

No. 18-9829

**ORIGINAL**

Supreme Court, U.S.  
FILED

**JUN 14 2019**

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

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)

**RECEIVED**

**JUN 19 2019**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

## Questions Presented

Consistant with recalling the mandate to prevent injustice

- 1) Did the Court of Appeals affirm a Constructive Amendment,  
which requires reversal per se?
- 2) Whether Petitioner was convicted of an uncharged offense  
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

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to Support Timeliness and Jurisdiction  
under 28 U.S.C. § 1254(1)

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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 2015 U.S. App. LEXIS 14487; 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 \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished. See Appendix B.

☐ 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 4/18/2019.

☐ 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: 5/31/2019, 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 5/31/2019. (See Appendix D). 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 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).

## II. STATEMENT OF FACTS

The Petitioner, Herve Wilmore, JR., was charged in a forty-one (41) count indictment with one count of conspiring to defraud the Internal Revenue Service ("IRS"), 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(A)(1) and 2 (Counts 24-25). (CR-Doc #246).

Following an eight-day trial, the Jury returned verdicts finding Petitioner guilty on one count of conspiracy, two counts of wire fraud, and two counts of aggravated identity theft. (CR-Doc #442).

The District Court sentenced Petitioner to 240 months imprisonment, followed by three years Supervised Release, and ordered him to pay a Special Assessment of \$500. The District Court also ordered Petitioner to pay restitution of \$20,246,577.00. (CR-Doc #572).

The Judgment was entered on July 7, 2014 (CR-Doc #574). Petitioner and one of his co-defendants, Delvin Jean Baptiste, appealed. On August 18, 2015, the Eleventh Circuit Court of Appeals affirmed Petitioner's Conviction and Sentence. See United States v. Herve Wilmore, Jr., et al., 625 Fed.Appx. 366 (11th Cir. 2015)(per curiam)(unpublished).

Petitioner did not file a motion for rehearing, and Petitioner did not file a petition for Writ of Certiorari in this criminal case.

Motion to Recall the Mandate was filed by Petitioner, and denied by the Court on 4/18/2019. Petitioner filed a Motion to reconsider the denial. The Court denied the motion to Reconsider on 5/31/2019.

## REASONS FOR GRANTING THE PETITION

In the interest of preventing injustice, a recall of the mandate is necessary to prevent a Constructive Amendment, which requires reversal per se, from working an injustice in this instant case. United States v. Herve Wilmore, Jr., et al., 625 Fed.Appx. 366 (11th Cir. 2015)(Per curiam)(unpublished), which states, "A reasonable jury could also conclude Wilmore committed wire fraud and aggravated identity theft because the fraudulently obtained refund checks were sent to addresses that he rented and used." This opinion supports that Mr. Wilmore was convicted of mail fraud 18 U.S.C. § 1341, at trial.

This is a different offense than the offense charged. See Superseding Indictment (CR-Doc. 246). Mr. Wilmore's right to only answer for, and be convicted of, the crimes charged in the Indictment, under the Fifth Amendment of the U.S. Constitution, has clearly been violated in this instant case.

This opinion is demonstrably wrong, and conflicts with Supreme Court precedent Stirone v. United States, 361 U.S. 212, 219, 80 S.Ct. 270, 274, 4 L.Ed.2d 252 (1960), which commands that a defendant has the right to be tried on felony charges returned by a Grand Jury Indictment. This grave, unforeseen contingency required by precedent Calderon v. Thompson, 523 U.S. 538, 550 (1998) supports why Mr. Wilmore prays this Court will grant this petition, and order the Eleventh Circuit Court of Appeals to recall its mandate, to prevent injustice.