

22-6676

No. _____

FILED

NOV 18 2022

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NICODEMO S. SCARFO — PETITIONER
(Your Name)

vs.

UNITED STATES — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THIRD CIRCUIT COURT of APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Nicodemo S. Scarfo Reg# 01381-748
(Your Name)

Federal Correctional Institution
P.O. Box 420

(Address)

Fairton, NJ 08320-0420
(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

**WHAT REMEMDY IS AVAILABLE FOR PETITIONER, WHERE COURT APPOINTED ATTORNEY IS
GRANTED WITHDRAWL FROM FILING A PETITION FOR CERTIORARI, WHEN THE ATTORNEY
AVERRED TO THE EXACT LEGAL QUESTION IN A PETITION FOR REHEARING EN BANC?**

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5,6
CONCLUSION	7

INDEX TO APPENDICES

(APPENDIX A) - ORDER from Third Circuit Court of Appeals, denying Petitioner's motion to Appoint CJA Counsel for Filing of Certiorari in Supreme Court. Dated 10/19/22

(APPENDIX B) - OPINION for US v Scarfo, 41 F.4th 136 (3rd Cir. 2022); 2022 US App LEXIS 19690, *157-161 (3rd Cir.). Petitioner has only attached the relevant portion to this petition due to it's length. Dated 7/15/22

(APPENDIX C) - ORDER denying Scarfo's Rehearing En Banc. Dated

(APPENDIX D) - PETITION for Rehearing En Banc. App. Ct. D.I. 331, filed 8/29/22

(APPENDIX E) - EMAIL from Scarfo to Mr. Riley, dated 9/26/22

(APPENDIX F) - EMAIL from Scarfo to Mr. Riley, dated 10/2/22

(APPENDIX G) - Scarfo MOTION to Circuit Court for appointment of counsel, dated 10/11/22

(APPENDIX H) - Riley's MOTION to Circuit Court to WITHDRAW Representation. App. Ct. D.I. 344, filed 10/6/22

(APPENDIX I) - Riley's NOTICE to Appellant That He May File for Certiorari Pro Se. App. Ct. D.I. 345, filed 10/6/22

(APPENDIX J) - Circuit Court ORDER granting Riley's motion to withdraw from representing Scarfo, dated 10/2/22

(APPENDIX K) - District Court ORDER barring any more motions in US v Scarfo. Dist. Ct. D.I. 1275, filed 7/17/15

(APPENDIX L) - Riley's LETTER to District Court seeking leave to file a motion for a new trial. Dist. Ct. 1280, filed 7/23/15

(APPENDIX M) - District Court's LETTER response denying Riley's request to file a motion for a new trial. Dist. Ct. D.I. 1281, filed 7/24/15

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Wilkins v. US, 441 U.S. 468, 99 S. Ct. 1829, 60 L. Ed. 2d 365 (1979)	5,6,7
Austin v. US, 513 U.S. 5, 115 S. Ct. 380, 130 L. Ed. 2d 219 (1994)	5,6
Holmgren v. US, 217 U.S. 509, 30 S. Ct. 588, 54 L. Ed. 861 (1910)	5,6
US v. Coney, 120 F. 3d 26 (3d Cir. 1997)	5
Nnebe v. US, 534 F. 3d 87 (3d Cir. 2008)	6
Ogden v. US, 112 F. 523 (3d Cir. 1902)	5,6

STATUTES AND RULES

Criminal Justice Act Plan for the Court of Appeal for the Third Circuit	
Court of Appeals, III-4,6	5
Supreme Court Rule 10	5
Federal Rules of Appellate Procedure, 35(b)(1)(A),(B)	5
Third Circuit Local Appellate Rules, 35.1	5
Third Circuit Local Appellate Rules, 109.2(b)	5

OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[X] reported at US v. SCARFO, 41 F. 4th 136, (3rd. Cir.,) ⁽²⁰²²⁾; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was 7/15/22 ; 10/19/22.

[] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 9/22/22, and a copy of the order denying rehearing appears at Appendix C.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Criminal Justice Act Plan for the Court of Appeals for the Third Circuit

Appendix.

The Judicial Council of the Third Circuit, pursuant to the provisions of the Criminal Justice Act of 1964, 18 U.S.C. Sec. 3006A, as amended by the Act of October 14, 1970 (P.L. 91-447, 91st Cong., 84 Stat. 916), for the purpose of supplementing the plans approved by the district courts within the circuit, adopts the plan set out hereinafter to provide and secure adequate representation on appeal for any person described in 18 U.S.C. Sec. 3006A(a), who is financially unable to employ counsel.

CHAPTER 3. Appointment of Counsel

4. The court, in its discretion, may at any state of the appeal proceedings, substitute one appointed counsel for another.
6. If, after an adverse decision by the Court of Appeals, a review by the Supreme Court of the United States is to be sought, the appointed attorney shall if requested to do so after communication with the person for whom the attorney is appointed, prepare a petition for certiorari and other necessary and appropriate documents in connection therewith.

STATEMENT OF THE CASE

On 11/1/11, Petitioner and 12 others were indicted on a 25 count indictment (Petitioner only defendant with all 25 counts), which included 8 separate conspiracies (RICO, SEC fraud, wire fraud, money laundering, obstruction of justice, bank fraud, making false statements, and 922(g)). Criminal case number 11/740-RBK

On 11/4/11, Petitioner was appointed, Michael E. Riley, as CJA counsel. Dist. Ct. D.I. 47.

On 3/7/12, Petitioner was appointed, Jeremy C. Gelb, as CJA co-counsel to Mr. Riley. Dist. Ct. D.I. 129.

On 1/7/14, the trial began with 7 defendants. Trial lasted 6 months (not including several weeks of jury selection).

On 7/3/14, Petitioner and 3 co-defendants were convicted on all counts, while 3 were acquitted on all counts.

On 7/28/15, Petitioner was sentenced to 360 months of incarceration, 5 years supervised release, and \$14 million (approx.) in restitution.

On 7/29/15, the Third Circuit appointed Mr. Riley to continue to represent the Petitioner on appeal. Case no 15-2811. APPENDIX H, p.2

On 7/15/22, in a 170 page Precedential Opinion the Third Circuit Panel upheld Petitioner's conviction. APPENDIX B

On 8/29/22, At the request of the Petitioner, Mr. Riley petitioned the Circuit Court for a Rehearing En Banc. APPENDIX D

On 9/22/22, Circuit Court denied Petitioner's request for a Rehearing En Banc. APPENDIX C

On 9/23/22, Petitioner contacted Mr. Riley and instructed him to file a petition for a writ of certiorari in this Court, and Petitioner understood after that conversation that a petition would be filed. APPENDIX E

On 10/2/22, Petitioner emailed Mr. Riley informing him that Petitioner formally request that Mr. Riley file for a writ of certiorari in this Court. APPENDIX F

On 10/11/22, Petitioner mailed via certified mail a letter/motion to the Circuit Court with Petitioner's dilemma concerning Mr. Riley's Motion to Withdraw and the need for appointed counsel to file in this Court. APPENDIX G

On 10/12/22, A day after mailing the letter/motion to the Circuit Court, Petitioner received via legal mail, Mr. Riley's Motion to Withdraw. APPENDIX H,I

On 10/12/22, the Circuit Court granted Mr. Riley's Motion to withdraw. APPENDIX J

On 10/19/22, the Circuit Court denied "Petitioner's Motion to Appoint CJA Counsel for Filing of Certiorari in Supreme Court". APPENDIX A

REASONS FOR GRANTING THE PETITION

Petitioner comes now before this Honorable Court, appealing the Third Circuit Court of Appeals denial of Petitioner's Motion to appoint counsel so that a petition for certiorari be filed before this Court. See APPENDIX A. Petitioner humbly requests this Court to vacate Petitioner's conviction, and remand back to the Third Circuit Court of Appeals to reenter Petitioner's conviction and appoint counsel to file a timely writ of certiorari, in accordance with this Court's procedures prescribed in *Wilkins v U.S.*, 441 U.S. 468 (1979)

The Criminal Justice Act of 1964, Codified as 18 U.S.C. 3006A, was enacted to permit courts to appoint an attorney for an indigent defendant in a criminal matter. See *Austin v US*, 513 U.S. 5, 6 (1994). This appointment extended to the appeal stage. *Id.* Which includes the filing for certiorari in this Court. WILKINS at 469. Unless that attorney felt that the issue was frivolous. *AUSTIN* at 8.

In following Rule 10 of this Court, counsel can determine whether an argument will pass muster to file for certiorari. This rule acts like a guideline to assist attorney's avoid filing of frivolous arguments before this Court, especially those requested by his appointed client. In the Third Circuit Court of Appeals Criminal Justice Act Plan, an appointed attorney "shall if requested" by the client file a petition for a writ of certiorari. See 3rd Cir. CJA Plan, III-6 and WILKINS at 469. Unless the appointed attorney finds that the issue is "frivolous" (*AUSTIN* at 8) or "lack[ed] legal merit" (3rd L.A.R. 109.2(b)). Petitioner understands these rules help prevent a flood of frivolous filings before this Court. But what if, an appointed attorney should aver to the very same argument in a petition for Rehearing En Banc? What should the client believe?

Since 11/4/11, Michael E. Riley was appointed to Petitioner under the CJA (eleven years in the instant matter). See APPENDIX H, p.1 He was reappointed by the Circuit Court to represent Petitioner on appeal. See APPENDIX H, p.2. It was a long and arduous representation; trial was long and complex; motion practice was extensive. A lengthy opening brief was filed in a consolidated appeal, where 8 points were raised. One of those points was Point VII: APPELLANT SEEKS REMAND REQUIRING THE DISTRICT COURT'S ORDER DENYING ACCESS TO APPELLANT WAS IN VIOLATION OF CONSTITUTION GUARANTEES." APPENDIX I, p.2

All of Petitioner's arguments were denied and Petitioner's conviction was upheld in a precedential opinion. See APPENDIX B. Upon Petitioner's request Mr. Riley filed a petition for Rehearing En Banc concerning Point VII. See APPENDIX D. In that petition Mr. Riley averred under 3rd L.A.R. 35.1:

"I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the U.S. Court of Appeals for the Third Circuit and the Supreme Court, and that consideration by the full court is necessary to secure and maintain uniformity of decisions. Specifically, under Rule 33(b)(1), the panel's decision under Section VII. Brady Issues, Subsection A. Denial of Scarfo's Request to file a Motion for a New Trial Pursuant to Rule 33(b), conflicts with *Ogden v United States*, 112 F. 523 (3d Cir 1902); *Holmgren v United States*, 217 U.S. 509 (1910)..." See APPENDIX D, pp. 1-2.

The petition for Rehearing was denied. See APPENDIX C. Soon after being notified by Mr. Riley, Petitioner contacted Mr. Riley and requested that he file a petition for certiorari in this Court, and after that conversation Petitioner believed that Mr. Riley would file the petition. See APPENDIX E. Only a week later Mr. Riley changed course, and said that he felt the issue did not have merit filing for certiorari. See APPENDIX F. This is the very same issue Mr. Riley averred to in his motion for Rehearing En Banc. See APPENDIX D. Nine days later, Petitioner filed a letter/motion to the Circuit Court concerning the dilemma with Mr. Riley and the need to have other counsel appointed or mandate Mr. Riley to file the petition for certiorari. See APPENDIX G.

A day later Petitioner received, via legal mail, Mr. Riley's Motion to Withdraw. See APPENDIX H,I. Mr. Riley's motion was granted (APPENDIX J) and Petitioner's motion was denied (APPENDIX A).

Petitioner can not understand why Mr. Riley would aver the merits of a claim, then without any additional facts or occurrences, aver that the very same argument lacked merit. Petitioner takes this as just a mechanism to be excused from representing Petitioner. Petitioner can not also understand why the Circuit Court did not recognize such a contradiction.

In WILKINS this Court afforded the petitioner a chance to file a timely petition and have counsel appointed. There are two exceptions to WILKINS and Petitioner's situation, that is; WILKINS appointed attorney never averred to the merits of the argument in a filing before the entire Circuit Court; and this Petitioner motioned the Circuit Court for the appointment of counsel. See WILKINS at 469; also APPENDIX G and A.

WILKINS was later modified by AUSTIN. In AUSTIN this Court "consider[ed] whether an attorney for an indigent defendant has a duty to file a petition for certiorari when the defendant so requests, [this Court] directed the Circuit Judicial Counsel to revise their Criminal Justice Plans, if necessary, so that counsel would not be obliged to file petitions for certiorari that would present FRIVOLOUS CLAIMS in violation of Supreme Court rules." (emphasis added) US v Coney, 120 F.3d 26, 28 (3d Cir. 1997). In response the Third Circuit of Court of Appeals installed Local Appellate Rule 109.2(b). The AUSTIN court specifically used the term "frivolous" and 3rd Cir. L.A.R. 109.2(b) states if a claim "lack[s] legal merit". Both of these terms are in stark contradiction to an attorney whom avers that a claim is worthy of review under the "rigorous requirements of FRAP 35 and 3rd Cir LAR 35.1". CONEY at 27.

If Petitioner were to be granted appointment of counsel and adequate time to file, one question would be presented to this Court: CAN A DISTRICT COURT ENJOIN A DEFENDANT FROM FILING A MOTION FOR A NEW TRIAL IN A CRIMINAL MATTER? Petitioner was denied the right to file a motion for a new trial by order of the District Court, "IT IS HEREBY FURTHERED ORDERED that no further motions shall be filed in this case, any such motions filed will be disregarded by the Court." APPENDIX K. The District Court made verbal statements that any motions will not be accepted or considered. See APPENDIX D, pp. 2-3. When Mr. Riley asked for leave to file a motion for a new trial, the District Court denied the request. See APPENDIX L and M, respectively. For the most part Petitioner stands on the arguments made in the Petition for Rehearing En Banc. APPENDIX D

The little precedent that does exist plainly states that a defendant has an "absolute right" to file a motion for a new trial in a criminal matter, and that motion be considered by the court. Ogden v. US, 112 F. 523, 525 (3d Cir. 1902) ("ODGEN ISSUE"). That a reviewing court examine the issue de novo. Id. at 526. This Court affirmed the need for de novo review, in explaining OGDEN. Holmgren v. US, 217 U.S. 509, 521-22 (1910)

The Circuit Court panel in its precedential opinion, upheld the District Court's discretion in the matter, while only pointing to civil cases as examples. See APPENDIX B, SCARFO at *157-161. Stating that a district court "should be" allowed the same deference in a criminal matter. ID at *169. That statement to Petitioner implies that district courts currently do not have that discretion in criminal cases, but should be. The panel further relegated OGDEN to a footnote. Id. at *160, n. 114.

Petitioner requires counsel in order to present the OGDEN ISSUE before this Court. Even though, it is not required that Petitioner show that the petition would be successful. Nnebe v US, 534 F. 3d 87, 91 (2d Cir. 2008). Without access to the Record on Appeal (which is in excess of 80,000 pages, not including the tens of thousands of pages of trial exhibits), and the lack of a formal education in law, while incarcerated during a pandemic makes it virtually impossible to do so.

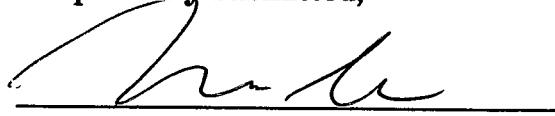
The OGDEN ISSUE is one that needs updated authority, and to allow the Third Circuit's decision stand, which is a complete reversal of its own precedent in OGDEN, would contravene the law of the land. Can this Court imagine a criminal defense attorney in a mega-trial or complex case, advise his client that, "we should not file so many motions or the court may bar us from filing any more, including a motion for a new trial."

CONCLUSION

To have Petitioner, who has had appointed-counsel for the past eleven years, without access to the voluminous Record on Appeal, while incarcerated during a pandemic, petition this Court for a writ of certiorari concerning the OGDEN ISSUE is unjust. Petitioner prays that this Court, vacate the judgment of the Third Circuit Court of Appeals, and remand back to the Court of Appeals, in order to reenter the judgment affirming the Petitioner's conviction -- so that Petitioner has the full 90 days to file for certiorari -- and appoint new counsel or direct Mr. Riley to file the petition for a writ of certiorari, in accordance with this Court's prescribed procedures in WILKINS.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 1/11/23