
No. 19-8248

IN THE

SUPREME COURT OF THE UNITED STATES

Herve Wilmore, Jr.,

Petitioner,

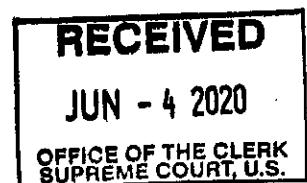
v.

United States of America,

Respondent.

On petition for rehearing for a writ of certiorari
to the United States Court of Appeals
for the Eleventh Circuit

Herve Wilmore, Jr.
Pro se petitioner
Reg. No. 02634-104
Federal Correctional Complex
Unit B-3 (Low Custody)
P.O. Box 1031
Coleman, FL 33521-1031



QUESTIONS PRESENTED

Under Federal Rules of Civil Procedure 60(b)(1), relief from the final judgment is warranted when a mistake of fact attributable to the court (Judge) has resulted in a defect in the integrity of the federal habeas proceedings. The Magistrate Judge, however, mischaracterized the factual basis for relief sought through the petition to vacate, set aside, or correct the sentence, pursuant to 28 U.S.C. 2255. The District court assumed without deciding that "there were mischaracterizations." Hence, the mischaracterization attributable to the Court has prevented a merits determination of a meritorious constitutional ineffective assistance of counsel claim.

1.

Does the Eleventh circuit Court of appeals decision in upholding defects due to mischaracterizations attributable to a judge, but failing to grant the warrant of relief from the final judgment under Fed. R. Civ. P. 60(B)(1) conflicts with the Supreme Court's binding precedent in Gonzalez v. Crosby?

2.

Does a defect in mischaracterizing the factual basis for the relief sought through a section 2255 petition attributable to a court warrant relief from the final judgment under Fed. R. Civ. P. 60(B)(1) pursuant to Gonzalez v. Crosby?

3.

Does a mistake of fact attributable to a judge warrant relief from the final judgment under Fed. R. Civ. P. 60(B)(1)?

Herve Wilmore, Jr. v. United States

Case No. 19-8248

CERTIFICATE OF INTERESTED PERSONS

1. United States of America, Plaintiff/Appellee
2. Wifredo Ferrer, Former United States Attorney
3. Jack A. Fleischman, United States Attorney
4. Sidney Z. Fleischman, Counsel at trial level
5. Noel J. Franscisco, Solicitor General of the Department of Justice
6. Benjamin G. Greenburg, United States Attorney at Direct Appeal level
7. Delvin Jean-Baptiste, Co-Defendant at trial
8. Neil Karadbul, AUSA, Counsel for government at trial level
9. Gregory E. Tortella, AUSA, Counsel for government at trial
10. Patrick A. White, Magistrate Judge, United States District Court
11. Herve Wilmore, Jr., Petitioner/Movant

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Appendix A - The opinion of the Eleventh Circuit Court of Appeals

Appendix B - The opinion of the United States District Court for the Southern District of Florida

Petitioner respectfully prays that a rehearing of his Writ of Certiorari issues to review the judgment below.

OPINIONS BELOW

for cases from Federal Courts

The opinion of the United States Court of Appeals appears at Appendix A, and is unpublished.

The opinion of the United States District Court appears at Appendix B, to the petition, and is unpublished.

JURISDICTION

The Supreme Court of the United States entered its judgment on May 26, 2020

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

This petition for rehearing is timely filed.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 2255 : Federal custody; Motion Attacking Sentence

(a) a prisoner in custody under sentence of a Court established by an Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the Court which imposed the sentence to vacate, set aside, or correct the sentence. 1,1,5

FEDERAL RULES OF CIVIL PROCEDURE 60(b) INVOLVED

Federal Rules of Civil Procedure 60(b)(1) provides that a Court may relieve a party of a final order of judgment for mistakes, inadvertence, surprise, or excusable neglect ...

Explaining that Fed. R. Civ. P. 60(b)(1) applies to mistakes of judges..... passim

TABLE OF AUTHORITIES

Gonzalez v. Crosby, 545 U.S. 524 (2005).....i, 6
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TABLE OF CODE

28 U.S.C. 2255i, 1, 5
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FROM: 02634104
TO:
SUBJECT: Cert Statement of the Case (2nd edit)
DATE: 05/24/2020 07:45:31 AM

STATEMENT OF THE CASE

The Petitioner filed a 60(b) motion in the District Court, arguing that the Magistrate Judge mischaracterized the factual basis for the relief sought through the petition. See Record (cv-Doc. 60 at pp. 2-3). Reversible error is shown because the District Court assumed "that there were mischaracterizations." See (Appendix B at p.3), attached hereto.

The Eleventh Circuit Court of Appeals should have granted a certificate of appealability in connection to the Fed. R. Civ. P. 60(b)(1) issue, alleging a Judge's mistake of fact.

The Eleventh Circuit Court of Appeals denied the certificate of appealability and the motion for release pending appeal, without addressing the merits. See (Appendix A at p.1), attached hereto.

SUMMARY OF THE ARGUMENT

The Magistrate Judge mischaracterized the factual basis for relief sought through the Petitioner's underlying motion to vacate his sentence under 28 U.S.C. 2255, which prevented a merits determination of the constitutional claim.

These defects upon which the Petitioner's denial is based warrant relief from the final judgment under Federal Rules of Civil Procedure 60(b)(1), due to mistakes of fact attributable to the Court (Judge).

REASONS FOR GRANTING THE WRIT

Under Federal Rules of Civil Procedure 60(b)(1), relief is warranted when a mistake attributable to the district court resulted in a "defect in the integrity of the federal habeas proceedings." (explaining that Fed. R. Civ. 60(b)(1) applies to mistakes of judges).

While addressing Mr. Wilmore's ineffective assistance of counsel claim, due to a constructive amendment, the court concluded that "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 these had different P.O. Box numbers." See record (cv-Doc. 42 at p.5).

The Magistrate Judge was completely mistaken as to the facts. To the contrary, Mr. Wilmore alleged that the indictment alleges that "Mr. Wilmore registered and caused to be registered five separate P.O. Boxes." But that his charges contained single ("1") and double digit ("12") P.O. Box numbers, which did not even exist. See record (Cv-Doc. 1 at p.4).

These facts support that the district court's denial was based upon assertions that the petition did not allege----defects. Further, in response to the Petitioner's 60(b) motion, the district court assumed, without deciding, "That these were mischaracterizations" attributed to the Magistrate Judge. See (Appendix B at p.3), attached hereto.

Moreover, the district court's decision conflicts with the Supreme Court's binding precedent in *Gonzalez v. Crosby*, 545 U.S. 524 (2005), because the District Court assumed there were mischaracterizations (defects), but failed to grant the warranted relief from the final judgment. This is a clear conflict.

Additionally, the mischaracterizations (defects) impacted the integrity of the federal habeas proceedings. Under Federal Rules of Civil Procedure 60(b)(1), relief is warranted when a mistake of fact attributable to the court has resulted in a defect in the integrity of the federal habeas proceedings. See *Gonzalez v. Crosby*, 545 U.S. 524 (2005).

CONCLUSION

This writ should be granted under Fed. R. Civ. P. 60(b)(1) due to the mistakes attributed to the district court in light of
Gonzalez v. Crosby.

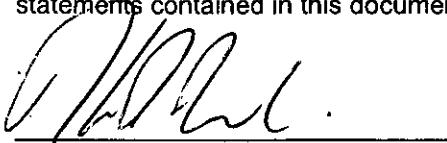
Respectfully submitted,



Herve Wilmore, Jr.

VERIFICATION

Under the penalty of perjury as authorized in 28 U.S.C. 1746, I declare that the factual allegations and factual statements contained in this documents are true and correct to the best of my knowledge.

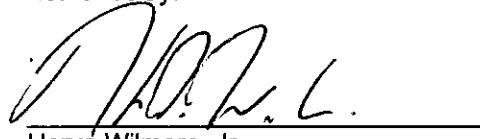


Herve Wilmore, Jr.

May 26 2020

CERTIFICATE

The Petitioner certifies that the Petition for rehearing of the Writ of Certiorari is limited to intervening circumstances of a substantial or controlling effect. The petitioner also certifies that the petition for rehearing is presented in good faith and not for delay.



Herve Wilmore, Jr.

May 26, 2020

CERTIFICATE OF SERVICE

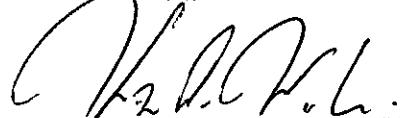
I, Herve Wilmore, Jr., do swear or declare that on this date, May 26 2020, I have served the enclosed Motion for Leave to Proceed In Forma Pauperis and Petition for a Rehearing for a Writ of Certiorari on each party to the above proceeding as required by depositing an envelope containing the above documents in the United States Mail in a properly-addressed envelope to each party with First Class postage prepaid.

The names and addresses of those served are as follows:

Solicitor General
950 Pennsylvania Avenue N.W., Room 5615
Washington, D.C. 20530

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on May 26, 2020:



Herve Wilmore, Jr., Pro se
Reg. No.: 02634-104, Unit B-3
FCC Coleman - LOW
P.O. Box 1031
Coleman, FL 33521-1031