

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2021

CASE NO. _____

DAVID WAYNE ARING,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

/

MOTION TO PROCEED ON PETITION FOR WRIT OF CERTIORARI
IN FORMA PAUPERIS

Petitioner David Wayne Aring, through undersigned CJA counsel, moves the Court pursuant to Rule 39 of the Rules of the United States Supreme Court, for leave to proceed *In Forma Pauperis* on this Petition for Writ of Certiorari. As good grounds in support of this motion Petitioner states:

Confirmation of Appointment as CJA Appellate Counsel for David Aring

Confirmation of appointment as counsel on direct appeal for Mr. Aring is documented by attaching the following at the end of this motion: (1) a copy of page 1 of the Docket for the Northern District of Florida, Case No. 4:20-cr-45-AW-MAF, demonstrating that The Federal Public Defender, Randolph P. Murrell, was

appointed to represent Mr. Aring in the district court, and that undersigned counsel was appointed to represent Mr. Aring for purposes of direct appeal; (2) a copy of the Order Appointing Federal Public Defender, entered by the Honorable Martin A. Fitzpatrick, United States Magistrate Judge, on August 24, 2020 at Docket No. 9; (3) a copy of the Order Granting Motion to Withdraw and to Appoint CJA Counsel “for purposes of appeal,” appointing “CJA panel attorney Sheryl Lowenthal,” entered by The Honorable Allen Winsor, United States District Judge on March 4, 2021, at Docket No. 47; and (4) the Procedural Letter from the United States Court of Appeals for the Eleventh Circuit, dated March 10, 2021 and signed by The Honorable David J. Smith, Clerk of Court, confirming undersigned’s appointment as CJA counsel on appeal for David Aring.

As demonstrated by the foregoing documents, Mr. Aring was found to be indigent, and has been represented by The Federal Public Defender in the district court, and by undersigned counsel on direct appeal continuously since the outset of these proceedings in August 2020.

Factual and Procedural Background

The record reflects that Petitioner Aring pleaded guilty plea to one count of receipt of child pornography in violation of 18 U.S.C. Section 2252(A)(a)(2), was convicted, and was sentenced to 90 months in custody to be followed by **lifetime**

supervised release, with the standard terms and conditions and special terms and conditions that he not possess a computer or any electronic device capable of processing or storing data without prior approval of the United States Probation Office; that any device be in compliance with the Computer and Internet Monitoring Program (CIMP); and that he not access the internet or any online service without prior approval of the United States Probation Office.

The unreasonableness of a **lifetime term of supervised release and lifetime ban from internet access without prior approval** were the subject of the issues raised on appeal. The Eleventh Circuit affirmed as to all issues raised. A timely-filed petition for rehearing was denied.

Meritorious Issues Raised in the Petition

The Petition that is filed on behalf of Mr. Aring presents two meritorious questions for this Court's review, including matters that require this Court to exercise its supervisory power over a decision of the Eleventh Circuit that departs from essential requirements of law in that it erroneously affirms a lifetime penalty of supervision that should be imposed only for the most aggravated and egregious child pornography offenders, and is not necessary for every one of them. All child pornography offense are heinous. But there are levels and gradations of the severity of such conduct and Mr. Aring is in the least culpable level (downloading and

watching), as compared to those who share, produce, or distribute child pornography and those who are found guilty of actual “hands-on” molestation of children and videotaping and then distributing and sharing the videos. The two questions presented are:

QUESTION ONE

Whether in the exercise of its supervisory jurisdiction over the United States Courts, this Court should correct the correctable injustice and violation of essential requirements of law that occurred when the Eleventh Circuit (a) affirmed **lifetime supervised release** for this **first-time, non-violent, former-lawyer-offender** convicted of receiving and watching child pornography, **but who did not share, distribute, or produce any videos or images, and who did not touch any child**; (b) whether lifetime supervised release should be reserved for those who commit more heinous and more serious child-sex offenses and those who are likely to reoffend; and (c) whether the Eleventh Circuit opinion conflicts with decisions of the Third, Fourth, Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals, all of which have issued decisions taking a measured and reasonable approach to imposing supervised release following a child pornography conviction, requiring this Court to resolve the conflict between the Eleventh and the other circuits?

QUESTION TWO

Whether in the exercise of its supervisory jurisdiction over the United States Courts, this Court should correct the correctable injustice, and violation of essential requirements of law that occurred when the Eleventh Circuit affirmed the special condition of supervised release providing for a **lifetime ban on computer and Internet access** in the real world in which almost everyone depends upon the Internet for almost everything just about every day, and likely will be even more computer and Internet-dependent in the next few years when Mr. Aring is released from BOP custody?

Accordingly, for the foregoing reasons, Petitioner David Wayne Aring respectfully prays that this Honorable Court will grant this motion and will allow him to proceed before this Court on Petition for Writ of Certiorari *In Forma Pauperis* through his CJA-appointed counsel.

Respectfully submitted,

/s/ Sheryl J. Lowenthal

Sheryl J. Lowenthal, Counsel for Mr. Aring
Sheryl J. Lowenthal, Attorney at Law
221 East Government Street
Pensacola, Florida 32502
Phone: 850-912-6710

Florida Bar No. 163475
Email: sjlowenthal@appeals.net

South Florida Office:
9130 S Dadeland Boulevard, Suite 1511
Miami, Florida 33156-7851
Phone: 305-670-3360

Dated: March 6, 2022

The body of this motion contains no more than than 904 Words.

Documents Attached

Northern District of Florida Case No. 4:20-cr-45-AW-MAF

Docket page 1 – The Federal Public Defender, Appointed Sheryl Lowenthal, Appointed for Appeal	Page 7
Docket No. 9 – Order Appointing Federal Public Defender August 24, 2020	Page 8
Docket No. 47 Order Appointing Sheryl Lowenthal as CJA Appellate Counsel March 4, 2021	Page 9

Eleventh Circuit Case No. 21-10730

Procedural Letter re: CJA Counsel Appointed March 10, 2021	Pages 10-11
---	-------------

**U.S. District Court
Northern District of Florida (Tallahassee)
CRIMINAL DOCKET FOR CASE #: 4:20-cr-00045-AW-MAF-1**

Case title: USA v. ARING

Date Filed: 08/04/2020

Date Terminated: 02/26/2021

Assigned to: JUDGE ALLEN C WINSOR
Referred to: MAGISTRATE JUDGE
MARTIN A FITZPATRICK

Appeals court case number: 21-10730-H
11th Circuit Court of Appeals

Defendant (1)

DAVID WAYNE ARING
TERMINATED: 02/26/2021

represented by **SHERYL JOYCE LOWENTHAL**
SHERYL J LOWENTHAL
9130 S DADELAND BLVD
#1511
MIAMI, FL 33156
305-670-3360
Fax: 850-429-9758
Email: sjlowenthal@appeals.net
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: CJA Appointment

RANDOLPH P MURRELL
FEDERAL PUBLIC DEFENDER OFFICE
- TALLAHASSEE FL
227 N BRONOUGH ST - STE 4200
TALLAHASSEE, FL 32301
850-942-8818
Fax: 850-942-8809
Email: randolph_murrell@fd.org
TERMINATED: 03/04/2021
Designation: Public Defender or
Community Defender Appointment

Pending Counts

ACTIVITIES RE MATERIAL
CONSTITUTING/CONTAINING CHILD
PORNO
(1)

Disposition

Defendant is sentenced to 90 months BOP
on Count 1. A life term of Supervised
Release is imposed. SMA \$100.00. Fine
waived.

Highest Offense Level (Opening)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

UNITED STATES OF AMERICA

vs.

Case No. 4:20cr45-AW

DAVID WAYNE ARING,

Defendant.

 /

ORDER APPOINTING FEDERAL PUBLIC DEFENDER

Defendant has shown by sworn evidence that he qualifies for appointment of counsel. Accordingly, it is **ORDERED** that RANDOLPH P. MURRELL, Federal Public Defender, 227 N. Bronough Street, Room 4200, Tallahassee, Florida 32301, (850) 942-8818, is appointed to represent this defendant. If a Criminal Justice Act (CJA) panel attorney is selected by the Public Defender as Defendant's attorney, this order authorizes payment of the CJA attorney for work on behalf of Defendant from the time that attorney was contacted by the Public Defender to take the case and agreed to take the case, even though that work predated this order. The pretrial service officer is hereby authorized to provide copies of the Defendant's criminal history to both parties.

DONE AND ORDERED on August 24, 2020.

s/ Martin A. Fitzpatrick
MARTIN A. FITZPATRICK
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

UNITED STATES OF AMERICA

v.

Case No. 4:20-cr-45-AW-MAF

DAVID WAYNE ARING,

Defendant.

/

ORDER GRANTING MOTION TO WITHDRAW
AND TO APPOINT CJA COUNSEL

The Federal Public Defender's motion to withdraw as counsel for purposes of appeal (ECF No. 46) is GRANTED. The Federal Public Defender's Office is permitted to withdraw.

The court appoints CJA panel attorney Sheryl Lowenthal to represent Defendant.

SO ORDERED on March 4, 2021.

s/ Allen Winsor
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

March 10, 2021

Sheryl Joyce Lowenthal
Law Offices of Sheryl Lowenthal
9130 S DADELAND BLVD STE 1511
MIAMI, FL 33156-7851

Appeal Number: 21-10730-H
Case Style: USA v. David Aring
District Court Docket No: 4:20-cr-00045-AW-MAF-1

Party To Be Represented: DAVID WAYNE ARING

Dear Counsel:

We are pleased to advise that you have been appointed to represent the indigent litigant named above. This work is comparable to work performed pro bono publico. The fee you will receive likely will be less than your customary one due to limitations on the hourly rate of compensation contained in the Criminal Justice Act (18 U.S.C. § 3006A), and consideration of the factors contained in Addendum Four § (g)(1) of the Eleventh Circuit Rules.

Supporting documentation and a link to the CJA eVoucher application are available on the internet at <http://www.ca11.uscourts.gov/attorney-info/criminal-justice-act>. For questions concerning CJA eVoucher please contact our CJA Team by email at cja_evoucher@ca11.uscourts.gov or phone 404-335-6167. For all other questions, please call the "Reply To" number shown below.

Every motion, petition, brief, answer, response and reply filed must contain a Certificate of Interested Persons and Corporate Disclosure Statement (CIP). Appellants/Petitioners must file a CIP within 14 days after the date the case or appeal is docketed in this court; Appellees/Respondents/Intervenors/Other Parties must file a CIP within 28 days after the case or appeal is docketed in this court, regardless of whether appellants/petitioners have filed a CIP. See FRAP 26.1 and 11th Cir. R. 26.1-1.

On the same day a party or amicus curiae first files its paper or e-filed CIP, that filer must also complete the court's web-based CIP at the Web-Based CIP link on the court's website. Pro se

filers (except attorneys appearing in particular cases as pro se parties) are **not required or authorized** to complete the web-based CIP.

Your claim for compensation under the Act should be submitted within 60 days after issuance of mandate or filing of a certiorari petition. We request that you enclose with your completed CJA Voucher one additional copy of each brief, petition for rehearing, and certiorari petition which you have filed. Please ensure that your voucher includes a detailed description of the work you performed. Thank you for accepting this appointment under the Criminal Justice Act.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Gerald B. Frost, H
Phone #: (404) 335-6182

CJA-1 Appointment of Counsel Letter

||