

22-5570

ORIGINAL

No. USCA2 No. 21-3024

FILED
JUL 13 2022

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

BERNABE ENCARNACION — PETITIONER
(Your Name)

VS.

GLENN GOORD, et al. — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

State Courts and Federal Courts: Southern, Northern, and Western District of N.Y., and U.S. Court of Appeals, Second Circuit of N.Y.

Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

The appointment was made under the following provision of law: 28 U.S.C. § 1915(e)(1) ("PRO BONO COUNSELS") copy enclosed _____, or

a copy of the order of appointment is appended.

Bernabe Encarnacion
(Signature)

**AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, BERNABE ENCARNACION, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Self-employment	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Income from real property (such as rental income)	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Interest and dividends	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Gifts	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Alimony	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Child Support	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Disability (such as social security, insurance payments)	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Unemployment payments	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Public-assistance (such as welfare)	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Other (specify): _____	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
Total monthly income:	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE	NONE	NONE	\$ NONE
NONE	NONE	NONE	\$ NONE
NONE	NONE	NONE	\$ NONE

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE	NONE	NONE	\$ NONE
NONE	NONE	NONE	\$ NONE
NONE	NONE	NONE	\$ NONE

4. How much cash do you and your spouse have? \$ NONE

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
NONE	\$ NONE	\$ NONE
NONE	\$ NONE	\$ NONE
NONE	\$ NONE	\$ NONE

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home
Value NONE

Other real estate
Value NONE

Motor Vehicle #1
Year, make & model NONE
Value NONE

Motor Vehicle #2
Year, make & model NONE
Value NONE

Other assets
Description NONE
Value NONE

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
<u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
<u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>
<u>NONE</u>	\$ <u>NONE</u>	\$ <u>NONE</u>

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
<u>NONE</u>	<u>NONE</u>	<u>NONE</u>
<u>NONE</u>	<u>NONE</u>	<u>NONE</u>
<u>NONE</u>	<u>NONE</u>	<u>NONE</u>

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ <u>NONE</u>	\$ <u>NONE</u>
Are real estate taxes included? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ <u>NONE</u>	\$ <u>NONE</u>
Home maintenance (repairs and upkeep)	\$ <u>NONE</u>	\$ <u>NONE</u>
Food	\$ <u>NONE</u>	\$ <u>NONE</u>
Clothing	\$ <u>NONE</u>	\$ <u>NONE</u>
Laundry and dry-cleaning	\$ <u>NONE</u>	\$ <u>NONE</u>
Medical and dental expenses	\$ <u>NONE</u>	\$ <u>NONE</u>

	You	Your spouse
Transportation (not including motor vehicle payments)	\$ <u> NONE </u>	\$ <u> NONE </u>
Recreation, entertainment, newspapers, magazines, etc.	\$ <u> NONE </u>	\$ <u> NONE </u>
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	\$ <u> NONE </u>	\$ <u> NONE </u>
Life	\$ <u> NONE </u>	\$ <u> NONE </u>
Health	\$ <u> NONE </u>	\$ <u> NONE </u>
Motor Vehicle	\$ <u> NONE </u>	\$ <u> NONE </u>
Other: <u> NONE </u>	\$ <u> NONE </u>	\$ <u> NONE </u>
Taxes (not deducted from wages or included in mortgage payments)		
(specify): <u> NONE </u>	\$ <u> NONE </u>	\$ <u> NONE </u>
Installment payments		
Motor Vehicle	\$ <u> NONE </u>	\$ <u> NONE </u>
Credit card(s)	\$ <u> NONE </u>	\$ <u> NONE </u>
Department store(s)	\$ <u> NONE </u>	\$ <u> NONE </u>
Other: <u> NONE </u>	\$ <u> NONE </u>	\$ <u> NONE </u>
Alimony, maintenance, and support paid to others	\$ <u> NONE </u>	\$ <u> NONE </u>
Regular expenses for operation of business, profession, or farm (attach detailed statement)	\$ <u> NONE </u>	\$ <u> NONE </u>
Other (specify): <u> NONE </u>	\$ <u> NONE </u>	\$ <u> NONE </u>
Total monthly expenses:	\$ <u> NONE </u>	\$ <u> NONE </u>

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

Yes No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? Yes No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

Yes No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am incarcerated since July 24, 1990 to the present, and I'm not allowed to work for payment, and only income is institutional wage of \$2.25 per week which such funds I need and use to pay filing fees, costs for legal, family and friend mails, and buy hygiene products for personal use. (Enclosed please find a copy of my inmate month statement).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 30, 2022

Bernabe Encarnacion
(Signature)

~~EXHIBIT~~

STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES
 ATTICA CORRECTIONAL FACILITY
 INMATE STATEMENT FOR THE PERIOD 04/30/22 THRU 05/31/22

 * NAME : ENCARNACION BERNABE DEPT ID:91B0943 CELL LOC:0C-26-41S NYSD:06690722 *

 * *****
 * *****

FACILITY	DATE	TRANSACTION (COMMENTS)	TR-NUM	RECEIPT(+)	DISBURS(-)	COLLECTED AMT	STATEWIDE SPENDABLE	STATEWIDE ACCT BAL
		STARTING BALANCE AT ATTICA						
		BALANCE FORWARD						
ATTICA	05/05/22	PAYOUT RCPT	077943	2.25		.90	14.70	170.55
ATTICA	05/12/22	PAYOUT RCPT	077943	2.25		.90	16.05	172.80
ATTICA	05/13/22	POSTAGE			.26	.00	15.79	172.54
ATTICA	05/19/22	PAYOUT RCPT	077943	2.25		.90	17.14	174.79
ATTICA	05/26/22	PAYOUT RCPT	077943	2.25		.90	18.49	177.04
		MONTHLY ENDING TOTALS		9.00	.26	158.55	18.49	177.04
		ENDING BALANCE AT ATTICA						
		20% OF AVERAGE 6 MO SPENDABLE BALANCE		5.75	20% OF AVERAGE 6 MO DEPOSIT AMT		177.04	
							9.75	

LAGGED PAYROLL, DAYS LAGGED - 15 AMOUNT LAGGED - 14.61
 THIS AMOUNT WILL BE ADDED TO YOUR ACCOUNT UPON RELEASE ONLY

REASON		DATE IMPOSED	NOTES	TOTAL OWED	COL. MTDATE	COL TO-DATE	BALANCE DUE	CNTY/ORI CAS
FED FILE FEE	USDCNDNY	11/03/21	921CV986	350.00	1.80	64.39	285.61	
FED FILE FEE	USDCWDNY	02/22/22	21 3024	505.00	1.80	27.95	477.05	
FED FILE FEE	USDCWDNY	02/22/22	21 CV 06665 CJS	350.00	.00	66.21	285.79	

* ENCUMBRANCES ESTABLISHED AND PAID IN THE CURRENT MONTH.

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BERNABE ENCARNACION,

Plaintiff,

Civil Action No.
9:15-CV-1411 (BKS/DEP)

v.

ANTHONY ANNUCCI, et al.

Defendants.

DAVID E. PEEBLES
CHIEF U.S. MAGISTRATE JUDGE

ORDER

During a telephone conference conducted on November 9, 2017, the court directed the clerk to appoint *pro bono* counsel for the plaintiff who is limited in his ability to speak and read English and, in addition, suffers from a vision impairment.

The court is authorized only to "request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1); see *Mallard v. United States District Court*, 490 U.S. 296, 298 (1989). Section 1915(e) does not, however, permit a federal court to require an unwilling attorney to represent an indigent litigant in a civil case. See *Mallard*, 490 U.S. at 298, 309. Appointment of *pro bono* counsel in a case such as this is

EXHIBIT 2

therefore contingent upon the availability of an attorney willing to voluntarily accept an appointment. "If no [one] agrees to represent the plaintiff, there is nothing more the court can do." *Rashid v. McGraw*, No. 01-CV-10996, 2002 WL 31427349, at *1 n.1 (S.D.N.Y. Oct. 29, 2002).

In this instance, because Elmer Robert Keach, III, Esq., has voluntarily agreed to accept the assignment, and because the court finds good cause to assign counsel to represent plaintiff, it is therefore hereby

ORDERED as follows:

(1) The following named attorney is hereby appointed as *pro bono* counsel for plaintiff, effective immediately:

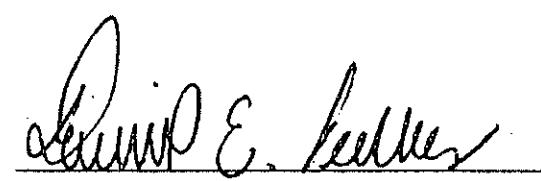
Elmer Robert Keach, III, Esq.
Attorney at Law
Law Offices of Elmer Robert Keach, III, P.C.
One Pine West Plaza – Suite 109
Albany, New York 12205
Tel. No. (518) 434-1718

(2) Plaintiff's motion for summary judgment (Dkt. No. 55) is deferred at this time and will be reinstated once a telephone conference is conducted before the court with counsel to discuss the status of this action, a briefing schedule for plaintiff's motion for summary judgment, and a deadline for the filing dispositive motions.

(3) A conference will be held by telephone with counsel only for all parties on **March 8, 2018 at 10:00 AM**. Defendants' counsel is directed to

make arrangements for initiating the call to plaintiff's counsel and chambers, which can be reached at (315) 234-8620.

(4) The clerk of the court shall serve a copy of this order upon plaintiff by regular mail and upon counsel by electronic mail.



David E. Peebles
David E. Peebles
U.S. Magistrate Judge

Dated: November 27, 2017
Syracuse, New York