

ORIGINAL

No. 22-5609

Supreme Court, U.S.
FILED

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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 - Camp
P.O. Box 1027
Coleman, FL 33521

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SUPREME COURT, U.S.

Question Presented

1) Whether the exception to the Law of the Case doctrine Permit a defendant to relitigate an issue that was erroneously decided by the U.S. Court of Appeals for the Eleventh Circuit during the defendants habeas Corpus review?

Certificate of Interested Persons
As required by Rule 29.6

- 1) United States of America, Appellee.
- 2) Andrew L. Brasher, Judge For the Eleventh Circuit Court of Appeal.
- 3) Robert N. Scola Jr. District Court Judge.
- 4) Herve Wilmore, Jr. Petitioner

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Index To Appendices

- Appendix A — District Court's Order. See Record(CV-Doc.91)
- Appendix B — Eleventh Circuit Court of Appeal order. See Record(CV-Doc.100)
- Appendix C — Motion for Reconsideration of a Single Judges Order
See 7/11/2022 order @ 1.

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

Opinions Below

☒ For Cases from Federal Court:

The opinion of the United States Court of Appeals
Appears at Appendix B to this petition and is

☒ unpublished

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

☒ unpublished

Jurisdiction

[X] for Cases from Federal Courts:

The date on which the United States Court of Appeals decided my case was 5-18-2022

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 7-11-2022, and a copy of the order denying rehearing appears at Appendix C.

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 7-11-2022 (See Appendix C) This petition is timely filed.

✓

Constitutional and Statutory Provisions Involved

Pages

Constitutional Provisions:

Article I, Section 9, Clause 2 (Suspension clause). "The Privilege of the Writ of the Habeas Corpus shall not be Suspended unless when in cases of Rebellion or Invasion the Public Safety may require it." 6

Statutory Provisions Involved:

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 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.
..... 4, 5

Rule 60. Relief From A Judgment or
Order

Pages

(b) Grounds for a relief from a final Judgment,
Order, or proceeding:

On motion and just terms, the Court may
relieve a party or its legal representatives
from a final Judgment, order, or proceeding for
the following reasons:

(6) Any other reason that justifies relief.

.... 4, 6

Table of Authorities

Pages

- 1) Arizona v. California, 460 U.S. at 618, n.8 6
- 2) Gonzalez v. Crosby, 545 U.S. 524, 535-38, 125 S.Ct. 2641, 162 L. Ed 2d 480 (2005) 6
- 3) Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005) 5

Statement of the Case

The Petitioners motion for relief from the final judgment in the habeas corpus Proceedings Pursuant to Federal rules of Civil Procedure 60(b)(6) before the District Court revealed: The Petitioners motion to Amend his motion to Vacate his sentence under 28 U.S.C. § 2255 related back to his original § 2255 motion, because the Amendment was based upon the initials "M.M." and "C.A.", These Initials belong to the Names "Madelyn Maxfield" and "Craig Archer," which are presented in the timely exhibit attached to the timely § 2255 motion. See Record (Cv-Doc. 90-1 at 1-2), (Cv-Doc. 90 at 1). The Petitioners Motion to Amend is clearly timely.

However the District Court relied upon the Eleventh Circuit Court of Appeals decision in order to strike the Petitioners rule 60(b) motion, but the U.S. Court of Appeals for the Eleventh Circuit Erroneously determined that the Petitioners "Amendment did not relate back to [the Movant's] original § 2255 motion" See Record (Cv-Doc. 91 at 1)

The U.S. Court of Appeals for the Eleventh Circuit should have granted a Certificate of Appealability because the Law of the Case doctrine Permits relitigation when the U.S. Court of Appeals decision is clearly erroneous and if implemented would work a manifest injustice.

Reason for granting the Writ

The Petitioner's Amendment of his motion to Vacate his Sentence under 28 U.S.C. § 2255 is based upon the following Initials: "M.M." and "C.A." See Record (CV-Doc. 41 at 2). The District Court has also acknowledge that the Petitioner's "motion to amend (CV-Doc. 41) his § 2255 motion" is based upon Same Initials "M.M." and "C.A." See Record (CV-Doc. 42 at 11). The Initials M.M. and C.A. belong to the Names "Madelyn Maxfield" and "Craig Archer," These Names are presented in a exhibit attached to the Petitioner's timely § 2255 motion See Record (CV-Doc. 5 at 5). Clearly the Petitioner's original and amended habeas corpus petitions state claims that are tied to a Common Core of operative facts.

In Mayle v. Felix, the Supreme Court held that an Amendment to a habeas corpus petition may relate back "So long as the original and amended petitions state claims that are tied to a Common Core of operative facts". 545 U.S. 644, 664, 125 S.Ct. 2562, 162 L. Ed. 2d 582 (2005). In this instant case, the record which is supported by case law clearly reveal that the Petitioner's motion to amend his motion to vacate his Sentence under 28 U.S.C. § 2255 is timely filed since the Initials relate back to the Names.

However the U.S. Court of Appeals for the Eleventh Circuit erroneously determined that the Petitioner's Amendment did not relate back to his original § 2255 motion when the Court concluded that: "The district Court did not abuse it's discretion in determining that the amendment did not relate back to [the Movant's] original § 2255 motion because the proposed amendment did not arise out of the conduct or occurrence in the original pleading, as it dealt primarily with an assertion of insufficient evidence at trial, while the original § 2255 motion dealt with the indictment." See Record (CV-Doc. 56 at 5).

The Petitioners Contentions Incorporated above clearly reveal that the Court of Appeals decision is clearly erroneous, But the District Court relied upon the Eleventh Circuit Court of Appeals opinion in order to strike the Petitioners third motion for relief from the final Judgment Pursuant to Federal rules of Civil Procedure 60(b)(6) See Record (CV-Doc. 91 at 1). In other words the District Court relied upon the Law of the Case doctrine to strike the relief Sought.

However the Law of the case doctrine allows a Petitioner the opportunity to relitigate an issue where the Court's Initial decision was "clearly erroneous and would work a manifest injustice" (quoting Arizona v. California, 460 U.S. at 618, n.8 (citation omitted)).

The U.S. Court of Appeals for the Eleventh Circuit made the erroneous decision as a result of it overlooking the Jury note (timely exhibit) which contained the names "Madelyn Maxfield" and "Craig Archer" See Record (CV-Doc. 5 at 5). This amounted to "extraordinary Circumstances" that occurred during the habeas Corpus proceedings See Gonzalez v. Crosby, 545 U.S. 524, 535-38, 125 S.Ct. 2641, 162 L. Ed. 2d 480 (2005)

In the absence of relief from the final Judgment Pursuant to Federal rules of Civil Procedure 60(b)(6), the Petitioner would Suffer the extreme and unexpected hardship of being denied the Constitutional right to habeas corpus review on the Insufficiency of the evidence at trial issue, Since the Motion to Amend (CV-Doc. 41 at 1) is timely filed. See U.S. Const. Art. 1, S 9, Cl. 2 ("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.").

Conclusion

The Petitioner prays that the Supreme Court of the United States will grant the writ of Certiorari 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.
Herve Wilmore, Jr. #02634-104
FCC Coleman-Camp, Unit F-1
P.O. Box 1027
Coleman, FL 33521

9-1-2022

Date

Proof of Service

I, Herve Wilmore, Jr., do swear or declare that this date, 9-1-2022, 2022 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, D.C. 20530

Herve Wilmore, Jr.
Herve Wilmore, Jr., #02634-104
FCC Coleman-Camp, Unit F-1
P.O. Box 1027
Coleman, FL 33521

9-1-2022

Date