

18-7441

No. _____

In The

SUPREME COURT OF THE UNITED STATES

JAMES LEE WHEELER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

ORIGINAL

Supreme Court, U.S.
FILED

DEC 21 2018

OFFICE OF THE CLERK

On Petition for a Writ of Certiorari to the
Sixth Circuit United States Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

In Propria Persona
James Lee Wheeler #01227-017
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QUESTIONS PRESENTED FOR REVIEW

- 1) Was the lower Court's Action in failing to allow Liberal Construction of Petitioner's claims in conflict with this Court's holding in *Haines v. Kerner*, 404 U.S. 519 (1972)

List of Parties

**All Parties Listed in Caption*

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October 31, 2018

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JURISDICTION

The date on which the United States Court of Appeals decided my case was August 23, 2018.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 31, 2018, and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE**Fifth Amendment To The United States Constitution**

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment To The United States Constitution

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner, as a pro se incarcerated litigant, was entitled to relief from Judgment under **Fed. R. Civ. Proc. Rule 60 B**, as he presented a meritorious issue controlling the statute of limitation governing his FTCA complaint, and had the Court granted proper deference and construction of his pleadings, Petitioner was entitled to relief.

In June 2004, Petitioner was convicted of violating the Racketeer Influence and Corrupt Organizations Act (“RICO”), RICO conspiracy, and conspiracy with intent to distribute narcotics. The District court subsequently issued a forfeiture order based on Petitioner’s RICO convictions. On appeal, this court reversed the RICO convictions and affirmed the narcotics conspiracy conviction. See **United States v. Wheeler**, 535 F.3d 446 (6th Cir. 2008). On February 8, 2010, the district court entered an order partially vacating the preliminary order of forfeiture. **United States v. Wheeler**, No. 3:03-cr-00739-JGC-1, dkt. Entry 2120 (N.D. Ohio Feb. 8, 2010).

In July 2014, Petitioner commenced an action against the United States under the FTCA, alleging that the government’s forfeiture of real property in connection with his criminal case violated the FTCA because the property was sold at auction after his RICO convictions were overturned. The government moved to dismiss Petitioner’s complaint, arguing that (1) Petitioner failed to timely file an administrative tort claim within two years of accrual of his claim, as required by the FTCA, see **28 U.S.C. § 240(b), 2675(a)**, and (2) the complaint failed to state a claim upon which relief could be granted because the government never obtained title to the real properties at issue and was not responsible for the alleged sale of the properties at auction. Petitioner opposed the government’s motion and filed a motion for summary judgment.

A magistrate judge recommended that the government's motion to dismiss be granted. Under the FTCA, a tort claim against the United States is barred unless the claim is presented to the "appropriate Federal agency within two years after such claim accrues." **28 U.S.C. § 2401(b)**. The magistrate judge accepted the government's position that Petitioner's claim accrued on August 1, 2008, the date the Court reversed the RICO convictions. Alternatively, the magistrate judge found that Petitioner "surely [would have been] on notice as of December 29, 2008, the date of the mandate issued by the Sixth Circuit following the [denial of Petitioner's] petition for rehearing en banc." The magistrate judge concluded that, using either date of accrual, Petitioner's claim was barred because he did not file his administrative claim until April 2011. On January 18, 2017, over Petitioner's objections, the district court adopted the magistrate judge's report and recommendation and granted the government's motion to dismiss. Petitioner did not file a timely appeal from the district court's judgment. But in July 2017, he filed a motion for relief from judgment, pursuant to **Rule 60(b)**. For the first time, Petitioner argued that the proper date of accrual is February 8, 2010, the date that the district court entered its order partially vacating the forfeiture order. He also stated that, in granting the motion to dismiss, the court "pointed to no legal authority, yet rejected [his] argument that the date on which the Supreme Court denied [c]ertiorari was determinative, in accordance with **Clay v. United States**, 537 U.S. 522 (2003) [,] and **Heck v. Humphrey**, 512 U.S. 477 (1994)."

Construing Petitioner's motion as seeking relief under both subsections (1) and (6) of **Rule 60(b)**, the district court denied the motion. Noting that Petitioner failed to present his argument for the February 8, 2010, accrual date in his objections to the magistrate judge's report and recommendation, the court concluded that his motion presented no extraordinary circumstances

that would justify relief under **Rule 60 (b)(1)**. The court also addressed Petitioner's argument that the court erred by not applying **Clay** and **Heck** and found that neither case applied to Petitioner's current challenge.

Petitioner thereafter Moved the Court of Appeals for Panel Rehearing and Rehearing en banc, asserting that the Appeals Court and the District Court had failed to abide by this Court's seminal decision in **Haines v. Kerner**, 404 U.S. 519 (1972), the Petitioner as a pro se incarcerated litigant be granted liberal construction of his pleadings; in that Petitioner had presented a meritorious issue that the vacatur of the forfeiture Order as the controlling date for FTCA purposes.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE LOWER COURT'S DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN HAINES V. KERNER, 404 U.S. 519 (1972) AND ITS PROGENY, WHICH REQUIRES LIBERAL CONSTRUCTION OF A PRO SE INCARCERATED LITIGANT'S LEGAL FILINGS, ESPECIALLY WHERE AS HERE, PETITIONER PRESENTED A MERITORIOUS ISSUE WHICH NECESSITATED RELIEF FROM THE JUDGMENT BELOW. U.S.C.A. 5TH & 6TH AMENDMENTS.

Petitioner at all stages below, was proceeding pro se. In fact multiple motions for assistance in recruiting counsel were denied in both this and the Seventh Circuit.

In presenting his argument for relief an overriding and concise claim was set forth: that the United States had wrongly disposed of real property, **before** Petitioner's Direct Appeal was final. **United States v. Wheeler**, 535 F. 3d 446 (6th Cir. 2008). Indeed, that real property was disposed of even before the District Court Vacated the Forfeiture order whereon the real property

was taken. **United States v. Wheeler**, No 3:03-cr-00739-JGC. 1, Docket entry 2120 (N.D. OH, Feb. 8, 2010)

Petitioner commenced an FTCA action, **28 U.S.C. 2670** et seq, which the District Court dismissed as untimely. Throughout all proceedings, Petitioner adjured the court to recognize his Pro Se status and asked for liberal constructions. The record though, is devoid of any such considerations.

Petitioner brought a **Rule 60 (b)** motion, which unequivocally established that the FTCA action was timely, when juxtaposed with the vacatur of the forfeiture order. Rather than grant relief, the District court applied a strict analysis to the **Rule 60 (b)** motion and denied same.

On direct appeal, Petitioner argued that there was an abuse of discretion, especially as there was no attendance to **Haines v. Kerner**, *supra*, and its mandate.

The Court of Appeals denied that appeal, on the same grounds as the district court. Once again, despite extensive briefing by Petitioner, the Court not only did not afford the liberal construction required, but its decision is dehors any consideration or application of the **Haines** mandate.

When approaching the issue of the Forfeiture vacatur, it is clear that that factor is dispositive of the Factual determination that the FTCA was untimely. And, this issue is the very gravamen of Petitioner's argument. See **Kirk Excavating Construction Inc. v. Columbus Equipment Co.** 204 Fed Appx 492 (6th Cir. 2017).

Plainly stated, had a liberal construction been provided, the fact that this claim "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading", reversal would have resulted. *Ibid.*

Had the Court of Appeals, and the district court not applied Hyper technical rules to ignore factual truth, Petitioner's motion and Appeal would have been **Granted**.

In sum, this Court's actions directly conflict with, and abjure in applying the mandate of **Haines**, *Supra*.

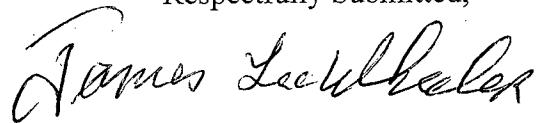
As such, this Court should grant Certiorari.

Accordingly, this Court is urged to Grant Certiorari, and Reverse the Decision of the Sixth Circuit that denied relief, and remand this matter with instructions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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