

FROM:  
TO:  
SUBJECT: page 1  
DATE: 05/28/2021 08:43:52 AM

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No. 20-7689

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IN THE SUPREME COURT OF THE UNITED STATES

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HERVE WILMORE JR. ,  
Petitioner,

V.

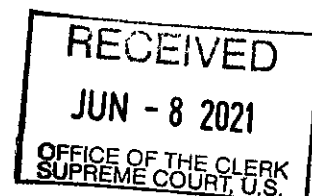
United States of America,  
Respondent,

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On petition for Rehearing of the certiorari  
to the United States Court of Appeals  
For the Eleventh Circuit

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Herve Wilmore, Jr.  
Pro Se Petitioner  
Reg. No. 02634-104  
Coleman Federal Correction Complex  
Satellite Camp, Unit F1  
P.O. Box 1027  
Coleman, FL 33521



FROM: .....  
TO:  
SUBJECT: QUESTIONS PRESENTED  
DATE: 05/28/2021 08:45:32 AM

#### Questions Presented

Federal Rules of Civil Procedure 60(b)(6) permits a court to re-open a judgment for any other reason that justifies relief. However Judicial precedent holds that relief under Rule 60(b)(6) is available in only extraordinary circumstances. In determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in appropriate cases, the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process. In this instant case, that issue that risks undermining the public's confidence in the judicial process, is the fact that the District Courts misconstructions is preventing the petitioner from obtaining habeas relief. Because the Petitioner's Motion to Vacate his sentence pursuant to 28 U.S.C. 2255 Presents a meritorious Ineffective Assistance of Counsel claim, which demonstrates his actual innocence. This issue raises the following questions:

- 1) Whether Federal Rules of Civil Procedure 60(b)(6) provides relief for a judgment that occurred as a result of a District Courts misconception of a meritorious Ineffective Assistance of Counsel claim which demonstrates the Petitioner's Actual Innocence in the Petition to Vacate the Sentence pursuant to 28 U.S.C. 2255 ?

FROM:  
TO:  
SUBJECT: CERTIFICATE OF INTERESTED PERSONS  
DATE: 05/27/2021 11:39:28 AM

Herve Wilmore, Jr. v. United States

Case No. 20-7689  
CERTIFICATE OF INTERESTED PERSONS  
As required by Rule 29.6

- 1) United States of America, Appellee.
- 2) Wilfredo 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 Petitioner
- 5) Solicitor General of the Department of Justice
- 6) Benjamin C. Greenburg, United States attorney at Direct appeal level
- 7) Delvin Jean-Baptiste, Co-Defendent 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 Tortella, AUSA counsel for the 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 Analysis. See record (cv-doc.79, pp. 1-4)
- APPENDIX B - Claim one of 2255 petition. See record (cv-doc.1, pp.1,4)
- APPENDIX C - Magistrate Judge's report. See record (cv-doc.42, pp.1-20)
- APPENDIX D - Eleventh Circuit Court of Appeals order denying C.O.A.

FROM:  
TO:  
SUBJECT: OPINIONS BELOW  
DATE: 05/28/2021 08:47:57 AM

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgement below.

#### OPINIONS BELOW

{ X } For cases from Federal Court :

The opinion of the United States Court of Appeals appears at APPENDIX D to the petition and is

{ x } is unpublished

The opinion of the United States District Court appears at APPENDIX A to the petition and is

{ x } is unpublished

#### JURISDICTION

{ x } For cases from Federal Courts :

The date on which the Supreme Court of the United States decided my case was 5/17/2021.

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

The Supreme Court of the United States Denied the initial petition on 5/17/2021. This petition for a re-hearing of the Writ of Certiorari is timely filed.

FROM:  
TO:  
SUBJECT: CONSTITUTIONAL AND STATUTORY PROVISIONS  
DATE: 05/28/2021 08:49:14 AM

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pages

Constitutional Provisions :

Article 1. Section 9, clause 2 (suspension clause). "The privilege of the writ of the Habeus Corpus shall not be suspended

unless when in cases of Rebellion or Invasion the public safety may require it." ..... 5

Statutory Provisions :

Title 28 U.S.C. 2255

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

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FROM: .  
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SUBJECT: RULES INVOLVED  
DATE: 05/28/2021 08:50:03 AM

RULES INVOLVED

RULE 60. RELIEF FROM A JUDGEMENT OR ORDER

Pages

(b) Grounds for a 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.

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FROM:  
TO:  
SUBJECT: TABLE OF AUTHORITIES  
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TABLE OF AUTHORITIES

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FROM:  
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SUBJECT: STATEMENT OF THE CASE  
DATE: 05/28/2021 08:53:48 AM

#### STATEMENT OF THE CASE

The petitioner sought relief from the final judgment under Federal Rules of Civil Procedure 60(b)(6). Because the Magistrate Judge and the District Court misconstrues his Meritorious Ineffective Assistance of Counsel claim which demonstrates his Actual Innocence in the petition to Vacate Sentence pursuant to 28 U.S.C. 2255. See Record (cv-doc.78, at pp 1-6)

Reversible Error is shown in the District Courts Analysis. Because the District Court determined that "none of the Petitioner's arguments prevail." Because "Magistrate Judge White's report notes that the superseding indictment reveals that, contrary to movant's assertion, it did not specify that any particular boxes was used....it simply alleged that movant used boxes at 4747 Hollywood Blvd (ECF No.42, at6-7)" and that "upon initial appeal, the Eleventh Circuit stated that the Petitioners attempts to argue that his counsel was ineffective 'for failing to argue constructive amendment based on post office box numbers is meritless'. (ECF No. 56, at 2). The Eleventh Circuit went on to state that 'no specific post office box numbers were mentioned' in his indictment and '{e}ven if they were, the numbers are not an essential element of wire fraud' (ECF No. 56, at 2-3). See (APPENDIX A, at p.2).

However, to the contrary of the Magistrate Judges report and the Eleventh Circuit decision, Mr. Wilmore alleged that his indictment alleges that he "registered and caused to be registered 5 separate P.O. boxes:" See (APPENDIX B at 4). No specific P.O. box number were alleged in the allegation presented in Mr. Wilmore section 2255 petition. Therefore the Law of the case Doctrine does not apply because "the prior decision was clearly erroneous and would result in a manifest injustice"

(Quoting *Oladeinde v. City of \* Birmingham*, 230 F.3d 1275, 1288 (11th Cir. 2000).

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SUBJECT: REASONS FOR GRANTING THE WRIT  
DATE: 05/28/2021 09:00:17 AM

## REASONS FOR GRANTING THE WRIT

When addressing the Petitioner's section 2255 petition, which alleges Ineffective Assistance of Counsel based upon counsel's failure to raise a constructive amendment to the indictment. The Magistrate Judge determined that the Petitioner alleged that his indictment alleges that he "caused to be registered five different P.O. boxes at 4747 Hollywood Blvd. with specific numbers". See (APPENDIX C, at 5). But the Magistrate Judges assessment of the Petitioners habeas claim is simply incorrect. Because to the contrary the Petitioner's 2255 motion said that the indictment alleged that he "registered and caused to be registered 5 separate P.O. boxes:" (See APPENDIX B, at 4)

The Magistrate Judges version of the Petitioners claim is completely mischaracterized because it has been misconstrued. However, the most significant error occurred when the Magistrate Judge disregarded the colon marks(:) presented in the Petitioners habeas claim. This error played a very crucial role in the court's adjudication process. Because the court took the facts presented after the colon marks, and merged them with the indictments allegation. Thereby changing the narrative of the allegation (element) presented in the 2255 petition, to focus on the P.O. Box numbers placed after the colon marks (:). This was fundamentally unfair, because a colon mark is used to separate two independent clauses, when the second clause explains or illustrates the first. This error changed the merit of the Petitioners claim. Because when the court adjudicated the habeas corpus claim, the specific P.O. box numbers placed after the colon marks became the sole reason behind the factual findings and legal conclusions of the report. For example, the Magistrate Judges reports states: "review of the superseding indictment reveals that, contrary to movants 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, movants claim is subject to summary denial on this basis alone". See (APPENDIX C, at 6-7)

The factual findings and legal conclusions of the report did not adjudicate the merits of the Petitioners habeas claim. Because had the court made a reasonable assessment of the facts, it would have determined that the Petitioners section 2255 petition states that he "registered and caused to be registered" 5 separate P.O. boxes:" See (APPENDIX B at 4). No specific P.O. boxes are presented in this allegation, when the colon marks provided are acknowledged.

These facts contradict the Magistrate Judges report, and support the fact that the judgment in this instant case is unfair, because it is manifestly unjust. See *Defense Distributed v. United States Dept. of State*, 947 F.3d 870; (5th Cir.) (2020). ("Reserving relief under 60(b)(6) for when the initial judgment has been manifestly Unjust). These facts also support that the District Court misconstrued the Petitioners habeas claim in adopting the report. See *Peterson v. Sec'y dept.*

of Corr., 676 Fed. Appx. 827, 829 (11th Cir.)(2017) (District court abused it's discretion in denying a Rule 60(b) motion for reconsideration where movant contended the court failed to consider or misconstrued one of movants claims in his underlying habeas corpus petition).

Furthermore, the District Court also misconstrued the facts in support of the evidence at trial. For Example, the report states: "but that movants 'charges' contain only three P.O. boxes at 4747 Hollywood Blvd address, and those had different box numbers". See (APPENDIX C, at 5). This is simply incorrect because to the contrary of the report, the Petitioners 2255 motion states that his 'charges' contained single and double digit P.O. box numbers which had different box numbers, meaning: P.O. Box "1" in Count 4, and P.O. Box "12" in Count 5, which support Actual Innocence. See (APPENDIX B at 4) The Petitioner clearly did not allege that his 'charges' contained "three P.O. boxes" as the report incorrectly states.

Rule 60(b)(6) is available only in "extraordinary circumstances". See Gonzalez v. Crosby, 545 U.S.at 535. In determining whether extraordinary circumstances are present a court may consider a wide range of factors. These may include, in an appropriate case, "the risk of injustice to the Parties" and "the risk of undermining the public's confidence in the judicial process". Buck v. Davis, 137 S.Ct.759, 777-78 (2017) (quoting Liljeberg v. Health Services Acquisitions Corp. 456 U.S.847,863-64 (1988)

The injustice in this particular case that risk undermining the public confidence in the judicial process is the fact that the Petitioner presented a meritorious Ineffective Assistance of Counsel claim which demonstrates Actual Innocence. See (APPENDIX B at 4). But the courts misconstructions and mischaracterizations prevent the petitioner from being entitled to habeas corpus relief. Additionally, in the absence of relief from the final judgment, the Petitioner would be denied the right to habeas corpus review as the Suspension Clause of the U.S. Constitution provides "the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it". See Article. Section 9, Clause 2. Respectfully Submitted.

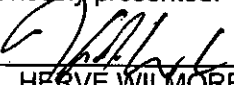
#### CONCLUSION

The Petitioner Prays that a Writ of Certiorari is issued in light of the facts that support Actual Innocence.

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SUBJECT: CERTIFICATE  
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CERTIFICATE

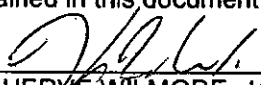
The Petitioner certifies that the Petition for Rehearing of the Writ of Certiorari is 1) Presented in Good Faith and not for delay 2) The grounds are limited to intervening circumstances of a substantial or controlling effect or to other grounds not previously presented.

  
\_\_\_\_\_  
HERVE WILMORE, JR. #02634-104  
Coleman Federal Correction Complex  
Satellite Camp / PO BOX 1021  
COLEMAN, FL 33521

5-28-2021  
DATE

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.

  
\_\_\_\_\_  
HERVE WILMORE, JR. #02634-104

5-28-2021  
DATE

PROOF OF SERVICE

I, Herve Wilmore Jr, do swear or declare that on this date, MARCH 28<sup>th</sup> 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 Rehearing of 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  
930 Pennsylvania Ave. NW  
Room 5616  
Washington, D.C. 20530

U.S. SUPREME COURT  
1 1st. St. NE  
Washington, D.C. 20543



5-28-2021

HERVE WILMORE, JR. # 02634-104  
FCC COLEMAN, SATELLITE CAMP  
P.O. BOX 1027  
COLEMAN, FL 33521

DATE