

No. 19-5038

ORIGINAL

Supreme Court, U.S.
FILED

JUN 20 2019

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD WILLEMS — 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

Donald Willems
(Your Name)

L.S.C.I. BUTNER P.O. Box 999
(Address)

Butner NC. 27509
(City, State, Zip Code)

919 - 575 - 5000
(Phone Number)

QUESTION(S) PRESENTED

1. Does an Appeal Waiver which is contained within a Plea Agreement toll the filing of a Notice to Appeal under the Sixth Amendments right to a speedy trial ?.
2. Does the Sixth Amendments Assistance of Counsel inhibit the breaching of a Plea Agreement, Also Known As "the good faith contract" ?.
3. Does a breached Plea Agreement nullify it's Appeal Waiver ?.
4. Are there constitutional protections against the failure to forfill a Plea Agreement ?.

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

The Honorable Donald M. Middlebrooks: United States District Court Judge.

Ann Marie C. Villafana; Assistant United States Attorney.

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3.
STATEMENT OF THE CASE	4.
REASONS FOR GRANTING THE WRIT	6.
CONCLUSION.....	11.

INDEX TO APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the Eleventh Circuit.

APPENDIX B

Judgment and Order of the United States District Court No. 17-cr-80013-DMM.

APPENDIX C

Order of Denial by the United States Court of Appeals for rehearing No. 18-12470.

APPENDIX D

Documents verifying excessive Two (2) point increase in USSG offense level based on the incorrect amount of restitution owed.

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
<u>House v. Bell</u> , 547 U.S. 518	08.
<u>Houston v. Lack</u> , 487 U.S. 266	06.
<u>McQuiggin v. Perkins</u> , 133 S. Ct. 1924	07.
<u>Schlup v. Delo</u> , 513 U.S. 298	08.
<u>United States v. Barthman</u> , U.S. App. LEXIS 9845	10.
<u>United States v. Willems</u> , No. 17 - cr - 80013 - DMM	08.

STATUTES AND RULES

18 U.S.C. section 3553	10.
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OTHER

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

[X] 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 U.S. App. LEXIS 2679; 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,
[X] is unpublished.

[] 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 03/26/2019.

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: 03/26/2019, 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).

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

U.S. Constitutional Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

U.S. Constitutional Amendment V

No person shall be held to answer for a capital, or 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 any person be twice put in jeopardy of life or limb; 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.

U.S. Constitutional Amendment VI

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.

Title 18 section 3553 United States Code;

" VOLUMINOUS "

STATEMENT OF THE CASE

On or about 12/21/16, Petitioner made his initial appearance before Magistrate Judge William Matthewman in which he self surrendered and was placed on a \$100,000 C/S bond and had a preliminary arraignment set for 1/11/17.

On 1/5/17 Mauricio Padilla, Jr. filed his Notice of Appearance.

On 1/6/17 The District Court Ordered a continuance of the arraignment until 1/25/17, Petitioner waived his speedy trial rights for the period between 1/6/17 through 1/25-2017.

On 1/24/17 An Indictment and a Notice of Criminal Forfeiture was filed.

On 1/25/17 An Arraignment as to Petitioner's speedy trial rights and Pre-Trial Matters which established an Order for Criminal Discovery was issued.

On 1/30/17 An Order to appear before Judge Donald M. Middlebrooks was set for 3/15/17.

On 2/7/17 A change of Plea hearing was set for 2/10/17 before Judge Middlebrooks.

On 2/10/17 A change of Plea hearing was reset to 2/15/17 before Judge Middlebrooks.

On 3/7/17 An Order continuing Trial was issued for 9/5/17 and the deadline for timely acceptance remained set for 3/15/17 and would not be extended.

On 3/10/17 A temporary revocation of Bond was so Ordered.

On 3/15/17 A change of Plea hearing was reset for 3/23/17 before Judge Middlebrooks, and an Order of detention was issued without mention of timely acceptance.

On 3/23/17 A Plea Agreement was entered and Petitioner's Sentencing Hearing was set for 6/7/17 before Judge Middlebrooks.

On 6/8/17 Bijan Sebastin Parwaresch filed his Notice of Appearance in regards to his representation of this Petitioner at sentencing. (Only).

On 6/13/17 Attorney Padilla filed a Motion for stipulation of substitution of counsel and was excused, Petitioner was then sentenced to 120 Months incarceration with 3 years supervised release, restitution and \$100 in special assessment fees.

On 7/17/17 The Judgment was amended to include a restitution of \$3,041,476.32.

On 6/12/18 A Notice of Appeal was filed along with Petitioners Motion In re:.

On 6/27/18 The Government filed it's C.I.P. through it's Attorney Andrea Hoffman.

On 7/2/18 Petitioner's Certificate of Interested Persons was filed and Seven (7) days later it was entered into the record.

On 7/16/18 A Second Certificate of Interested Persons was filed then entered into the record Nine (9) days later on 7/25/18.

On or about 7/25/18 Pro se Appellant/Defendant (this Petitioner) filed HIS Opening Brief,

STATEMENT OF THE CASE (cont.)

Four (4) days BEFORE the appointment of CJA Attorney Arthur Louis Wallace III on 7/27/18.

On 7/25/18 Pro se Appellant/Defendant's Opening Brief was returned with a clerks letter stating Pro se Appellant/Defendant was represented by counsel, Two (2) days BEFORE the LEGAL and factual appointment of the CJA Attorney Arthur Louis Wallace on 7/27/18.

On 7/27/18 Order Granting the appointment of Arthur Louis Wallace as Attorney for the Appellant/Defendant issued (officially).

On 11/5/18 Second Motion for extention of time to file Appellants Brief filed by Mr. Arthur Wallace on behalf of the Appellant/Defendant.

On 11/19/18 Appellants Brief filed by Mr. Arthur Wallace using Attorney Wallace's argument (not Appellant/Defendant's desired argument) as THE basis for the Appeal.

On 12/06/18 Motion to Dismiss the Appeal as untimely and stay the Briefing Schedule filed by the U.S.A.

On 1/25/19 Motion to Dismiss GRANTED by the Appellate panel Wilson, Jordan and Grant Circuit Judges for the Eleventh Circuit.

On 02/14/19 A Petition for Rehearing, En banc was timely filed by this Petitioner.

On 03/26/2019 Order dening Petition for Rehearing issued by Appellate panel Wilson, Jordan and Grant.

REASONS FOR GRANTING THE PETITION

Now Comes, DONALD WILLEMS, hereinafter Petitioner, seeking a writ of certiorari in the matter of UNITED STATES v. WILLEMS; No. 18 - 12470 - HH, which is an Appeal from the United States District Court for the Southern District of Florida, Case No. 17 - cr - 800013 - DMM - 3.

Petitioner in an attempt to seek justice and relief from an excessive sentence, filed on 6/5/18 under the "mailbox rule" which is delineated in, Houston v. Lack, 487 U.S. 266, 101 L. Ed. 2d. 245, 108 S. Ct. 2379. (1988); a pre-litigation document entitled In re: WILLEMS.

The In re, clearly recited one of the unfulfilled inducements offered by the Assistant United States Attorney Ann-Marie C. Villafana, (A.U.S.A Villafana), as-well-as a synopsis of the penalty clause that is contained in the Plea Agreement between the United States and this Petitioner.

The penalty clause states in full relevance: "Should I (this Petitioner) violate the terms of this Agreement by exercising my right to Appeal, then this Agreement shall be void and the Defendant (this Petitioner) shall thereafter be subject to prosecution for any federal criminal violations of which Mrs. Villafana's Office has knowledge". (See Plea Agreement, Document 148, Page 6, Paragraph 13, begining at sentence 1).

The point here is the fact that this Petitioner DID file an Appeal, and in doing so voided the Plea Agreement and MUST now be prosecuted as stipulated by both parties to the Plea Agreement, under the Penalty Clause. (that's all that I require, to be prosecuted as agreed).

It is not the appointment of an appellate Attorney, it is not the meritorious argument involved, that the sentence is Twelve (12) Months to long in length and that the total offense level points under the guidelines were grossly miscalculated by Judge Middlebrooks, and it is not because the First Amendment to the United States

REASONS FOR GRANTING THE PETITION (Cont.)

Federal Constitution grants the protection to my right of grievance, it is simply because of the fact that I DID FILE AN APPEAL not what the Appeal was to be; which now brings us to the constitutional questions: Does an Appeal waiver toll the filing of a Notice of Appeal under the Sixth Amendment's right to a speedy trial ?, and Does a breached Plea Agreement nullify it's Appeal waiver ?.

I now humbly ask this Most Honorable Said Court to compel the agreed prosecution by A.U.S.A. Villafana and her Office before Judge Middlebrooks, because Petitioner has hard evidence, proof of his innocence under the actual innocence standard as delineated in McQuiggin v. Perkins, 133 S. Ct. 1924, 185 L. Ed. 2d. 1019 (2013).

A.U.S.A. Villafana offered certain enducements in exchange for my Plea of Guilty, However, A.S.U.A. Villafana DID NOT follow thru on these enducements; is there a a constitutional violation here ?, I leave this to this Most Honorable Said Court to decide.

A.U.S.A. Villafana also PLACED penalties within the Plea Agreement against my filing a Notice to Appeal, and again A.U.S.A. Villafana DID NOT follow thru on these penalties.

Upon my "Timely" filing a Notice of Appeal A.U.S.A. Villafana was obligated to and compelled by the Plea Agreement to prosecute this Petitioner.

As previously stated this Petitioner can produce PROOF of his actual innocence a rubber stamp, a facsimile of his signature used by Mr. Kenneth Chaptman (the real criminal here) to sign/stamp whatever false statements and claims that HE wanted, Petitioner can also produce Two (2) witnessess in regards to this FACT, However, the District Court and A.U.S.A. Villafana, I believe are still unaware of this FACT, hence the urgent need for this Petitioner's prosecution.

In McQuiggin, Justice Ginsburg delivered the opinion of the Court. The opinion has great relevance to this Petitioner, it was stated that...."McQuiggin v. Perkins., concerns the "actual innocence" gateway to Federal Habeas review as applied in

REASONS FOR GRANTING THE PETITION (Cont.)

Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d. 803 (1995), and further explained in House v. Bell, 547 U.S. 518, 126 S. Ct. 2064, 165 L. Ed. 2d. 1 (2006).

In those cases, a convincing showing of actual innocence enabled habeas Petitioners to overcome a procedural bar to consideration of the merits of their constitutional claims. Here, the question arises in the context of 28 U.S.C. 2244(d)(1), the statute of limitations on Federal habeas Petition prescribed in the Antiterrorism and Effective Death Penalty Act of 1996. Specifically, if the Petitioner does not file her her Federal habeas Petition, at the latest, within one year of the claim or claims presented could have been discovered through the exercise of due diligence, 2244 (d)(1)(D), can the time bar be overcome by a convincing showing that she committed no crime.

We hold that actual innocence, if proved, serves as a gateway through which a Petitioner may pass whether the impediment is a procedural bar, as it was in Schlup and House, or as in this case, expiration of the statute of limitations". Here, in United States v. Willems, as in McQuiggin v. Perkins, this Petitioner's actual innocence will not only overcome ant barment but will also exonerate him of any wrong doings, only however, if this Petitioner is allowed his prosecution by agreement.

Whether trial Attorney Mauricio Padilla Jr. committed excusable neglect or was just plain ineffective for not finding and pursuing the issue of the facsimile signature is better left for a later day.

It is this Petitioners belief that the Court of Appeals rendered an incorrect mandate. The Court of Appeals, in my opinion, should have ruled in my favor based on Three (3) points. Point 1, is the denial by the District Court (Judge Middlebrooks) of my Subsstitute/Sentencing Attorney's Motion for the extention of time to familiarize himself with my case, just prior to sentencing, it is more likely than not, that my Attorney, Mr Parwaresch, given time would have found the facsimile signature issue and brought it to the Courts attention.

REASONS FOR GRANTING THE PETITION (Cont.)

Point 2, is the denial of the enducements offered by A.U.S.A. Villafana, in exchange for my Plea of Guilty, that went unfulfilled, this seems to this Petitioner to be some sort of bait and switch deal perpetrated by A.U.S.A. Villafana; and....Point 3, the failure of A.U.S.A. Villafana to prosecute this Petitioner per our agreement upon the filing of a Notice to Appeal, not the actual acceptance of the Appeal.

Was A.U.S.A. Villafana worried that her bait and switch scheme might be found ? or was A.U.S.A. Villafana concerned that Plain Error might be found ? or was A.U.S.A. Villafana just conducting business as usual without any regards to prosecutorial misconduct ? this Petitioner cannot say for certain, However, the lack of prosecution by agreement does cast some suspicion. Why wouldn't the A.U.S.A., Mrs Villafana NOT go forward with prosecution upon by direct and blatant violation of the penalty clause, it was agreed that she would, unless there was some other reason which escapes me at this time not to, I believe that Mrs. Villafana should be held in contempt of the law and that the Plea Agreement's Penalty clause be fully enforced.

And finally, with all due respects this Petitioner, a simple layperson offers One last reason for granting him certiorari, and that is the plain error aspect in all of this.

This Petitioner believes that by filing his pre-litigation documents, and his Notice to Appeal that he has preserved his rights to challenge the length and application of his sentence. This Petitioner believes that if a certiorari is granted he can and will make a significant showing of actual innocence based on the hard evidence that he can provide and the Opinion rendered in McQuiggin.

It is plainly clear based on the transcriptural record that stems from this case, and the due diligence of Arthur L. Wallace III, the Appellate Attorney, that the District Court (Judge Donald M. Middlebrooks), abused its discretion by sentencing this Petitioner to a term of 120 Months, the statutory maximum penalty, which is 12 Months in excess of the guideline range of 87 - 108 Months which was based on

REASONS FOR GRANTING THE PETITION (Cont.)

factors already considered in this Petitioner's presentence report and without specifying the 18 U.S.C. section 3553(a) factors supporting the variance. (See Initial Brief of Appellant Donald Willems, Pg. 1, Paragraph 1, filed 11/19/18).

The transcriptural record shows that the District Court was confused as to the offense level points, the Court clearly miscalculated them. This is based on the pre-sentence report, the Plea Agreement and open Court dialogue, which was confusing to Judge Middlebrooks, also the unfulfilled enducement of minus One (1) point if the level of points exceeded 16 points and the minus Two (2) points "awarded by the Court" and not A.U.S.A. Villafana for affirmative and timely acceptance lead him astray (See Document #148, Plea Agreement, Pages 3 and 4, Paragraph 7, Line Items f. and g.). In Appendix D of this Petition it shows the actual amount of restitution owed not the incorrect or estimated amount of restitution used. (See Document #148, Plea Agreement, Pg. 3, Paragraph 7, Line Item b.). This incorrect or estimated amount of restitution caused the needless application of Two (2) additional offense level points.

The aforementioned unfulfilled enducements and the District Court's concerns about any bail violations also added to the miscalculations of this Petitioner's offense level points.

"Although there maybe instances where countervailing factors satisfy an Appeal court that the fairness, intergrity and public reputation of the proceedings will be preserved absent correction in the ordinary case. Proof of a plain U.S. Sentencing Guidelines (USSG) error that affects the defendant's substantial rights is precisely that type of error that ordinarily warrants relief under plain error review.

That is because in the context of a plain USSG error, the risk of unnecessary deprivation of liberty particulary undermines the fairness, intergrity or public reputation of the judicial proceedings".; United States v. Barthman, U.S.App. LEXIS 9845, No. 18 - 1279 (4/3/19).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 6/20/19