

No. 18-6676

IN THE  
SUPREME COURT OF THE UNITED STATES

ORIGINAL

Supreme Court, U.S.  
FILED

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Herve Wilmore, Jr. — PETITIONER  
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals  
For the Eleventh Circuit

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

PETITION FOR WRIT OF CERTIORARI

Herve Wilmore, Jr., #02634-104

(Your Name)

Federal Correctional Complex-Low, Unit B-3

(Address)

P.O. Box 1031  
Coleman, FL 33521  
(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1) WHETHER, MR. WILMORE'S RIGHT TO BE TRIED ON CHARGES ACCEPTED BY A GRAND JURY, AND MR. WILMORE'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WERE VIOLATED, WHEN THE GOVERNMENT WAS ALLOWED TO PROVE AN ESSENTIAL ELEMENT OF WIRE FRAUD 18 U.S.C. 1343 AT TRIAL, WITH FACTS NOT ALLEGED IN THE INDICTMENT, WHICH THEREBY IMPERMISSIBLY CONSTRUCTIVELY AMENDED THE INDICTMENT, IN VIOLATION OF THE GRAND JURY CLAUSE OF THE "FIFTH AMENDMENT"?

Herve Wilmore, Jr. v. United States

Case No.

Corporate Disclosure Statement  
As Required by Rule 29.6

- 1) Jack A. Fleischman, counsel at appellate level
- 2) Sidney Z. Fleischman, counsel at trial level
- 3) Delvin Jean-Baptiste, co-defendant
- 4) Neil Karadbil, AUSA, counsel for government at trial level
- 5) Honorable Robert N. Scola, Jr., United States District Court Judge, Southern District of Florida, presiding Judge at trial level.
- 6) Gregory E. Torfella, AUSA, counsel for the Government at the trial level
- 7) Patrick A. White, Magistrate Judge, United States
- 8) United States of America, Plaintiff/Appellee
- 9) Ferrer, Wifredo, Former United States Attorney
- 10) Herve Wilmore, Petitioner/Movant
- 11) Emily M. Smachetti, United States Attorney for the Southern District of Florida Appellee, Chief of Appellate Division
- 12) Benjamin G. Greenburg, United States Attorney, Attorney for Appellee
- 13) Honorable Lurana Snow, Magistrate Judge

14)KEVIN C. NEWSOM- 11TH CIR. JUDGE  
15)WILLIAM PRYOR- 11TH CIR. JUDGE  
16)SOLICITOR GENERAL- NOEL FRANCISCO | ^ ii -

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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**

For cases from **federal courts**:

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

reported at 2018 U.S. App. Lexis 24541; 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 B to the petition and is

reported at 2018 U.S. Dist. Lexis 41060; 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

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 8-28-2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 10-22-2018, 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).

The United States Court of Appeals for the Eleventh Circuit issued its Judgment for reconsideration on 10-22-2018. (See Appendix C). This petition is timely filed.

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

### Constitutional Provisions:

The requirement that a defendant be tried on the charges set forth in the Grand Jury Indictment finds its origin in the Fifth and Sixth Amendments of the U.S. Constitution. The Fifth Amendment commands that "No person shall be held to answer for a Capital or otherwise Infamous Crime, unless on a presentment or indictment of a Grand Jury," and the Sixth Amendment gives every defendant the right to be informed of the nature and cause of the accusation."

In violation of this principle, Constructive Amendment occurs, which requires reversal per se.

### Statutory Provisions:

Conspiracy to commit wire fraud, and commit aggravated identity theft, all in violation of 18 U.S.C. 371 (Count 1); two counts of wire fraud in violation of 18 U.S.C. 1343 and 2 (Counts 4-5); and two counts of aggravated identity theft, in violation of 18 U.S.C. 1028(9)(1) and 2 (Counts 24-25). (CR-DE #246).

## STATEMENT OF THE CASE

Herve Wilmore, Jr. is a federal prisoner serving a 240 month sentence after a jury convicted him in 2014 of conspiracy, 2 counts of wire fraud, and 2 counts of aggravated identity theft. Mr. Wilmore and one of his co-defendants directly appealed their convictions in a joint appeal. The Eleventh Circuit Court of Appeals affirmed and then denied Wilmore's co-defendant's motion for rehearing on November 10, 2015. Mr. Wilmore did not file a petition for a Writ of Certiorari from the United States Supreme Court.

On January 31, 2017 Mr. Wilmore filed a timely 28 U.S.C. §2255 motion to vacate his sentence, arguing that his trial and appellate counsel were constitutionally ineffective, because they failed to raise the issue of a Constructive Amendment, because the Indictment charged him with registering and causing to be registered five separate P.O. boxes, but Mr. Wilmore's charges in Counts four and five contained facts that were not included in the indictment, as those facts were not registered and not caused to be registered, and thereby denying Mr. Wilmore's right to be tried only on those charges presented to and accepted by a Grand Jury. As a result of the "Constructive Amendment," Mr. Wilmore's Constitutional right to effective assistance of Counsel as provided by the Sixth Amendment was also violated. On February 20, 2018, Mr. Wilmore sought to add a second claim to his 2255 motion. Mr. Wilmore asserted that his trial and appellate Counsel had been Constitutionally ineffective because they failed to raise the issue of a "Constructive Amendment" based on the fact that the government relied on the mailing of the

refund checks (element of mail fraud), to prove wire fraud. To which the government concedes (See CV-Doc 37 p.9), which states, "Movant Wilmore's causing the mailing of the refund is not even an element of any offense charged - only evidence that supports his guilt."

The district court determined that Mr. Wilmore had not shown that his counsel was ineffective for his first claim, and denied his § 2255 motion. The district court also denied Mr. Wilmore's motion to add a claim because the amendment would be futile, as the claim was time barred.

The district court denied Mr. Wilmore a Certificate of Appealability. Mr. Wilmore filed timely objections, and a timely Notice of Appeal. Mr. Wilmore was denied a COA in the Eleventh Circuit Court of Appeals on 8-28-2018. Mr. Wilmore then filed a timely Motion for Reconsideration, which was denied on 10-22-2018.

Mr. Wilmore now petitions the Supreme Court for a Writ of Certiorari.

#### CASES

U.S. Court of Appeals No. 18-11653-J

U.S. District Court No. 17-60278-cv-SCOLA

U.S. District Court No. 13-60029-cr-SCOLA

## REASONS FOR GRANTING THE PETITION

Mr. Wilmore respectfully asks this Honorable Supreme Court to liberally construe his arguments pursuant to Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

The petition should be granted because the Indictment alleged that "Mr. Wilmore registered and caused to be registered five separate mailboxes." Overt Act K (CR-Doc. 246 p.7)

The P.O. boxes associated with counts four "Apt 1" (CR-DE 607 p.84) and count five "Apt 12" (CR-DE 607 p.77), were not a part of the indictment, because they were not registered and not caused to be registered, and they increased the indictment from 5 P.O. boxes to 7 P.O. boxes. Citing Stirone v. USA, 361 U.S. 212, 219, 80 S.Ct. 270, 274, 4 L.Ed.2d 252 (1960). A defendant has the right to be tried on felony charges returned by a Grand Jury Indictment. See Appendix F.

### Visual of the Facts

1. (Gx-6a) mailbox 128 Application to support registered and caused to be registered
2. (Gx-6b) mailbox 191 Application to support registered and caused to be registered
3. (Gx-6c) mailbox 192 Application to support registered and caused to be registered
4. (Gx-6d) mailbox 199 Application to support registered and caused to be registered
5. (Gx-6e) mailbox 152 Application to support registered and caused to be registered

See Appendix D - Government's Exhibit List

6. Mailbox numbers in Count Four Apt 1, not registered and not caused to be registered (See CR-DE 607 p.84)
7. Mailbox numbers in Count Five Apt 12, not registered and not caused to be registered (See CR-DE 607 p.77)

These facts pave the way for the Supreme Court to grant Mr. Wilmore a Writ of Certiorari authorizing him to appeal the denial of his 28 U.S.C. § 2255 Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. 2253(C)(2). See Slack v. McDaniel, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000), Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003).

Mr. Wilmore contends that Reasonable Jurists would find the previous court's assessment of the Constitutional claims debatable or more likely wrong, or that the issue deserves encouragement to proceed further respectfully.

The Eleventh Circuit Court of Appeals used facts that Mr. Wilmore Objected to, in order to deny Mr. Wilmore on the merits in its Order. See Objections as "Appendix E" First objection. Finally, Mr. Wilmore never received a de novo review in the previous courts, nor liberal construction of the Argument.

## CONCLUSION

Were the facts in Counts Four and Five Registered and caused to be registered as alleged in the indictment (CR-DOC. 246 p.7)? No. Therefore, it was a constructive Amendment, which requires reversal per se. Mr. Wilmore's entire Indictment requires reversal per se.

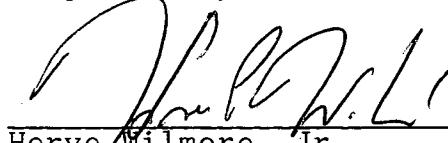
Therefore, Trial and Appellate Counsel were ineffective for failing to raise this meritorious claim. See Strickland v.

Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Finally, the District Court could not approve the Recommendation Report and the Eleventh Circuit Court of Appeals could not Affirm the denial. See Appendix G and Appendix A.

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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10-31-18  
Date