

No. 22-5609

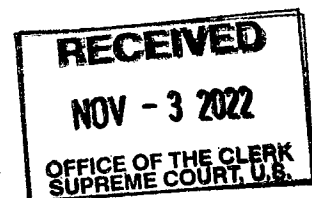
In The Supreme Court of the United States

Herve Wilmore, Jr.,
Petitioner,

v.
United States of America
Respondent

On Petition for a 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 - Camp
P.O. Box 1027
Coleman, FL. 33521



Question Presented

The Petitioner filed a timely motion to Vacate his Sentence under 28 U.S.C. §2255 which included a timely exhibit. However after the AEDPA time restrictions the Petitioner filed an amendment to his habeas corpus petition which was based upon a Meritorious Insufficiency of the Evidence at trial claim, which related back to the exhibit filed with the timely habeas corpus petition. But the U.S. Court of Appeals for the Eleventh Circuit erroneously determined that the Petitioner's Amendment did not relate back to the habeas corpus petition, because the Court overlooked the Petitioner's timely filed exhibit which included the facts that the Petitioner's Amendment was based upon. The Law of the Case doctrine permits a defendant to relitigate an issue that is erroneously decided by a U.S. Court of Appeals, and when implemented would work a manifest injustice. In this particular case, the injustice that would result is the fact that the Petitioner has been wrongfully convicted as acknowledged by the government in its response during the Petitioner's habeas corpus review. There is insufficient evidence to sustain the Petitioner's convictions, but the lower courts continue to overlook the facts that would entitle the Petitioner to habeas corpus review on a Meritorious habeas corpus claim. This issue raises the following question.

- 1) Whether the Law of the Case doctrine allows a defendant to relitigate a relation back doctrine issue since the Court's initial decision is clearly erroneous and if implemented would work a manifest injustice?

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 Appeals
- 3) Robert N. Scola Jr. District Court Judge.
- 4) Herve Wilmore, Jr. Petitioner

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Jurisdiction

[x] For Cases from Federal Courts:

The date on which the Supreme Court of the United States decided my case was: 10-17-22

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

The Supreme Court of the United States denied the Writ of Certiorari on 10-17-22 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." 4

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. 1, 2, 3

Rules Involved

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.

..... 2, 4

Table of Authorities

Pages

- 1) Arizona v. California, 460 U.S. 97, 618, n.8 4
- 2) Gonzalez v. Crosby, 545 U.S. 524, 535-38, 125 S. Ct. 2641, 162 L. Ed 2d 480 (2005) 4
- 3) Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005) 3, 2

Statement of the Case

On "2/03/2017" the Petitioner filed a timely exhibit along with his motion to Vacate his Sentence Under 28 U.S.C. § 2255 which contain the names "Madelyn Maxfield" and "Craig D. Aicher" See Record (CV-Doc. 5 at 5). The Initials of the Names Incorporated above are "M.M." and "C.A.". The District Court has acknowledge that the Petitioners "motion to amend (CV-DE #41) his § 2255 motion" is based upon the Names: "M.M." and "C.A.". See Record (CV-Doc. 42 at p. 11). Since both the Original and Amended habeas petitions are based upon the same common core of operative facts being: "M.M." and "C.A." this makes the Petitioners motion to amend timely. See Mayle v. Felix, 545 U.S. 644, 664, 125 S. Ct. 2562, 162 L. Ed. 2d 582 (2005). These contentions were presented before the district court under Federal rules of civil procedure 60(b)(6). See Record (CV-Doc. 90-1 at 1-2).

Moreover the Petitioners motion to Amend his habeas corpus petition presents a Meritorious Insufficient evidence at trial issue, and the government has acknowledge the wrongful conviction during habeas corpus review: "Movant Wilmore's Causing the Mailing of the refund is not even an element of any offense charged - Only evidence that supports his guilt" See Record (CV-Doc. 37 at 9).

The Petitioner Prays that this Court will acknowledge his exhibit that went overlooked by the U.S. Court of Appeals for the Eleventh Circuit.

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 the 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 its 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, § 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 rehearing of 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. 02634-104
FCC Coleman-Camp, Unit F-1
P.O. Box 1027
Coleman, FL 33521

10-26-2022

Date

Certificate

The Petitioner Certifies: 1) that the grounds on which this request for rehearing of Writ of Certiorari are limited to Intervening Circumstances of Substantial or Controlling effect and other Substantial grounds not previously presented; 2) that the petition for rehearing is presented in good faith and not for delay.



Herve Wilmore Jr.

10-26-2022

Date