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No. 19-8248

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IN THE

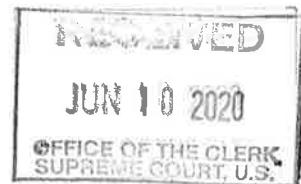
SUPREME COURT OF THE UNITED STATES

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MOTION TO RELEASE A PRISONER IN A HABEAS CORPUS PROCEEDING  
PURSUANT TO SUPREME COURT RULE 36

\*\*\*\*\*

Here 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



## TABLE OF CONTENTS

Table of Contents.....	i
Supreme Court Rule 36.....	ii
Table of Authorities.....	iii
Statement of the Facts.....	1
Statement of the Case.....	2
Summary Argument.....	3
Reasons Why this Court Should Grant the Writ.....	4
Extraordinary Circumstances.....	5
Conclusion.....	6
Verification.....	7
Certificate of Service.....	8

SUBJECT: Rule 36 - S. Ct. Rule 36  
DATE: 05/17/2020 01:14:52 PM

Supreme Court Rule 36 provides for release of a prisoner in a Habeas Corpus proceeding:

3(a). Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or, in other appropriate custody, or may be enlarged on personal recognizance or bail, as may appear appropriate to the Court, Justice, or Judge who entered the decision, or to the Court of Appeals, this Court, or a Judge or Justice of either Court.

TO:

SUBJECT: Rule 36 - Table of Authorities (edited)

DATE: 05/17/2020 06:04:40 PM

#### TABLE OF AUTHORITIES

Stirone v. United States, 361 U.S. 212, 217 (1960).....	5
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TRULINCS 02634104 - WILMORE, HERVE JR - Unit: COL-B-C

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SUBJECT: Rule 36 - Statement of the Facts  
DATE: 05/17/2020 01:16:54 PM

#### STATEMENT OF THE FACTS

The Petitioner filed a Motion for bond in the Eleventh Circuit Court of Appeals. The court denied the motion for bond without addressing the merits. See Appendix A attached to the petition.

SUBJECT: Rule 36 - Statement of the Case (edited)

DATE: 05/17/2020 06:00:48 PM

#### STATEMENT OF THE CASE

The Petitioner filed a Federal Rules of Civil Procedure 60(b) motion in the District Court, alleging that the Magistrate made mistakes of fact while addressing the Petitioner's underlying motion to vacate his sentence under 28 U.S.C. 2255. See record (cv-Doc. 60 at pp. 2-3). The District court assumed without deciding that "there were mischaracterizations". See record (cv-Doc. 64 at p.3).

The District Court's order contains reversible error, because the Court conceded by assuming "there were mischaracterizations."

SUBJECT: Rule 36 - Summary Argument

DATE: 05/17/2020 01:21:39 PM

#### SUMMARY ARGUMENT

The Magistrate Judge mischaracterized the factual basis for the relief sought through the petition to vacate, set aside or correct sentence pursuant to 28 U.S.C. 2255. The Petitioner's ineffective assistance of counsel claim is meritorious. Had the Magistrate Judge decided the petition on its merits, the Petitioner would have been entitled to a reversal of all the convictions, as a constructive amendment, and an amendment of the Superseding Indictment, requires reversal per se.

SUBJECT: Rule 36 - Reasons for Granting Bond (2nd Edit)  
DATE: 05/17/2020 07:29:51 PM

#### REASONS WHY THIS COURT SHOULD GRANT BOND

Mr. Wilmore raised a Federal Rules of Civil Procedure 60(b)(1) argument in the District Court, alleging a Judge's mistake of fact. See record (cv-Doc. 60 at pp.2-3). In response to this claim, the District Court assumed without deciding that "there were mischaracterizations". See record (cv-Doc. 64 at p.3) or see (Appendix B at p.3), attached hereto.

Had it not been for the mischaracterizations attributable to the District Court, Mr. Wilmore would have been entitled to an immediate release for the following reasons:

The Petitioner alleged that trial counsel and appellate counsel were constitutionally ineffective for failing to raise a constructive amendment based upon evidence presented at trial. See record (cv. Doc. 1 at p.4).

In support of this claim, the Petitioner contends that the Superseding Indictment charged conspiracy to commit wire fraud and aggravated identity theft as charged in 18 U.S.C. 371 of (Count I). Moreover, Overt Act K. of this Count alleged that:

K. 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 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 record (cr-Doc. 246 at p.7)

There were five P.O. Boxes identified by number in the Superseding Indictment to have been "registered and caused to be registered." These P.O. Boxes were presented throughout trial as being:

1. (GX-6a) mailbox "128",
2. (GX-6b) mailbox "191",
3. (GX-6c) mailbox "192",
4. (GX-6d) mailbox "199", and
5. (GX-6e) mailbox "152".

See record (cr-Doc. 605 at pp. 159-161).

However, to the contrary of the Superseding Indictment, Mr. Wilmore's charges associated with (Counts 4-5), and (Counts 24-25) in relation to (Counts 4-5) contained single and double-digit P.O. Box numbers, which did not even exist. See record (cr-Doc. 607 at p. 84), mailbox "1" did not even exist. See record (cr-Doc. 607 at p.77) mailbox number "12". Moreover, there

were no P.O. Box applications to support "registered and caused to be registered", as alleged in the Superseding Indictment. See record (cr-Doc. 605 at pp. 182-83).

Mr. Wilmore contends, once the indictment presents a factual basis for an element of a crime, the prosecution may not rest its proof of that element of the crime at trial on other facts. Citing Stirone v. United States, 361 U.S. 212, 217 (1960). A defendant must be tried upon open charges presented against him in a Grand Jury Indictment. This requirement stems from the Fifth Amendment of the U.S. Constitution, which commands "No person shall be held to answer for a Capital, or otherwise infamous crime, unless on a presentment or Indictment of a Grand Jury." These facts support that Mr. Wilmore has a meritorious issue of a constructive amendment which requires a reversal per se, and had it not been for the mischaracterization attributable to the District Court, Mr. Wilmore would have prevailed in his collateral proceedings. Moreover, Mr. Wilmore's claim can be liberally construed to allege a legally defective indictment, because mailboxes are "registered and caused to be registered", as alleged in the Superseding Indictment, to commit mail fraud as charged 18 U.S.C. 1341, which is a different offense than the offense charged. See Superseding Indictment (cr-doc. 246). The Petitioner is being detained against his will and in violation of his substantial rights.

#### EXTRAORDINARY CIRCUMSTANCES THAT WARRANT BOND

Had the District Court cleared Mr. Wilmore's ineffective assistance of counsel claim on the merits, Mr. Wilmore would have been free since April of 2018, when the District Court adopted the mischaracterized Recommendation Report. Mr. Wilmore's unconstitutional convictions are being carried out by the American taxpayers' expense. Additionally, the Petitioner is factually innocent. See (cv-Doc. 1 at p.4). Moreover, the CoViD-19 pandemic requires social distancing of six feet. It is physically impossible for the Petitioner to exercise this recommendation by the CDC in this overcrowded prison. The Petitioner is at extreme risk while incarcerated, plus the Petitioner has a history of hypertensive disorder, which is well documented in the Petitioner's PSR. See (cr-Doc. 522 at p.32). The Petitioner's medical conditions put him at great risk of harm. If he were to contract the disease, especially in a prison which is unequipped to handle treatment.

Furthermore, the Petitioner is losing out on the prime years of his life. The Petitioner seeks bond and justice and so requests it respectfully.

TRULINCS 02634104 - WILMORE, HERVE JR - Unit: COL-B-C

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SUBJECT: Rule 36 - Conclusion  
DATE: 05/17/2020 02:43:48 PM

### CONCLUSION

The Petitioner has a meritorious ineffective constitutional claim which requires reversal per se, but the District Court's mistakes have prevented him from obtaining relief.

TRULINCS 02634104 - WILMORE, HERVE JR - Unit: COL-B-C

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TO:

SUBJECT: Rule 36 - Verification

DATE: 05/17/2020 02:45:15 PM

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 document are true and correct to the best of my knowledge.



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Herve Wilmore, Jr.

June 5 2020

Date

TRULINCS 02634104 - WILMORE, HERVE JR - Unit: COL-B-C

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FROM: 02634104  
TO:  
SUBJECT: Rule 36 Certificate of Service  
DATE: 05/17/2020 02:49:15 PM

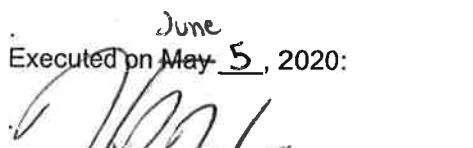
CERTIFICATE OF SERVICE

I, Herve Wilmore, Jr., do swear or declare that on this date, May 5<sup>th</sup>, 2020, I have served the Motion for Bond 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, First Class postage prepaid.

The names and addresses of those served are as follows:

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

Executed on May 5, 2020:

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

Appendix A

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 A

United States District Court  
for the  
Southern District of Florida

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. §

Appendix A

*Appendix A*

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.

Appendix A

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))).

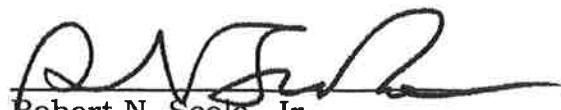
Two additional Rule 60 arguments are raised by the Third Motion. (ECF No. 60.) Wilmore's sixth argument is that the Government misrepresented the record in response to his petition. This argument is that certain factual representations by the Government were unclear and not supported by record citation. 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