

APPENDIX A

Opinion of the U.S. Court of Appeals 11th Cir.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-13185-E

HERVE WILMORE,

Petitioner-Appellant,

versus


UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Herve Wilmore's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). His motion for release pending appeal is DENIED AS MOOT.


UNITED STATES CIRCUIT JUDGE

APPENDIX B

Opinion of the U.S. District Court

"Appendix B"

United States District Court
for the
Southern District of Florida

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Hervé Wilmore, Petitioner,)	
)	
v.)	Civil Action No. 17-60278-Civ-Scola
)	
United States of America,)	
Respondent.)	

Omnibus Order

Before the Court are three motions filed by Petitioner Hervé Wilmore ("Wilmore"). On April 12, 2018, the Court affirmed and adopted (ECF No. 45) a report of Magistrate Judge Patrick White (the "R&R," ECF No. 42) recommending dismissal of Wilmore's motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255 and related filings, (the "Petition," ECF Nos. 1, 8, 10-12, 17-20, 28-30, 32, 35). The Eleventh Circuit denied a certificate of appealability. (ECF No. 56.) Wilmore then filed a petition for certiorari with the United States Supreme Court, which was also denied on January 7, 2019. Having exhausted his appellate remedies, Wilmore now moves this Court for a new trial based on newly discovered evidence (the "First Motion," ECF No. 58); and for relief from final judgment pursuant to Federal Rule of Civil Procedure 60(b) (the "Second Motion," ECF No. 59). Wilmore filed a third motion raising additional arguments under Rule 60(b). (the "Third Motion," ECF No. 60.) All three motions are **denied** as follows.

1. The First Motion

In the First Motion, Wilmore requests the Court to "vacate all convictions" or "grant a new trial in light of the newly discovered evidence." (ECF No. 58.) The "newly discovered evidence" subject to this motion are copy-and-pasted excerpts from briefs filed by the Government in this post-conviction proceeding. (See ECF No. 58 at p. 2.) As an initial matter, the Government's brief is not evidence. See *Bryant v. U.S. Steel Corp.*, 428 F. App'x 895, 897 (11th Cir. 2011) ("counsel's argument is not evidence"). Nor is it newly discovered, having been of record in this proceeding since December 18, 2017—three months before Judge White recommended denial of the Petition. (ECF Nos. 37, 42.) Wilmore is also not entitled to a new trial because there was never a trial in this post-conviction proceeding. And to the extent Wilmore brings the First Motion to request the court to vacate his conviction or grant him a new criminal trial, the Court rejects that request as an unauthorized, successive habeas petition. See 28 U.S.C. §

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2255(h); (see also *United States v. Wilmore*, 13-cr-60029-RNS-2 (S.D. Fla.), ECF No. 715.) The First Motion (**ECF No. 58**) is **denied**.

2. The Second and Third Motions

In the Second Motion, Wilmore seeks "relief from final judgment pursuant to Fed. R. Civ. P. Rule 60(b)." (ECF No. 59.) For his first argument, Wilmore submits that Judge White erred by not deeming Wilmore's amended claims timely-filed under the relation-back doctrine. (*Id.* at pp. 1-4.) The Eleventh Circuit already rejected that argument. (ECF No. 56 at p. 5 ("the district court did not abuse its discretion in determining that the amendment did not relate back to Wilmore's original § 2255 motion").) That is the law of this case, which binds this Court. *United States v. Arias*, 400 F. App'x 546, 547 (11th Cir. 2010) ("Under the law-of-the-case doctrine, '[a]n appellate decision binds all subsequent proceedings in the same case not only as to explicit rulings, but also as to issues decided necessarily by implication of the prior appeal.'" (quoting *United States v. Tamayo*, 80 F.3d 1514, 1520 (11th Cir. 1996))). The first argument is therefore rejected.

Wilmore next argues that Judge White failed to "liberally construe" the Petition, as required for *pro se* litigants. (ECF No. 59 at p. 4.) That's the entire argument. No specific instances of strict construction are provided, let alone ones which prejudiced Wilmore. Without more, this argument lacks merit and is rejected.

Moving on, Wilmore's third argument is that the Court failed to consider all the claims presented in his section 2255 petition by not addressing his argument that appellate counsel in his direct appeal was ineffective by raising an argument in the body of the appellate brief but not in the statement of issues section. (*Id.* at p. 5.) Judge White already rejected Wilmore's ineffective assistance of appellate counsel argument as "totally meritless." (ECF No. 42 at p. 11.) The Eleventh Circuit agreed. (ECF No. 56 at pp. 3-4 ("Wilmore argument that his counsel was ineffective for failing to argue constructive amendment is . . . meritless"). Wilmore presents no reason to revisit that finding, and the third argument is denied.

As the "fourth defect," Wilmore argues that the Court failed to conduct a *de novo* review of the record in adjudicating his objections to Judge White's report and recommendations. (ECF No. 59 at pp. 5-6.) Wilmore is wrong. The Court "affirm[ed] and adopt[ed]" the report and recommendation after considering the "objections, the record, and the relevant legal authorities." (ECF No. 45.) The Eleventh Circuit affirmed. (ECF No. 56.) The fourth argument is rejected.

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Fifth, Wilmore argues that Judge White failed to consider all arguments raised in the initial petition. Specifically, Wilmore contends that the R&R did not consider whether a juror note from his criminal trial supports his argument that no reasonable jury could find him guilty beyond a reasonable doubt. Wilmore does not describe the contents of this note or explain how it supports his belief that the twelve jurors in his criminal case could not have reasonably (and unanimously) convicted him of the charged offenses. In any event, Wilmore did not raise that objection to this Court or, apparently, the Eleventh Circuit on appeal. The fifth argument is therefore denied. See *Caison v. Sec., Dep't of Corrections*, 766 F. App'x 870, 874-75 (11th Cir. 2019) ("[A] Rule 60(b) motion cannot substitute for an appeal." (quoting *Scutieri v. Paige*, 808 F.2d 785, 795 (11th Cir. 1987))).

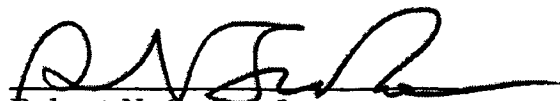
Two additional Rule 60 arguments are raised by the Third Motion. (ECF No. 60.) Wilmore's sixth argument is that the Government misrepresented the record in response to his petition. This argument is that certain factual representations by the Government were unclear and not supported by record citation. From that premise, Wilmore jumps to the conclusion that he was prevented from fully and fairly presenting his case. The Court fails to see the connection. In any event, Wilmore does not identify any fraud, misrepresentation or misconduct of the Government that could warrant relief under Rule 60(b)(3). The sixth argument is therefore rejected.

Seventh, and finally, Wilmore argues that Judge White mischaracterized the factual basis for the relief sought through the Petition. Assuming—*arguendo*—that there was a mischaracterization, Wilmore identifies no "substantial right[]" affected by same and the Eleventh Circuit implicitly found none by denying a certificate of appealability in this case. (ECF No. 56); Fed. R. Civ. P. 61. The seventh argument is therefore denied.

3. Conclusion

In sum, the Court **denies** the First Motion (**ECF No. 58**), **denies** the Second Motion (**ECF No. 59**) and **denies** the Third Motion (**ECF No. 60**). The case shall remain closed. The Court does not issue a certificate of appealability. All pending motions are denied as moot.

Done and ordered, in Chambers, at Miami, Florida, on July 22, 2019.


Robert N. Scola, Jr.
United States District Court

APPENDIX C

Opinion of the U.S. Court of Appeals 11th Cir.
For Reconsideration

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-13185-E

HERVE WILMORE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

Before: JORDAN and BRANCH, Circuit Judges.

BY THE COURT:

Herve Wilmore has filed a motion for reconsideration, pursuant to 11th Cir. R. 22-1(c) and 27-2, of this Court's February 12, 2020, order denying a certificate of appealability in his appeal from the denial of his Fed. R. Civ. P. 60(b) and Fed. R. Civ. P. 59(e) motions to reconsider the district court's order denying his underlying 28 U.S.C. § 2255 motion to vacate, correct, or set aside his sentences. Upon review, Wilmore's motion for reconsideration is DENIED because he has offered no new evidence or arguments of merit to warrant relief.

APPENDIX D

U.S. Court of Appeals 11th Cir. Docket Sheet

FROM: Paul, Wilbert
TO: 02634104
SUBJECT: Docket
DATE: 03/26/2020 07:36:08 PM

" Appendix D "

General Docket

United States Court of Appeals for the Eleventh Circuit
Court of Appeals Docket #: 19-13185 Docketed: 08/14/2019
Termed: 02/12/2020

Nature of Suit: 2510 Prisoner Petition-Vacate Sentence

Herve Wilmore v. USA

Appeal From: Southern District of Florida

Fee Status: Fee Paid

Case Type Information:

- 1) U.S. Civil - Prisoner
- 2) Motion to Vacate
- 3) -

Originating Court Information:

District: 113C-0 : 0:17-cv-60278-RNSLead: 0:13-cr-60029-RNS-2
Civil Proceeding: Robert N. Scola, Junior, U.S. District Judge
Date Filed: 02/03/2017
Date NOA Filed:
08/14/2019

09/20/2019 Open Document MOTION for release pending appeal filed by Appellant Herve Wilmore, Jr.. Opposition to Motion is Unknown [8887452-1] [Entered: 09/23/2019 02:41 PM]
09/25/2019 Open Document APPEARANCE of Counsel Form filed by Lisa A. Hirsch for USA [19-13185] (ECF: Lisa Hirsch) [Entered: 09/25/2019 04:31 PM]
09/26/2019 Open Document RESPONSE to Motion filed by Appellant Herve Wilmore, Jr. [8887452-2] filed by Attorney Lisa A. Hirsch for Appellee USA.. [19-13185] (ECF: Lisa Hirsch) [Entered: 09/26/2019 03:04 PM]
10/07/2019 Open Document Reply to response filed by Appellant Herve Wilmore, Jr.. [Entered: 10/08/2019 09:34 AM]
10/11/2019 Open Document USDC order denying COA as to Appellant Herve Wilmore, Jr. was filed on 10/10/2019. Docket Entry 75. [Entered: 10/11/2019 08:30 AM]
10/24/2019 Open Document MOTION for certificate of appealability filed by Appellant Herve Wilmore, Jr.. Opposition to Motion is Unknown [8916607-1] [Entered: 10/25/2019 11:15 AM]
02/10/2020 Open Document Motion to Amend and Correct certificate of appealability [8916607-2], Motion for certificate of appealability [8880539-2] filed by Appellant Herve Wilmore, Jr.. [Entered: 02/11/2020 12:30 PM]
02/12/2020 Open Document ORDER: Herve Wilmore's motion for a certificate of appealability is DENIED because he has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. Section 2253(c)(2).. His motion for release pending appeal is DENIED AS MOOT. [8916607-2], [8880539-2], [8887452-2] ELB [Entered: 02/12/2020 11:37 AM]
02/21/2020 Open Document MOTION for reconsideration of single judge's order entered on 02/12/2020 filed by Appellant Herve Wilmore, Jr.. Opposition to Motion is Unknown [9020253-1] [Entered: 02/27/2020 11:20 AM]
03/23/2020 Open Document ORDER: Motion for reconsideration of single judge's order filed by Appellant Herve Wilmore, Jr.. is DENIED (see attached order for complete text). [9020253-2] AJ and ELB [Entered: 03/23/2020 09:12 AM]

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APPENDIX F

Recommendation Report by Magistrate Judge

Recommendation Report - by Magistrate Judge Patrick White Appendix "F"

States, 962 F.2d 996, 998 (11th Cir. 1992); see also Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (conclusory allegations of ineffective assistance of counsel are insufficient to raise a constitutional issue). A movant's claims of ineffective assistance of counsel are thus subject to dismissal without a hearing when they "are merely 'conclusory allegations unsupported by specifics' or 'contentions that in the face of the record are wholly incredible.'" Tejada v. Dugger, 941 F.2d 1551, 1559 (11th Cir. 1991) (citations omitted). The movant in a \$2255 proceeding alleging ineffective assistance of counsel must set forth specific facts supported by competent evidence, raising detailed and controverted issues of fact which, if proved at a hearing, would entitle him to relief. United States v. Aiello, 900 F.2d 528, 534 (2nd Cir. 1990). Bare and conclusory allegations of ineffective assistance of counsel which contradict the existing record and are unsupported by affidavits or other indicia of reliability are insufficient to require a hearing or further consideration. See United States v. Robinson, 64 F.3d 403, 405 (8th Cir. 1995); see also Diaz v. United States, 930 F.2d 832, 834-35 (11th Cir. 2009) (affirming denial of ineffective assistance claim without evidentiary hearing where movant's allegations were refuted by the record).

↙
Discussion

Movant's sole claim in this proceeding is that trial and appellate counsel were ineffective in failing to raise a constructive amendment to the indictment. In support of this 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 those had different box numbers.

APPENDIX G

Claim One from Section 2255 Petition

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Claim one from Section 2255 petition.

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(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: TRIAL COUNSEL AND APPELLATE COUNSEL WERE INEFFECTIVE BECAUSE NEITHER RAISED THE ISSUE OF A CONSTRUCTIVE AMENDMENT (CONSTITUTIONAL ISSUE) BASED UPON EVIDENCE PRESENTED AT TRIAL

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Constructive Amendment. Indictment alleged Mr. Wilmore registered and caused to be registered 5 separate P.O. boxes:
4747 Hollywood Blvd, Suite 101, Apt 128
4747 Hollywood Blvd, Suite 101, Apt 152
4747 Hollywood Blvd, Suite 101, Apt 191
4747 Hollywood Blvd, Suite 101, Apt 198
4747 Hollywood Blvd, Suite 101, Apt 199

Mr. Wilmore's charges contained these addresses:
Count 4 (1040 tax form) 4747 Hollywood Blvd, Suite 101, Apt 1
Count 5 (1040 tax form) 4747 Hollywood Blvd, Suite 101, Apt 12
(Actual Innocence)

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

My attorney was ineffective

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

"Appendix G"

Claim One From Section 2255 petition