

19-8248  
No. \_\_\_\_\_

In the Supreme Court of the United States

Herve Wilmore, Jr., Petitioner

v.

United States of America

On Petition For a Writ of Certiorari  
To the United States Court of Appeals  
For the Eleventh Circuit

Petition For a Writ of Certiorari

In Pro Se, Herve Wilmore, Jr.  
BOP #02634-104, Unit B-3  
Federal Correctional Complex-Low  
P.O. Box 1031  
Coleman, FL 33521

ORIGINAL

Supreme Court, U.S.  
FILED  
APR 01 2020  
OFFICE OF THE CLERK

RECEIVED  
APR - 8 2020  
OFFICE OF THE CLERK  
SUPREME COURT, U.S.

## QUESTIONS PRESENTED

### Question One

Federal Rules of Civil Procedure 60(B)(1) provides for relief from a Judgment or Order when a mistake of fact attributable to a Judge has resulted in a defect in the integrity of a Federal Habeas proceeding. The District Court, however, "Assumed without deciding" that the Magistrate Judge mischaracterized the factual basis for the relief sought through the petition. Hence, the mischaracterization by the court prevented a merit determination of the Constitutional claim from the 28 U.S.C. §2255 petition. This raises the following question:

Whether a mischaracterization of facts by a Judge warrant relief from a final judgment in light of Gonzalez v. Crosby?

### Question Two

On a Federal Rules of Civil Procedure 60(B)(3) motion, a party must establish (1) fraud, misrepresentation or misconduct on the part of the adverse party, and (2) that the moving party did not have the opportunity to present his case fully and fairly as a result of that misconduct. The District Court, however, failed to see a connection between the government's misrepresentation of the record and the Petitioner's claim that could warrant relief. But the misconduct is directly linked to the Petitioner's claim. This raises the following question:

Whether a misrepresentation of the record warrant relief from a final Judgment?

Herve Wilmore, Jr. v. United States

Case No.

Corporate Disclosure Statement  
As Required by Rule 29.6

- 1) Wifredo Ferrer, former United States Attorney
- 2) Jack A. Fleischman, counsel at appellate level
- 3) Sidney Z. Fleischman, counsel at trial level
- 4) Benjamin G. Greenburg, United States Attorney, Attorney for Appellee
- 5) Delvin Jean-Baptiste, co-defendant
- 6) Neil Karadbil, AUSA, counsel for government at trial level
- 7) Honorable Robert N. Scola, Jr., United States District Court  
Judge, Southern District of Florida, presiding Judge at  
trial level
- 8) Emily M. Smachetti, Chief of Appellate Division
- 9) Honorable Lurana Snow
- 10) Gregory E. Torfella, AUSA, counsel for the Government at the  
trial level
- 11) United States of America, Plaintiff/Appellee
- 12) Patrick A. White, Magistrate Judge, United States
- 13) Herve Wilmore, Petitioner/Movant

## TABLE OF CONTENTS

Questions Presented .....	i
Certificate of interested Persons .....	ii
Table of Contents .....	iii
Table of Authorities .....	iv
Constitutional and Statutory Provisions involved .....	iv
Federal Rules of Civil Procedure Rule 60(b) .....	v
Opinions Below .....	1
Jurisdiction .....	1
Statement of the Case .....	2
Statement of the Facts .....	3
Statement .....	4
Reasons to Grant the Writ as to Question One .....	5
Reasons to Grant the Writ as to Question Two .....	7
Conclusion .....	9
Verification .....	9
Certificate of Service .....	10

## INDEX OF APPENDICES

APPENDIX A - Opinion of the U.S. Court of Appeals 11th Cir.

APPENDIX B - Opinion of the U.S. District Court

APPENDIX C - Opinion of the U.S. Court of Appeals 11th Cir.

### For Reconsideration

APPENDIX D - U.S. Court of Appeals 11th Cir. Docket Sheet

APPENDIX E - Motion for Leave to Proceed in Forma Pauperis

APPENDIX F - Recommendation Report by Magistrate Judge

APPENDIX G - Claim One from Section 2255

### STATEMENT OF THE CASE

On 3-20-2019, the Petitioner filed a timely motion to set aside the Judgment under Federal Rule of Civil Procedure Rule 60(B). See (Cv-Doc. 59 pp.1-5). On 4-8-2019, the Petitioner filed a timely motion to Amend and leave his Rule 60(B) motion to add two additional claims. See (Cv-Doc. 60 pp.1-3). On 7-22-2019, the District Court entered its Order denying all motions. See (Appendix B) attached hereto. Reversible error is shown in connection to Petitioner's Rule 60(B)(1) issue alleging a Judge's mistake of fact, because the District Court "assumed" there were mischaracterizations by the Magistrate Judge. See (Appendix B at p. 3) attached hereto.

The Eleventh Circuit court of appeals affirmed without addressing the issues on appeal. See (Appendix "A" at p.1) attached hereto. The Eleventh Circuit court of appeals overlooked the reversible error on reconsideration as well. see (Appendix "b" at p. 1) attached hereto. The Eleventh circuit court of appeals should have granted a Certificate of appealability in connection to the Fed.R.Civ.P.R. 60(b)(1) issue alleging a judges mistake of fact, which occured during the section 2255 proceedings.

STATEMENT OF THE 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). The Opinion contains reversible error.

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.

STATEMENT

The Petitioner has a meritorious Constructive Amendment issue, which requires reversal *per se*, but the District Court's mistakes created a defect that prevents the Petitioner from being protected by his Fifth Amendment rights, which provide in relevant part 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." Moreover, the District Court's defect also prevents Mr. Wilmore from being protected by his Sixth Amendment rights, which provides in relevant part: "to have the assistance of counsel for his defense."

Without the defects, Mr. Wilmore would prevail.

REASONS TO GRANT THE WRIT AS TO QUESTION ONE

Whether a mischaracterization of facts by a Judge warrant relief from a final Judgment in light of Gonzalez v. Crosby?

Federal Rules of Civil Procedure 60(B)(1) provides for relief from a Judgment or Order on a basis of mistakes. In that regard the rule may apply to a Judge's mistake of fact.

While addressing Mr. Wilmore's Ineffective Assistance of Counsel claim due to a Constructive Amendment, the Court concluded that "In support of his claim, movant alleges that the Indictment alleged that Movant caused to be registered five different P.O. boxes at 4747 Hollywood Blvd. with specific numbers, but that Movant's charges contained only three P.O. boxes at the 4747 Hollywood Blvd. address, and that these had different box numbers." See Report (Cv-Doc. 42 at 5) or (Appendix F, attached).

The Magistrate Judge was completely mistaken as to the facts for the following reasons. First, Mr. Wilmore did not assert that the Indictment alleged that "Movant caused to be registered five different P.O. boxes at 4747 Hollywood Blvd. with specific numbers." This is an erroneous assessment of the facts by the Court.

In contrary to the Court's position of the facts, Mr. Wilmore alleged that the Indictment stated "Mr. Wilmore registered and caused to be registered 5 separate P.O. boxes." (See Cv-Doc. 1 at 4) or (Appendix G, attached).

Moving along, Mr. Wilmore did not assert that his "Charges" contained three P.O. boxes as the report suggests. This is another mistake by the District Court.

To the contrary, Mr. Wilmore alleged that his "charges" contained single ("1") and double ("12") digit P.O. box numbers, which did not exist. (See Cv-Doc. 1 at 4) or (Appendix G attached).

These defects prevented Mr. Wilmore from having his 28 U.S.C. §2255 petition heard on the merits. Clearly, Mr. Wilmore has shown a defect in the integrity of his federal habeas proceedings, which warrants relief from the final Judgment, due to mistakes by the Court under Fed.R.Civ.P. 60(B)(1). See Gonzalez v. Crosby, 545 U.S. 524 (2005).

Moreover, the District Court adopted Mr. Wilmore's position as to the defects, when it assumed without deciding that there were mischaracterizations (See Appendix B at 3). Furthermore, the District Court's position conflicts with the Supreme Court's binding precedent in Gonzalez v. Crosby, because the Court assumed there were mischaracterizations (defects), but failed to grant relief from the final Judgment. Additionally, these defects prevented Mr. Wilmore from being protected by his Fifth Amendment rights, which provide in relevant part: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Moreover, the District Court's defects also prevented Mr. Wilmore from being protected by his Sixth Amendment rights, which provide in relevant part: "to have the effective assistance of counsel for his defense." Mr. Wilmore is not culpable in the defect, nor would reopening his case prejudice the opposing party.

In conclusion, this writ of Certiorari should be granted in light of Gonzalez v. Crosby, Under Fed.R.Civ.P. 60(B)(1), due to mistakes by the District Court.

## REASONS TO GRANT THE WRIT AS TO QUESTION TWO

Whether a misrepresentation of the record warrant relief from a final Judgment?

To prevail on a Rule 60(b)(3) motion, a party must establish (1) fraud, misrepresentation or misconduct on the part of the adverse party, and (2) that the moving party did not have the opportunity to present his case fully and fairly as a result of that misconduct.

### Misrepresentation by the Government

The government misrepresented the record in their response to deny Mr. Wilmore's Section 2255 motion. The misconduct occurred when the government stated: "Further, the allegation in Overt Act that Movant Wilmore rented five mailboxes at 4747 Hollywood Boulevard is not at variance with and does not contradict the fact that he received IRS checks delivered to other fictional 4747 Hollywood Boulevard addresses." (See Cv-Doc. 37 p.9).

First, the government's allegation mentions five mailboxes identified by number. Second, Mr. Wilmore's claim from his Section 2255 also mentions five mailboxes identified by number (See Cv-Doc. 1 at 4) or (Appendix G, attached).

These facts support a connection between the government's response and Mr. Wilmore's claim for relief. Further, the government does not indicate an Overt Act number or letter to support it. Furthermore, the only allegation from the Superseding

Indictment mentions 5 mailboxes identified by number as Mr. Wilmore's claim, and as the government's response, is Overt Act K, which states:

"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." (See Cr-Doc. 246 at 7).

The misrepresentation occurred when the government replaced the element "registered and caused to be registered" with "rented." (1) This is error, (2) the error is plain, (3) the error affects Mr. Wilmore's substantial rights.

Plain error is "error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity and public reputation of judicial proceedings. See United States v. Olano, 507 U.S. 725, 732 (1993). Moreover this defect prevented Mr. Wilmore from fully presenting his Sixth Amendment Ineffective Assistance of Counsel claim, because Mr. Wilmore's claim is factually dependant on the factual basis - "registered and caused to be registered" (See Cv-Doc. 1 at 4).

Mr. Wilmore contends, without the factual basis, he cannot support that his substantial rights have been violated, as the factual basis is clearly needed to support which mailboxes the Grand Jury did and did not indict him for. This is a clear defect See Gonzalez v. Crosby, 545 U.S. 524 (2005).

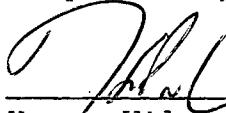
The government's misconduct went to the heart of Mr. Wilmore's claim. Moreover, the government's misconduct prevented Mr. Wilmore from being protected by his Sixth Amendment rights, which provides in relevant part that "to have the assistance of counsel for his defense."

In conclusion, this petition for writ of Certiorari should be granted in light of Gonzalez v. Crosby under Fed.R.Civ.P. 60(B)(3) due to the misrepresentation by the government.

#### CONCLUSION

Mr. Wilmore prays that the Supreme Court will exercise its Supervisory Powers and Remand this instant case to the lower court in light of Gonzalez v. Crosby, under either Rule 60(B)(1) or Rule 60(B)(3) or both.

Respectfully Submitted,



---

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

3-29-20

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.

3-29-20

Date

**CERTIFICATE OF SERVICE**

I, Herve Wilmore, Jr., do swear or declare that on this date,  
3-29-20, 2020, as required by Supreme Court Rule 29  
I have served the enclosed Motion for Leave to Proceed in Forma  
Pauperis and Petition 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 of them and with First class postage prepaid.

The names and addresses of those served are as follows:

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

I declare under penalty of perjury that the foregoing is true  
and correct. Executed on 3-29-20, 2020.



---

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