to represent himself.

4) The Defendant's lack of knowledge and understanding of the rules of evidence, court procedures and court room decorum was absent and erroneously considered favorably even when Unrepresented Defendant answered that he did not know these

5) Whether standby counsel was restricted with her hands tied behind her back.

The extent of standby's involvement to 'only assist' was nil to none as her role was conflicted between the rulings of the magistrate judge and the trial judge. The magistrate judge ordered the standby to not assist with any case support, but "to be there to take over should anything bad happen", which the stand-by complied. However,

the trial judge referred to the standby being there for assistance, but when assistance was requested, standby referred back to the magistrate judge's instructions as 'you are on your own'. This unclear role of the standby created major confusion of her position and responsibilities.

6) The Court showed favor to Co-Defendant Harper in the same court, same judge and same proceedings without verification and assigned him an attorney when he simply asked for one.

7) Unrepresented Defendant did not try to manipulate the trial proceeding by stating that he had an attorney which he had hired nine months before indictment.

The Court of Appeals affirmed the judgment and sentence of the lower court based on erroneous assessment of the facts 1- 7.

Also stated in it's opinion at United States v Clarence Scranage Jr [742 Fed Appx 745], "the court stated it repeatedly reminded Scranage that standby counsel was available to assist him. At Sentencing, Unrepresented Defendant asked for standby to take over as counsel, and even though standby was present in the courtroom and didn't object, this motion was denied. Involuntarily Unrepresented Defendant was then sentenced to 360 months in prison.

The United States court of Appeals for the 4th Circuit affirmed Unrepresented Defendant's conviction per curium. In a two page opinion, from the outset, the Court never addresses any other issues raised in the appellant Brief other than whether Unrepresented Defendant knowingly and voluntarily waived his Sixth Amendment Rights to counsel and left the entire assessment of the evidence unaddressed.

CONCLUSION

WHEREFORE, Clarence Scranage, Jr., moves this Honorable Court for a Rehearing of the Writ of Certiorari based on the above ground presented for review taken from the Appellant's Brief and his original petition for Certiorari.

This foregoing 'Petition for Rehearing" clearly sets out a constitutional violation of his Sixth Amendment rights to have an attorney appointed to him because he was too poor to hire one. The Court of Appeals failed to consider the entire record before affirming his conviction and sentence.

The Court shall find that Clarence Scranage,Jr.'s, Sixth Amendment Constitutional rights have been violated, and this Court should Grant, Vacate, and Remand (GVR) because justice requires nothing less.

Respectfully submitted,



CLARENCE SCRANAGE, JR
REG NO. 39581-083
FEDERAL MEDICAL CENTER
BUTNER, NC 27509

11-15, 2019
Date

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

UNITED STATES OF AMERICA,)
v.)
CLARENCE SCRANAGE, JR.,)
Defendant.)
Criminal Case No. 3:17cr23 (HEH)

ORDER

On February 24, 2017, Defendant appeared before the Court for an initial appearance arising from an indictment that charges him with Conspiracy to Possess with Intent to Distribute and Dispense and Cause the Distribution and Dispensation of Controlled Dangerous Substances, and Distribution of Controlled Substances and Aiding and Abetting, in violation of 21 U.S.C. §§ 841 and 846 and 18 U.S.C. § 2. At that time, Defendant informed the Court that he had the resources to retain counsel and would do so. On March 1, 2017, Defendant appeared before the Court for a scheduled detention hearing; however, he had not hired counsel. Consequently, the hearing was rescheduled for March 3, 2017, and the Court again instructed Defendant to obtain counsel. On March 3, 2017, at the second scheduled detention hearing, Defendant submitted a financial affidavit and requested Court-appointed counsel. The Court informed Defendant that an attorney would be provisionally appointed to represent him, but, if Defendant should hire his own counsel, the Court-appointed attorney would be released. The detention hearing was then rescheduled for March 7, 2017.

On March 6, 2017, the Court provisionally appointed Amy L. Austin as counsel for Defendant. On March 7, 2017, Defendant again appeared before the Court without having hired counsel; however, Ms. Austin appeared at the Court's request. At that time, the Court lacked sufficient information to properly assess Defendant's ability to retain counsel. Thus, the Court ordered Ms. Austin and the Government to brief the issue of Defendant's alleged indigence. On March 21, 2017, the Court granted the Government's motion for a hearing regarding that issue, and scheduled the hearing for March 28, 2017.

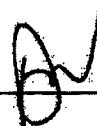
On March 28, 2017, the Court heard evidence and oral argument regarding Defendant's eligibility for Court-appointed counsel. Having reviewed Defendant's financial affidavit and supplement, and based upon the evidence at the hearing, the Court hereby FINDS that Defendant possesses sufficient assets to hire counsel and, therefore, is ineligible for Court-appointed counsel. Of course, Defendant may hire his own counsel, but he has failed to do so thus far.

To ensure that this case moves forward in a timely manner, the Court hereby ORDERS that Ms. Austin will continue to represent Defendant as described in the Court's previous Order dated March 7, 2017 (ECF No. 30). Furthermore, the Court hereby ORDERS Defendant to liquidate those assets listed in his financial affidavit and supplement, including all vehicles, except for the 1989 Mercedes 500 SEC, and all business equipment and assets. To that end, the Government and Ms. Austin SHALL meet and confer regarding a plan for selling those assets, and submit to the Court their agreed plan by 5:00 p.m. on Friday, March 31, 2017. Further, if counsel are unable to agree to such a plan, then they will submit their respective positions to the Court by 5:00 p.m. on March 31, 2017, and the Court will conduct a hearing at 11:00 a.m. on April 6, 2017, to determine how the sale of Defendant's assets will proceed. The proceeds from the sale of Defendant's assets shall be paid directly to the Clerk, U.S. District Court. At the

conclusion of this matter, after the Court has been fully reimbursed for Ms. Austin's fees, the remaining proceeds from the sale of Defendant's assets, if any, shall be returned to Defendant, absent any intervening event.

Let the Clerk file this Order electronically and notify all counsel accordingly.

It is so ORDERED.

/s/ 

David J. Novak
United States Magistrate Judge

Richmond, Virginia
Dated: March 28, 2017