

No. 18-9829

IN THE
SUPREME COURT OF THE UNITED STATES

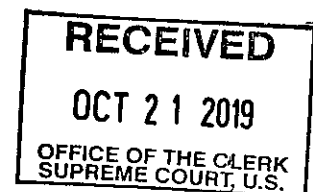
In Pro se, HERVE WILMORE, JR. - Petitioner

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



Questions Presented

Consistent with Recalling the Mandate to Prevent Injustice

- 1) Whether Petitioner's convictions were affirmed with elements of an uncharged offense, and in a manner not alleged of that uncharged offense?
- 2) Whether, the U.S. Court of Appeals for the Eleventh Circuit decision, in upholding wire fraud convictions with uncharged mail fraud elements conflicts with Supreme Court binding precedent in Stirone v. United States, 361 U.S. 212, 217, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)?

Herve Wilmore, Jr. v. United States

Case No. 18-9829

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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Constitutional and Statutory Provisions Involved

Constitutional Provisions:

The Fifth Amendment of the U.S. Constitution 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.

The Sixth Amendment of the U.S. Constitution gives every defendant "the right...to be informed of the nature and cause of the accusation."

In violation of these principles, a Constructive Amendment or Variance occurs. Which requires reversal per se.

Statutes and Rules

18 U.S.C. 371	2
Conspiracy to commit Wire fraud and aggravated Identity Theft (Count 1) (CR-Doc. 246)	

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

In October 2013, a Southern District of Florida grand jury returned a 41-count superseding indictment charging appellants Herve Wilmore, Jr. and Delvin Jean Baptiste and eight codefendants with a three-prong multi-object conspiracy: (1) to defraud the United States by impeding, impairing, and obstructing the lawful governmental functions of the Internal Revenue Service (IRS) in the ascertainment and collection of federal income taxes; (2) to devise a scheme and artifice to defraud for obtaining money by means of false and fraudulent pretenses and representations, and to execute the scheme by means of wire communications, in violation of 18 U.S.C. § 1343; and (3) to commit aggravated identity theft by transferring, possessing and use without lawful authority the means of identification of another person, in violation of 18 U.S.C. § 1028A; all in violation of 18 U.S.C. § 371 (DE:246)(Count 1). Wilmore and Baptiste were, respectively, also charged with substantive counts of wire fraud, in violation of 18 U.S.C. § 1342 (Counts 4 - 5) (Wilmore); and (Counts 18 - 19) (Baptiste); and aggravated identity theft, in violation of 18 U.S.C. § 1028(A) (Counts 24 - 25) (Wilmore; and (Counts 38 and 39) (Baptiste). The codefendants were variously charged with substantive counts (DE:146).

After trial by jury, guilty verdicts were returned against Wilmore and Baptiste (DE:442-43). Both appellants filed timely motions for judgments of acquittal at the conclusion of the government's case in chief (DE:615 at 46), and at the conclusion

of all the evidence (id. at 72).

The remaining codefendants, as well as two codefendants who had been similarly charged in the original indictment had pleaded guilty to various counts. Six codefendants cooperated with the government and testified against Wilmore and Baptiste during the trial. In turn, pursuant to USSG §5K1.1, the government filed motions to mitigate their sentences, and the district court granted the motions resulting in reduced sentences for those codefendants (DE:617 at 13-14).

In July 2014, the district court sentenced Wilmore to 240 months of imprisonment, and Baptiste received 121 months of imprisonment and \$20 million was ordered in restitution. In addition, both appellants were sentenced to three years of supervised release (DE:574, 576).

2. Statement of the Facts

a. Preface

The evidence in this case focused upon a series of South Florida tax preparation entities and check cashing stores that Baptiste and Wilmore were variously associated along with other coconspirators between 2008 and 2013. The scheme was to concoct and electronically file fraudulent tax returns via computers, unlawfully inducing IRS to issue refunds, variously received by Wilmore, Baptiste and other coconspirators. The tax returns were prepared and filed by Wilmore, Baptiste and others, with stolen identities provided by traffickers. The victims included prisoners and deceased persons.

Electronically filing tax returns required the filer to have an IRS Electronic Filing Identification Number (EFIN). Wilmore and Baptiste paid a business partner to apply for and obtain such EFINS from IRS in the names of the business partner. The use of such third-party EFINS allowed Wilmore and Baptiste to disguise their participation in the scheme and avoid IRS scrutiny. Once IRS refund checks issued, they needed to be delivered and cashed, so that the coconspirators would be paid. Wilmore prominently obtained the use of a mail drop address, used by thousands of purported tax filers, where IRS was induced to send tax refund checks procured by fraud. Profiting from the scheme required collaboration with corrupt check cashing stores. Because the checks represented the proceeds of tax fraud, the corrupt check cashing stores knowingly conspired in the scheme by receiving substantial commissions between 20 and 40 percent on each check cashed by the coconspirators; Wilmore and Baptiste variously participated in the conspiracy by preparing returns, obtaining the use EFINS and cashing fraudulently issued tax refund checks, see government Brief (2-4-15, Pg. 16-17).

Reasons For Granting 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. See 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 Grand Jury Clause of the U.S. Constitution has clearly been violated in this instant case.

The Eleventh Circuit Court of Appeals 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. Mr. Wilmore is clearly being detained on prosecutorial misconduct, through a Constructive Amendment, which requires reversal per se. Furthermore, not only is Mr. Wilmore being detained unconstitutionally as the result of a Constructive Amendment, but also Mr. Wilmore is being detained unconstitutionally through a material variance, as well, for the following reasons.

Count 1 charges conspiracy to commit wire fraud, and Aggravated Identity theft, as charged in 18 U.S.C. § 371. Overt Act K, of this Count alleges that:

K. From on or about August 7, 2009 through on or about January 19, 2012, defendant HERVE WILMORE, JR. registered and caused to be registered Five separate mailboxes, each such 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.

(Superseding Indictment, CR-Doc. 246 at 7)

However, in contrary to the Superseding Indictment, Mr. Wilmore's charges associated with Count 4 "1" (CR-Doc. 607 at 84), and Count 5 "12" (CR-Doc. 607 at 77), contained single and double digit P.O. Box numbers, which did not exist, and there were no P.O. box applications to support the essential element "registered and caused to be registered", as alleged in the Superseding Indictment. See (CR-Doc. 605 at 182, 183).

These facts support, not only was Mr. Wilmore convicted of an uncharged offense in mail fraud, but also that he was convicted in a manner not alleged by the uncharged offense. The Court's Opinion conceals this fact. This is injustice.

Moreover, The Eleventh Circuit Court of Appeals Opinion concedes to the fact that there was insufficient evidence to support the wirefraud and aggravated identity theft convictions. As the Opinion fails to establish what evidence a reasonable trier of fact could rely on to find Mr. Wilmore guilty beyond a reasonable doubt. This is injustice. Furthermore, these grave, unforeseen contingencies 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.

Finally, failure to grant this petition would allow a constructive Amendment, which requires reversal per se, to prevail in this instant case, where previous cases were reversed.

CONCLUSION

With the facts and Constitutional issues strongly presented before this Honorable Supreme Court, Mr. Wilmore asks the Supreme Court to enter a Judgment as a matter of law and fact in the Movant's favor.

Respectfully Submitted,



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

10-15-19

Date

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.



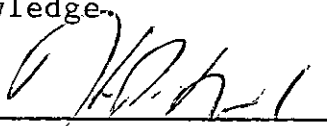
Herve Wilmore, Jr.

10-15-19

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
P.O. Box 1031
Coleman, FL 33521

10-15-19


Date

PROOF OF SERVICE

I, Herve Wilmore, Jr., do swear or declare that on this date, 10-15, 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 United States mail, properly addressed to each, with first class postage prepaid. Service has been made to:

Solicitor General
950 Pennsylvania Ave. NW
Room 5616
Washington, DC 20530

U.S. Supreme Court
1 1st St. NE
Washington, DC 20543



Herve Wilmore, Jr., #02634-104
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P.O. Box 1031
Coleman, FL 33521

10-15-19

Date