

20-7689

ORIGINAL

No.

Supreme Court, U.S.  
FILED

MAR 24 2021

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

Herve Wilmore, Jr.,  
Petitioner,

V.

United States of America  
Respondent,

On petition 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

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MAR 30 2021

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SUPREME COURT, U.S.

## QUESTIONS PRESENTED

The constitution requires fairness during the collateral proceedings on challenging the constitutionality of the criminal convictions(due process). However, the Magistrate Judge misconstrued the factual basis for the sole claim presented in the petition to vacate, set aside, or correct the sentence pursuant to title 28 U.S.C. 2255. As a result, the court did not adjudicate the merits on whether counsel is constitutionally ineffective for failing to raise a constructive amendment to the indictment. The District Court adopted the misconstructions in the Magistrate Judge's report, and the Eleventh Circuit Court of Appeals Affirmed. The petitioner filed a motion for reconsideration pursuant to Federal rules of civil procedure 60(b)(6). The District Court determined that "the petitioner points to several supposed errors in the Magistrate Judge's report". However, the court overlooked the record citations which support the errors exist. This raises the following questions.

- 1). Does the court's misconception of the habeas corpus claim violate due process of law?
- 2). Does the court's failure to adjudicate the merits of the habeas claim violate due process of law?
- 3). Does the court's misconception of the ineffective assistance of counsel claim require relief from the final judgment pursuant to Fed. R. Civ. P. 60(b)(6)?

Herve Wilmore, Jr. v. United States

Case NO.

**CERTIFICATE OF INTERESTED PERSONS**

As required by rule 29.6

- 1). United States of America, Appellee.
- 2). Wifredo Ferrer, former United States attorney.
- 3). Jack A Fleishman, attorney for Petitioner on Direct Appeal for criminal case.
- 4). Sidney Z. Fleishman, attorney at trial level for the petitioner.
- 5). 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 Karadbil, AUSA, counsel for government at trial.
- 9). Robin S. Rosenbaum United States Appellate Court Judge for the 11th Circuit.
- 10). Gregory E. Tortella, AUSA, counsel for government at trial.
- 11). Patrick A. White, Magistrate Judge, United States District Court.(retired)
- 12). Charles Wilson United States Appellate Court Judge for the 11th Circuit.
- 13). Herve Wilmore, Jr., Petitioner/movant.

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Appendix A - District Court's Analysis. See record(cv-Doc. 79, pp. 1-4)
Appendix B - Claim one of 2255 Petition. See Record(cv-Doc. 1, at 4)
Appendix C - The Magistrate Judge's report. see record(cv-Doc. 42, pp. 1-20)
Appendix D - Eleventh Circuit Court of Appeals order denying C.O.A.
Appendix E - Eleventh Circuit Court of Appeals order denying Reconsideration for C.O.A.

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

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix D 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 United States district court appears at Appendix A to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ 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 2-4-2021.

☐ 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: 3-8-2021, and a copy of the order denying rehearing appears at Appendix E.

☐ 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).

The United States Court of Appeals for the Eleventh Circuit issued its Judgment for reconsideration on 3-8-2021. (See Appendix E). This petition is timely filed.

☐ 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

### Pages

Constitutional Provisions: Fifth Amendment of U.S. Constitution(Due process clause) "No person shall ...be deprived of life, liberty, or property, without Due process law". .....6

Statutory Provision: Title 28 U.S.C. § 2255

(a) A prisoner in custody under sentence of a court established be 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 the 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 of correct the sentence.

.....Passim

**RULES INVOLVED**

**RULE 60. RELIEF FROM A JUDGEMENT OR ORDER**

(b). Grounds for relief from a final Judgement, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representatives from a final judgement, order, or proceeding for the following reasons:

(6). any other reason that justifies relief.(extraordinary circumstances).

.....Passim



## TABLE OF AUTHORITIES

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<u>Buck v. Davis</u> , 137 s. ct. 759, 777-78(2017).....	7
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## STATEMENT OF THE CASE

The petitioner sought reconsideration for the denial of his 2255 motion pursuant to Federal Rules of Civil Procedure 60(b)(6). The petitioner's claims were: The Magistrate Judge misconstrued, ignored, and failed to address his Sixth Amendment claim on the merits. see record(cv-Doc. 78, at pp.1-6).

Reversible error is shown in the District Court's analysis, because the court erroneously determined that "the petitioner points to several supposed errors in the Magistrate Judge's report". see (App. A, at 2). The District Court overlooked the record citations which support the errors exist. The court made an unreasonable assessment of the facts. Reasonable Jurist would have granted a Certificate of Appealability.

### Reasons For Granting The Writ

While addressing the Petitioner's 2255 petition, raising ineffective assistance of counsel, based upon counsel's failure to raise a constructive Amendment to the indictment. The Magistrate Judge determined that the petitioner alleges that the indictment alleged that he "caused to be registered five different P.O. boxes at 4747 Hollywood Blvd. with specific numbers". see(App. C, at 5).

But the Petitioner's 2255 motion said that the indictment alleged that he "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" see (App. B at 4)

A careful review of the Magistrate Judge's version of the Petitioner's claim reveals, that the court misconstrued the allegation presented in the 2255 motion. However, the most significant error occurred when the court ignored the colon marks(:) presented, which separated the specific P.O. Box numbers from the indictment's allegation. As a result, the court was able to merge the indictment's allegation with the specific P.O. Box numbers placed after the colon mark(:). This misconstruction is fundamentally unfair, because the Magistrate Judge was able to change the narrative of the allegation presented to focus on specific P.O. Box numbers being alleged in the indictment. Further, when the court adjudicated the issue at hand, the specific P.O. Box numbers became the sole reason behind the factual findings and legal conclusions of the report. For example, the Magistrate Judge's report states: "review of the superseding indictment reveals that, contrary to movant's assertion, it did not

specify that any particular boxes were used.(cr-DE#246). Rather, it simply alleged that movant used boxes at 4747 Hollywood blvd.(id). Thus, Movant's claim is arguably subject to summary denial on this basis alone". see (App. C, at 6-7)

However, the factual findings and legal conclusion of the report is simply incorrect. Because, had the court made a reasonable assessment of the facts, it would have determined that the petitioner's claim stated, that the indictment alleged that he "registered and caused to be registered 5 separate P.O. Boxes:" Identified by number. see (App. B, at 4). No specific P.O. Box numbers are presented in this allegation, when the colon marks(:) provided are acknowledged. This contradicts the report. In other words, if the court had recognized the colon mark presented, it could not have reached the conclusion in the report. Additionally, a colon mark is used to separate two independent clause, when the second clause explains or illustrates the first.

These facts support that the Judgement in this habeas Corpus proceeding is unfair, because it is manifestly unjust. See Defense Distributed v. United States Department of State, 947 F.3d 870;(5th Cir.)(2020)("Reserving relief under 60(b)(6) for when the initial Judgement has been manifestly unjust").

The petitioner did not receive a merit determination of a Meritorious ineffective assistance of counsel claim, due to the misconstruction in the underlying motion to vacate, set aside, or correct sentence pursuant to title 28 U.S.C. 2255. The Misconstruction's unfairly impacted the Petitioner's ability to obtain his "liberty" from the relief sought in the habeas petition. This ultimately violates the Due Process clause of the Fifth Amendment to the U.S. Constitution, which commands that "No person shall ...be deprived of life, liberty, or property, without Due Process of law".

These are extraordinary circumstances that require the warrant of relief from the final Judgement pursuant to Federal rules of Civil Procedure 60(b)(6). see Gonzalez v. Crosby, 545 U.S. 524(2005)

Furthermore, the Magistrate Judge also misconstrued the facts in support of the evidence presented at trial. For example, the report states: "but that movant's 'charges' contain only three P.O. Boxes at 4747 Hollywood blvd. address, and that those had different box numbers". see (App. C, at 5).

However, to the contrary of the report, the petitioner's 2255 motion states that his "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" see (App. B at 4)

More specifically, the petitioner alleged that his charges contained single and double digit p.o. box numbers. Meaning: P.O. box "1" in count 4, and P.O. box "12" in count 5. see (App. B at 4). The petitioner clearly did not allege that his "charges" contained "three p.o. boxes", as the report incorrectly states. see (App. C, at 5).

These errors "risk""undermining the Publics confidence in the Judicial process." Buck v. Davis, 137 s. ct. 759, 777-78(2017)(quoting Liljeburg v. Health Services Acquisition Corp., 486 U.S. 847, 863(1988)). Because the District Court blindly adopted the Recommendation report. see record(cv-Doc. 45, at 1). The misconstructions were at every phase of the claim. This habeas Corpus proceeding was completely unfair. Mr Wilmore's constitutional right to a fair and impartial Judge has been overlooked, which also violates due process.

The court obviously did not resolve the merits of the petitioner's claim, which supports that the District Court failed to resolve all claims for relief in a \$2255 regardless of whether relief is to be granted or denied. see Clisby v. Jones, 960 F.2d 925(11th Cir. 1992). See also Rhode v. United States, 583 F.3d 1289, 1291(11th Cir. 2009). In Clisby the court stated that, if the district court failed to consider a claim that was raised in a \$2255 motion, this court will remand the case in order to allow the district court to consider

the claim. 960 F.2d at 938. This issue waves finality of the Judgement.

Last but not least, in the absence of relief from the final judgement pursuant to Fed. R. Civ. p. 60(b)(6). The Petitioner will suffer the extreme and unexpected hardship of being denied the constitutional right to his one fair shot at habeas corpus review, plus a fundamental miscarriage of justice would result, because the petitioner's 2255 petition presents a meritorious constructive amendment/actual innocence claim. see (App. B, at 4).

The petitioner's 60(b) motion should be considered timely, because he has been pursuing his right diligently since the denial of his section 2255 petition, which occurred since March 12, 2018. see (App. C, at 1) The petitioner filed his first 60(b) motion in March of 2019. see record (cv-Doc. 59). This is the petitioner's second attempt at seeking reconsideration and justice pursuant to Federal rules of civil procedure 60(b). The petitioner has been timely in every court, from District Court all the way up to the Supreme Court, on multiple occasions, arguing the same facts that have been misconstrued and ignored. The petitioner prays that justice will be done in light of all the facts provided in his 2255 petition.


#### **CONCLUSION**

The petitioner pleads and prays that the Supreme Court will order a response from the Solicitor General of the United States to resolve the merits in the 2255 petition, or in the alternative. The petitioner prays that the Supreme Court will grant the writ of Certiorari to resolve the meritorious issue presented in the habeas petition, or any relief this court deem appropriate in the interest of Justice.

Respectfully Submitted.

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

3-24-2021

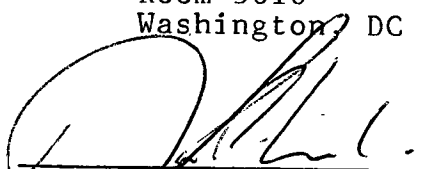
\_\_\_\_\_  
Date

PROOF OF SERVICE

I, Herve Wilmore, Jr., do swear or declare that on this date,  
March, 24, 2021 as required by Supreme Court  
Rule 29, I have served the enclosed Motion for Leave to Proceed In  
Forma Pauperis and a 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, with first class  
postage prepaid. Service has been made to:

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

U.S. Supreme Court  
1 1st St. NE  
Washington, DC 20543

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

3-24-2021

\_\_\_\_\_  
Date