

No. 18-6676

IN THE  
SUPREME COURT OF THE UNITED STATES

In Pro se, HERVE WILMORE, JR. - Petitioner  
vs.  
UNITED STATES OF AMERICA - Respondent

On Petition for a re-hearing of his  
"Writ of Certiorari"

Herve Wilmore, Jr., #02634-104  
Federal Correctional Complex-Low, Unit B-3  
P.O. Box 1031  
Coleman, FL 33521

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Questions Presented

1) Consistent with settled law established by the Supreme Court to liberally Construe Arguments of Pro se litigants.

Did the District Court err in dismissing Pro Se complaint, without allowing Petitioner opportunity to present evidence on his claim of a Constructive Amendment, based on evidence presented at Petitioner's trial, which is in violation of the Grand Jury Clause of the Fifth Amendment?

2) Consistent with Rule 15(c) Relation back Doctrine.

Did an Actual Constructive Amendment, relate back to a Constructive Amendment?

3) Consistent with the Actual innocence exception on the issue of untimeliness.

Did the District Court endorse a fundamental miscarriage of justice, to keep Petitioner who is Actually Innocent imprisoned on the issue of untimeliness, after the government conceded to the fact the only element that supports his guilt, comes from an uncharged offense?

CERTIFICATE

The Petitioner certifies: 1) that the grounds on which this request for re-hearing of Writ of Certiorari are limited to Intervening Circumstances of Substantial or Controlling effect and other substantial grounds not previously presented; 2) that the petition for rehearing is presented in good faith and not for delay; and 3) that in this proceeding the constitutionality of an "Act of Congress" is drawn into question according to Rule 28 U.S.C. 2403.

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Statutes and Rules

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Conspiracy to commit Wire fraud and Aggravated Identity Theft (Count 1) (CR-Doc 246)									
18 U.S.C. 1028(a)	...	...	...	...	...	...	...	...	
Knowingly transfer, possess or use, without lawful authority, the means of identification of another person in violation of 18 U.S.C. 1028A									
18 U.S.C. 1343	...	...	...	...	...	...	...	...	2
Knowingly and intentionally devise and intend to devise a scheme and artifice to defraud, and for obtaining money or property by means of false and fraudulent pretenses, representations or promises, and for the purpose of executing such scheme and artifice, <u>transmit and cause to be transmitted</u> by means of wire communication in interstate commerce certain writing, signs, signals, pictures and sounds, in violation of 18 U.S.C. 1343. See Indictment (CR-Doc 246)									

## Constitutional Provisions Involved

Fifth Amendment Grand Jury clause

Fifth Amendment Due Process Clause

Fourteenth Amendment right to a Fair Trial

Sixth Amendment right to be informed of the Nature and Cause

Sixth Amendment right to Effective Assistance of Counsel

## Reasons for Granting the Writ

Comes now, Petitioner, Herve Wilmore, Jr., Pro se and in forma pauperis, hereby petitions this Court for a re-hearing of his "Writ of Certiorari," according to Rule 44 of the Supreme Court, to vacate, set aside or correct his sentence in the above-captioned case. In support of this brief, Mr. Wilmore prays as follows:

### Liberal Construction

Did the district Court err in dismissing Pro Se complaint, without allowing Petitioner opportunity to present evidence on his claim of a Constructive Amendment, based upon evidence presented at Petitioner's trial, which is in violation of the Grand Jury clause of the Fifth Amendment?

It is settled law of this Court, that the allegations of a pro se complaint, however "inartfully pleaded" are held to a less stringent standard than formal pleadings drafted by lawyers, and therefore entitled to liberal construction. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

A careful review of Mr. Wilmore's recommendation report, addressing the Constructive Amendment constitutional issue based upon evidence presented at trial, reveals the report failed to apply liberal construction, as afforded to pro se litigants. See (CV-Doc. #42). This fact supports the recommendation report was provided in violation of settled law of this Court.

Mr. Wilmore objected to the grounds of liberal construction in his objections before the District Court, which states "When reading liberally a pro se habeas petition, it should be interpreted to raise the strongest argument that it suggests." See Objections (CV-Doc #43 p.3). The District Court failed to raise the strongest

argument the issue suggests, for the following reasons:

The Recommendation Report states "Movant alleges that the Indictment alleged that Movant caused to be registered five different P.O. boxes at 4747 Hollywood Blvd. with specific numbers, but that Movant's "charges" contained only three P.O. boxes at the 4747 Hollywood Blvd. address and that those had different box numbers." See (CV-Doc #42 p.5).

This was misconstrued as all the facts were stated incorrectly.

In Contrary to the Recommendation Report, Petitioner stated that the Indictment alleged "Mr. Wilmore registered and caused to be registered" (Section 1343) 5 separate P.O. boxes: (a colon mark is used to separate two independant clauses). See (CV-Doc 1 p.4).

Moreover, in contrary to the Recommendation Report, Petitioner alleged that his "charges" contained single and double digit boxes at the 4747 Hollywood Blvd. address, and that he was actually Innocent as his conduct did not support that he registered and caused to be registered (Section 1343), any of the boxes associated with Counts Four and Five. See Petitioner's Section 2255 motion (CV-Doc #1 p.4).

Additionally, even if Petitioner did describe 5 specific P.O. boxes that were registered and caused to be registered (Section 1343), the Recommendation Report should have liberally construed this to 5 P.O. boxes identified by number, that the Indictment alleged were registered and caused to be registered (Section 1343) Overt Act K. of Count One Conspiracy to commit wire fraud. See (CR-Doc 246 p.7).

Further, in determining the merits, the Recommendation Report stated "Here, review of the Superseding Indictment reveals that, contrary to Movant's assertion, it did not specify that any particular boxes were used. Rather, it simply alleged that Movant used boxes at 4747 Hollywood Blvd. (Id.) See (CV-Doc #42 pp.6-7). Petitioner objected to these assertions before the District Court by saying, in contrary to the Recommendation Report Petitioner's Ground One issue asserted that the Superseding Indictment alleged that "Mr. Wilmore registered and caused to be registered five separate P.O. boxes" (Section 1343) Overt Act K. (CR-Doc #246 p.7) See Objections (CV-Doc 43 p.1).

The Recommendation Report misconstrued Petitioner's assertions to specific boxes being used to support a Constructive Amendment, when in truth Petitioner's assertion was the fact that the Indictment in Overt Act K. (Count 1) Conspiracy to commit wire fraud alleged that:

K. from on or about August 7, 2009, through on or about January 12, 2012, defendant HERVE WILMORE JR. registered and caused to be registered Five Separate mailboxes, each separate registration constituting an Overt Act with Post Office Box addresses, located at 4747 Hollywood Blvd., Hollywood, Florida, under the name Worldwide Income Tax Multi Services, LLC.

(CR-Doc #246 p.7).

(See also Section 2255 CV-Doc 1 p.4).

And in contrary to the Indictment, Petitioner's charges associated with Count Four "Apt 1" (CR-Doc 607 p.84) and Count Five "Apt 12" (CR-Doc 607 p.77) contained single and double digit P.O. boxes that did not exist, and there were no P.O. box applications to support Registered and caused to be registered as alleged. See (CR-Doc 605 pp. 182, 183)

Petitioner contends since the government chose to charge a Section of 1343 in Overt Act K. of Conspiracy (Count 1) in a particular manner, that in any conviction pursuant to that indictment, the prosecution is bound by the particular allegations contained therein, and it cannot obtain a conviction by proof of a violation of the same statute in a manner not alleged. This reflects the rule that once the Indictment presents a factual basis for an element of a crime, the Prosecution may not rest its proof of that element of the crime at trial on other facts. Citing Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, a defendant must be tried on charges made out against him in an indictment. The requirement that a defendant be tried only on the charges made out against him finds its origin in the Fifth and Sixth Amendments of the U.S. Constitution. The Fifth Amendment commands, "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 the cause of the accusation." Petitioner also contends since the P.O. boxes were not registered, it infringed on his right to have the Grand Jury make the charges on its own judgment,

Therefore, Trial Counsel and Appellate Counsel were constitutionally ineffective for failing to raise the Constructive Amendment Constitutional Issue based on evidence presented at trial, which requires reversal per se. See Strickland v. Washington, 466 U.S. 668, 687 (1984).

Petitioner's entire Indictment requires reversal per se, as Count 1 charged conspiracy to commit wire fraud and aggravated identity theft in violation of 18 U.S.C. § 371, and counts 4 and 5 charged wire fraud 18 U.S.C. §1343 and in relation to the wire fraud, aggravated identity theft as charged in 18 U.S.C. 1028(a) counts 24 and 25. See Indictment (CR-Doc 246)

These facts support the claim that had the District Court provided Mr. Wilmore with an opportunity to present evidence in support of his claims he would have prevailed, as a pro se complaint should be dismissed only if it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitle him to relief.

the Indictment (CR-Doc 246 p.7).

Rule 15(c) Relation Back Doctrine

Did an Actual Constructive Amendment, relate back to a Constructive Amendment?

Relation back of the amendments or pleadings relate back to the date of the pleadings when... the amendment asserts a claim or defense that arose out of the Conduct Transaction, or occurrence set out or attempted to be set out in the original pleading.

Fed. R. Civ. P. 15(c)(1)(B).

Petitioner's original petition asserted a Constructive Amendment / Actual Innocence claim, due to the fact the Indictment alleged Petitioner registered and caused to be registered 5 separate mailboxes in Overt Act K (CR-Doc #246 p.7), in Count One of Conspiracy to Commit Wire fraud and Aggravated Identity Theft, as charged in 18 U.S.C. § 371.

In contrary to the Indictment, the evidence presented at trial associated with Count Four "Apt 1" (CR-Doc #607 p.84) and Count Five "Apt 12" (CR-Doc #607 p.77) did not even exist, and there were no

P.O. box applications to support "registered and caused to be registered" Section 1343, as alleged in the indictment. See (CR-Doc #605 pp.182,183). See also Ground One of Petitioner's § 2255 motion (CV-Doc #1 p.4).

Petitioner contends that his motion to amend alleged an Actual Constructive Amendment / Actual Innocence claim in his second ground for relief in the Section 2255 motion. See (CV-Doc #41).

Petitioner argued that the government never presented evidence that Petitioner prepared the tax returns of the victims creating the wire transaction per statute (Actual Innocence). Rather, the government altered its theory from having to prove wire fraud 18 U.S.C. § 1343, as charged (CR-Doc #246), to proving mail fraud 18 U.S.C. § 1341 (uncharged) in the mailing of the refund checks to the Hollywood Postal Center where Petitioner rented or registered or caused to be registered five separate P.O. boxes. See (CR-Doc #605 pp.159,160,161).

The refund check associated with Count Four was mailed to 4747 Hollywood Blvd. Suite #101 Apt "1", a mailbox Petitioner did not sign for, and a mailbox that does not exist. The same could be said about Count Five. The refund check associated with this count was mailed to 4747 Hollywood Blvd. Suite #101 Apt. "12", again, a mailbox Petitioner did not sign for and a mailbox number that did not exist.

The mailing of the refund check was the only element and theory the government made an attempt to prove at trial, which is an element to a different offense than the offense charged

(Constructive Amendment).

Petitioner contends that the amended petition arose out of the same Conduct, Transaction or Occurrence set out or attempted to be set out in the original pleading. See Dean v. United States, 278 F.3d 1218, 1222-23 (11th Cir. 2002). Both grounds for relief attacked the indictment, however the District Court recharacterized Petitioner's meritorious claim to an insufficiency of the evidence argument, when in truth it was a Constructive Amendment / Actual Innocence argument. See (CV-Doc #41). See also Mayle v. Felix, 545 U.S. 644, 655, 125 S.Ct. 2562, 162 L.Ed.2d 528 (2005).

Finally, Petitioner also contends the amended claim (CV-Doc 41), set out the same common core of operative facts (P.O. box addresses) uniting the original and newly asserted claims.

#### Actual Innocence Exception on the Issue of Timeliness

Did the District Court endorse a fundamental miscarriage of Justice, to keep Petitioner, who is Actually Innocent, imprisoned on the issue of untimeliness, after the government conceded to the fact the only evidence that supports his guilt comes from an uncharged offense?

The government conceded on the record, to establishing Mr. Wilmore's guilt from a different offense than the offense charged (Actual Constructive Amendment). See government's response, which

states: "Petitioner's Causing the mailing of the refund is not even an element of any offense charged - only evidence that supports his guilt." See (CV-Doc #37 p.9).

This fundamental miscarriage of Justice was initially endorsed on direct appeal. The Opinion states in reference to the Substantive Counts (4, 5, 24, 25 CR-Doc #246) that "A reasonable Jury could also conclude Petitioner committed Wire fraud and Aggravated Identity Theft because the fraudulently obtained checks were sent to addresses that he rented and used." See United States v. Herve Wilmore, Jr., et al., 625 Fed. Appx. 366 (11th Cir. 2015)(per curiam)(unpublished).

This opinion is consistent with mail fraud elements (uncharged offense.) The opinion is also factually false, because Petitioner did not sign or register and cause to be registered the addresses associated with the Substantive Counts, which are:

(Count Four) 4747 Hollywood Blvd. Suite 101 Apt "1"

(CR-DE 607 pp.80-82, 84-86)

(Count Five) 4747 Hollywood Blvd. Suite 101 Apt "12"

(CR-DE 607 pp.73, 75-77)

Petitioner contends that his Motion to Amend alleging Actual Innocence / Constructive Amendment was recharacterized to an Insufficiency of the Evidence claim and then considered time barred.  
See (CV-Doc #41).

Finally, Petitioner addressed this issue before the District Court in his objections to the report, that a Constitutional Violation (Constructive Amendment), has resulted in the conviction of Petitioner, who is actually innocent. Therefore, the motion to

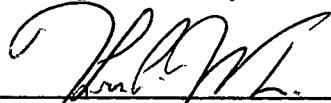
Amend and Leave (CV-Doc #41) should have been accepted as timely.  
See objection # two (CV-Doc #43 pp.3-5).

Conclusion

Mr. Wilmore asks this Honorable Court to overlook the issue of timeliness to consider Mr. Wilmore's meritorious claim, because failure to do so would result in a fundamental miscarriage of Justice, which would violate the Fifth Amendment Grand Jury clause, Fifth Amendment Due Process Clause, Fourteenth Amendment right to a Fair Trial, and the Sixth Amendment right to effective assistance of counsel.

Wherefore now, Mr. Wilmore urges this Honorable Court to issue a Certificate of Appealability authorizing him to appeal the District Court's denial of his constitutional and procedural claims presented herein. In the alternative, this Honorable Court may grant a C.O.A. and remand for further proceedings.

Respectfully Submitted,



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1-10-19

Date

VERIFICATION

Under penalty of perjury, as authorized in 28 U.S.C. § 1746,  
I declare that the factual allegations and factual statements  
contained in this document are true and correct to the best of my  
knowledge.



---

Herve Wilmore, Jr., #02634-104  
FCC Coleman Low, Unit B-3  
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Coleman, FL 33521

1-10-19

Date

PROOF OF SERVICE

I, Herve Wilmore, Jr., do swear or declare that on this date,  
January 10, 2019, as required by Supreme Court  
Rule 29, I have served the enclosed Motion for Leave to Proceed In  
Forma Pauperis and a Petition for a Rehearing for a Writ of  
Certiorari on each party to the above proceeding or that party's  
counsel, and on every other person required to be served, by  
depositing an envelope containing the above documents in the  
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Date

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