

NO: 19-1245

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IN THE  
SUPREME COURT OF THE UNITED STATES

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Samuel Kwushue

**PETITIONER**

v.

United States of America

**RESPONDENT(S)**

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ON PETITION FOR A WRIT OF CERTIORARI TO

United State Court of Appeals for the Eleventh Circuit.

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**PETITION FOR REHEARING**

Samuel Kwushue 67311-019

6001 Kahiti Trc.

Union City, GA 30291

*404-477-9905*

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PETITION FOR REHEARING

Pursuant to Sup. Ct. R. 44.2, petitioner (Samuel Kwushue) respectfully petitions this Court for an order (1) granting rehearing, (2) vacating the Court's May 26, 2020 order denying certiorari, (3) granting the petition for writ of certiorari in the light of clarification made in *Kelly v United States* No: 18-1059, and (4) granting an order for a Certificate of Appealability.

Petitioner submits that while his petition for writ of certiorari No. 19-1245 was pending in this court, the United States Supreme court, on May 7, 2020, unanimously decided *Kelly v United States* No: 18-1059. *Kelly* clarifies that "The wire fraud statute thus prohibits only deceptive "schemes to deprive [the victim of] money or property."

As grounds for this petition for rehearing, petitioner states the following:

Petitioner challenged his conviction and sentence in a 2255 motion for the offense of wire fraud under 18 USCS 1343 on the following constitutional grounds: Jurisdictional Error, Factual Innocence, Inaccurate Presentence Report, Due Process Error, Ineffective Assistance of Trial and Appellate Counsels. Petitioner submitted that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

payment process as charged. The indictment alleged that "Contrary to SNAP rules and regulations, KWUSHUE provided cash to food stamp recipients in exchange for EBT card payments..., caused the following wire communications to be transmitted in interstate commerce: ... All in violation of Title 18, United States Code, Section 1343." The clarification made by this Court in *Kelly v United States* No: 18-1059, indicates that a conviction for wire fraud would stand only if there exists a "deceptive scheme" involving the use of wire, aimed at money or property of the victim.

In the light of *Kelly* supra, the District Court erred when it concluded that petitioner is not entitled to a COA without ascertaining from the record if the predicate offense charged in the indictment states that petitioner used "deceptive scheme..." as clarified in *Kelly v United States*. No: 18-1059. The indictment in petitioner's case did not allege a "deceptive scheme" but charged "Contrary to SNAP rule and regulation..." - a regulatory wrongdoing for which petitioner apologized during his allocution in the district court. Petitioner asserted "YOUR HONOR, I AM PLEADING THAT YOU HAVE MERCY AND THAT YOU FORGIVE AND PARDON MY VIOLATION OF THE FOOD STAM REGULATION" Doc.50 pg. 94 Pp 23-25.

Second, the district court erred because it ignored government assertions and government witness testimony on record which point to the fact that petitioner could not have violated the wire fraud statute as clarified in *Kelly v United States*, No: 18-1059.

(1) It is undisputed on record that petitioner was granted a license on behalf of the KD Metro Store after satisfying the State of Georgia's legal requirements to participate in the SNAP program. The government asserted "AFTER THIS DOCUMENT WAS SUBMITTED TO THE SNAP PROGRAM. THE STORE, KD METRO, WAS APPROVED TO PARTICIPATE IN THE SNAP PROGRAM AND IT BEGAN PROCESSING EBT CARD TRANSACTIONS ON BEHALF OF FOOD STAMP RECIPIENTS." Doc.49 pg.19. No "deceptive scheme" was alleged in the process of obtaining SNAP license.

(2) It is also undisputed that the SNAP fund was downloaded into the SNAP recipient's personal SNAP account. The government asserted; "RECIPIENTS OF FOOD STAMP BENEFITS WOULD USE THE EBT CARDS TO PURCHASE ELIGIBLE FOOD ITEMS AT APPROVED RETAIL STORES AND THE AMOUNT OF THE PURCHASE WOULD THEN BE DEBITED FROM THE FOOD STAMP RECIPIENT'S SNAP ACCOUNT" .Doc. 49-15 Pp 13-16, "IF THE RECIPIENT'S SNAP ACCOUNT HAS SUFFICIENT FUNDS AVAILABLE, IF THE SALE IS AUTHORIZED, THE FUNDS FROM THE RECIPIENT'S ACCOUNT ARE ELECTRONICALLY TRANSFERRED TO THE RETAIL STORE'S BANK ACCOUNT..." Doc. 49-16 Pp 18-22. The fund was not in the account of the agency. It was in the SNAP recipient personal SNAP account. As shown here, the SNAP recipient control's what happens to the money if it is available in the account.

(3) Record evidence shows that in dealing with the SNAP recipient, the petitioner could not have obtained or deprived SNAP recipients of money by "deceptive

scheme" as clarified in *Kelly v United States*, No: 18-1059. Government witness testimony on record asserted "WHEN I WOULD GO IN I WOULD...GRAB A SODA OR SOMETHING TO DRINK...I PUT THEM ON THE COUNTER TOP,...THEN I PROCEED TO TELL HIM HOW MUCH CASH BACK I WANT". Doc.50 pg.12. PSR Pp. 15 a, b, and c. The testimony show that the SNAP recipient made a request to the petitioner to which petitioner agreed. The record did not show that Petitioner used "deceptive scheme" or means to deprive the SNAP recipient of "money or property" as clarified in *Kelly v United States* No: 18-1059.

(4) The use of the wire in the SNAP/EBT program is a lawfully compelled requirement, governed by 7 CFR, 274.8(10) (i) which provides in relevant part that "State agencies or their designated agents must draw funds from State SNAP accounts for SNAP benefits transacted by that State's SNAP recipients, regardless of where benefits were transacted"

This court held in *Parr v United States*, 363 U.S 370 (1960) that "It cannot be said that mailings made or caused to be made under the imperative command of duty imposed by Federal law are criminal under the federal mail fraud statute." The reasoning of the court in *Parr supra* should apply in petitioner's case because the court apply the same interpretation to the mail and wire fraud statute

In United States v. Brown, No. 93-4063. (11th Cir. 1996), the Eleventh Circuit held that "Instead, we must closely analyze the statutory language and the facts presented in a particular case; "[t]here are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the

statute.” quoting *Fasulo v. U.S.*, 272 U.S. 620, 629, 47 S.Ct. 200, 202, 71 L.Ed. 443 (1926). The Eleventh Circuit invalidated Brown’s conviction because there was no record evidence of a “scheme to defraud” “within the meaning of the federal criminal statutes...”

Whether petitioner’s conduct offended the wire fraud statute is a determination petitioner seeks through his petition for a COA. In the light of *Kelly v United States*, No: 18-1059, the granting of a writ of certiorari in a case similar to petitioner’s case, which raised a pertinent issue raised in petitioner’s request for COA, with regard to the question of whether petitioner’s conduct violated the wire fraud statute should constitute “intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented” sufficient to warrant rehearing of the order denying certiorari in petitioner’s case. Sup. Ct. R 44.2.

## CONCLUSION

For the foregoing reasons, petitioner prays that this Court (1) grant rehearing of the order denying the petition for writ of certiorari in this case, (2) vacate the Court’s May 26, 2020 order denying certiorari, (3) grant the petition for a writ of certiorari, and (4) issue an order for a COA to enable petitioner obtain appellate review of the merits of his constitutional claims.

06/10/2020

Respectfully Submitted,



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NO 19-1245

IN THE SUPREME COURT OF THE UNITED STATES

SAMUEL KWUSHUE  
Petitioner,  
V

UNITED STATES OF AMERICA  
Respondent.

On Petition for Writ of Certiorari to the United States

Court of Appeals for the Eleventh Circuit

CERTIFICATE

I Petitioner (Samuel Kwushue), hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.



SAMUEL KWUSHUE